

Punishment, state, and society in the global periphery

Mass incarceration, mass incorporation, and the rise of a protagonist
Judiciary in Brazil



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Abstract

This thesis explains the production and reproduction of mass incarceration in Brazil, the country with the world's third-largest prison population. It challenges dominant Global North theories—such as penal populism and neoliberal penality—by analysing how mass incarceration has emerged and persisted in a peripheral, dependent state undergoing democratisation, economic growth, and social inclusion. This thesis argues that it results from two processes that intersect: the expansion of the state and the rise of a protagonist judiciary, both operating within historically specific, structurally unequal conditions. The first process traces how Brazil shifted from domestic, informal and hidden forms of punishment—prevalent in slaveholding, rural, and authoritarian periods—to official state punishment. This transformation reflects deeper changes in social control, tied to the incorporation of previously marginalised populations into state governance and control. The second process examines the central role of the judiciary in sustaining and intensifying mass incarceration. Judges were empowered and the judiciary expanded during the democratic transition, but left institutionally unreformed, thereby becoming a key actor in the penal state. Its recruitment filters—bureaucratic and class-based—reproduced a judicial class largely aligned with a punitive consensus. Those who somehow overcome these filters, without consensually adhering to the punitive normality, face institutional coercion through reassignment, disciplinary measures, and criminalisation, with the result that dissent judges are neutralised and institutional conformity ensured. Methodologically, the thesis combines sociohistorical analysis, court-file analysis, in-depth interviews, and online observation. Theoretically, it draws on Southern Criminology, Critical Realism, the political economy of punishment and agonistic perspectives to develop a historically grounded, empirically rich account of mass incarceration in Brazil. It ultimately shows how mass incarceration was not a deviation from democratic consolidation, but a constitutive element of it, shaped by the very ways state power, judicial roles, and class domination were reconfigured in post-authoritarian Brazil.

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Introduction

Studies of mass incarceration and punitiveness dominated the criminological agenda in the Global North from the 1990s to the early 2010s. Scholars approached the expansion and harshening of penal systems from diverse perspectives, including sociolegal, cultural, political, and structural approaches. Since the mid-2010s, however, much of the attention in the Global North has shifted away from mass incarceration—given its declining trend in most countries—towards other emerging issues such as police brutality and migration. Nevertheless, the topic remains central to academic and political debates in the Americas. This thesis focuses on mass incarceration in Brazil, a country with the world’s third-largest prison population.¹

The significance of Brazil's incarceration crisis extends beyond its high rates of imprisonment. What makes Brazil’s experience particularly noteworthy is the counterintuitive nature of its mass incarceration trend—if looked at from a Northern perspective. Incarceration rates began to rise significantly in the early 1990s, following the country’s transition to democracy after a long civil-military dictatorship (1964–1985). Between 1985 and 1993, incarceration rates grew from 51 to 85 prisoners per 100,000 inhabitants. From the early 2000s, under a left-wing government amid significant economic growth and social inclusion, rates of incarceration skyrocketed further, from 137 in 2002 to 352 per 100,000 in 2016 (MJ, 2017). This trend has received little attention in international debates on mass incarceration, which predominantly focus on Northern experiences and fail to address similar dynamics in peripheral regions such as Brazil. When attention has been paid to the Brazilian case, mass

¹ As per the World Prison Brief: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All

incarceration has been analysed using Northern lenses—even if by criminologists from peripheral regions. Extant work has insisted on the decisive role of penal populism and the neoliberal penalty, despite evidence highlighting the limited applicability of these frameworks in the Brazilian context (Dal Santo, 2020a; 2020b; Azevedo and Cifali, 2016).

This raises a key puzzle: how has mass incarceration emerged in Brazil during a period of re-democratisation in the 1990s, and why has it persisted and even intensified during the 21st century, amid economic growth and social inclusion? This thesis answers these questions by analysing mass incarceration in Brazil ‘in its own terms’ (Connell, 2007). The study addresses the gap in existing criminological literature by offering an account of mass incarceration that considers the distinct political, economic, historic, and social context of Brazil, analysing this phenomenon from the peripheral features that have shaped the Brazilian state and society.

To solve this puzzle, this thesis adopts historical-materialist and sociolegal approaches. To start with, I invert the question. Instead of asking why Brazilian incarceration rates are currently so high, I ask: how was it possible for incarceration rates to remain so low for much of Brazil’s history—even resembling those of Nordic countries (Sozzo, 2016c)—before spiking in the 1990s? By analysing the historical roots of Brazilian punishment beyond incarceration, this thesis explores how material conditions, socioeconomic relations, and political power structures shaped distinct patterns of punishment that were predominant in different times and conditions. The political economy of punishment provides the analytical lens to explore how these structures allowed Brazilian punitiveness to remain concealed for much of its history through informal and domestic punishment mechanisms. It was not until the mid-20th century that state punishment became more central. However, even if more relevant, state

punishment assumed a more predominant form as hidden state punishment, through extraofficial, authoritarian practices. The transition to democracy in the late 1980s then set the conditions for the shift from hidden state punishment to official state punishment. The thesis traces how this shift explains the initial rise in incarceration rates in a context of democratisation.

In the 21st century, a combination of favourable economic, social, and political factors could have reverted or at least neutralised mass incarceration. Brazil's left-wing government pursued an inclusive agenda, and social indicators improved significantly between 2001 and 2013. Poverty and extreme poverty rates fell from 34.6% to 12.8%, while the GINI index decreased from 59.4 in 2002 to 52.6 in 2012 (Azevedo and Cifali, 2016). At the same time, the proportion of public spending on security decreased, while that on welfare programmes increased dramatically (FBSP, 2016; Brazil, 2016). At the executive level, increasingly inclusive pardons have been granted annually, releasing thousands of inmates each year (Dal Santo, 2023a). Legislative processes, rather than fundamentally punitive, have been more ambivalent (Campos, 2010; Cifali, 2016), and included innovations aimed at decarceration (Dal Santo, 2023a). Yet despite this favourable scenario, Brazil's incarceration rates continued to rise. This thesis argues that judges have played a central role in the persistence—and intensification—of mass incarceration during this period. This is shown through the analysis of their concrete decision-making and of the key dynamics that have shaped them as protagonist figures in the Brazilian liberal democracy, while preserving their authoritarian features and practices.

This thesis is situated within the punishment and society scholarship. By focusing on Brazil as a case study, the research not only expands criminology's horizons by incorporating

a peripheral jurisdiction that has been largely overlooked in mainstream criminological discussions, but also challenges key assumptions in the dominant Northern frameworks. Drawing on Southern Criminology and Critical Realism, this thesis overcomes more simplistic theory importations from the core, moves beyond normative discussions on the need to 'southernise' criminology, and offers concrete contributions that reshape the scholarship. Through the case of Brazil, it underscores the importance of examining punitive dynamics, societal transformations, and judicial practices that are often absent in Northern theories. These often-overlooked factors are precisely what makes it possible for the production and reproduction of mass incarceration in Brazil to be explained. By shedding light on blind spots and inaccuracies in the dominant literature, this research enhances the theoretical understanding of punishment, state, society, and the judiciary.

This thesis makes three main contributions. First, it offers a historically grounded, theoretically nuanced, and empirically rich account of mass incarceration in a peripheral setting. Second, it centres the judiciary as a key actor of the penal state in a transitional context, challenging both liberal assumptions of judicial neutrality and populist accounts of external pressure. Third, it expands the field of punishment and society by showing how penal practices and institutions operate differently in dependent, peripheral states, in response to the specific dynamics and needs for these states and societies to be reproduced.

The thesis is divided into four main sections, each with distinct focuses that build upon one another to reveal historical roots and contemporary dynamics that have enabled mass incarceration in Brazil. In the first section, the theoretical and methodological framework is established. The opening chapter presents the conceptual framework for analysing punishment and mass incarceration, drawing from the political economy of punishment and

agonistic perspectives. This is further enriched by Southern Criminology and Critical Realism. The second chapter provides an overview of the Brazilian criminal justice system, and identifies the strengths and limitations of the national and international scholarships that somehow analyse the relations between judicial decision-making and mass incarceration. The third chapter outlines the methodology and methods employed in this thesis, explaining the empirical research strategies that underpinned this research project, including archival research, court-file analysis, in-depth interviews, and online observation.

The second section examines the historical development of punishment in Brazil, identifying the historical marginality of state justice and imprisonment as mechanisms of governance and order production in the country. Chapters Four focuses on the predominance of domestic and informal patterns of punishment during colonial, slaveholding, and rural settings. Chapter Five shifts to the military dictatorship period, analysing how state-led punishment became more relevant, yet still employed extraofficial methods, amounting to hidden forms of state punishment. Chapter Five also shows how the conditions through which the transition to democracy allowed the shift from hidden to official state punishment, impacting significantly in the country's incarceration rates.

The third section addresses judicial punitiveness in practice, focusing on the direct contribution of judges to the phenomenon of mass incarceration. Chapter Six examines trials of robbery charges, while Chapter Seven looks at sentencing processes following those trials. Both chapters reveal the existence of a punitive normality in judicial proceedings, which, in crimes such as robbery, typically renders conviction and imprisonment in closed prisons the default judicial practice. These chapters identify how punitive normality unfolds to produce inflated convictions and punishment through systematic violations of core fundamental rights

and procedural safeguards and judicial 'counter-reforms'. These chapters also show the different forms in which judicial punitiveness materialises.

The final section focuses on the dynamics that shape judicial punitiveness and allow the punitive normality to prevail. Chapter Eight investigates the role of consensus in reproducing judicial punitiveness, particularly through the judicial recruitment process, which is influenced by bureaucratic and class-based filters. Chapter Nine addresses instances where consensus fails and coercive mechanisms are employed to neutralise dissenting judges and ensure institutional conformity. Coercion plays a crucial role in maintaining the punitive normality, ensuring institutional conformity even when there is not necessarily consensus.

Ultimately, this thesis argues that mass incarceration in Brazil is the result of two main processes: mass incorporation and the rise of a protagonist judiciary. Mass incorporation refers to the expanding role of the state in incorporating historically marginalised groups into its penal and social agendas, leading to an increase in state punishment. The rise of a protagonist judiciary, meanwhile, reflects judges' central role in a democratic framework that has nonetheless failed to reform and democratise the judiciary and address its authoritarian practices, reactionary traits, and inquisitorial culture. Despite being tasked with curbing authoritarianism, judges have, in many instances, endorsed it and reproduce it themselves, from within their legal powers. Overt domination by sheer violence and unregulated force was replaced by a more covert form of dominance, exercised under the appearance of legality.

PART ONE
THEORETICAL AND METHODOLOGICAL FOUNDATIONS

Chapter One

Theorising mass incarceration

Southern and realist contributions to Punishment and Society scholarship

Punishment and Society scholars have analysed processes of mass incarceration from many different perspectives. The ascendance of late modernity (Young, 1999; Garland, 2001a), neoliberalism (Wacquant, 2009b), post-Fordism (de Giorgi, 2002), penal populism (Garland, 2001a; Roberts et al., 2003; Pratt, 2007), actuarial justice (Feeley and Simon, 1992; 1994), variations of political economy (Cavadino and Dignan, 2006; 2011; Lacey, 2008; Melossi et al., 2018), and a new mode of racial control (Alexander, 2010) are examples of theories that have been prominent in the scholarship. All these theories have been developed based on experiences of core countries. Does it mean that they are unable to explain mass incarceration in peripheral countries? Does this mean that there is—or needs to be—a completely different scholarship on mass incarceration in peripheral settings?

This chapter starts by providing an overview on the debate on mass incarceration, engaging with some of the most influential theories. I then highlight the recent emergence of a body of literature on punishment in peripheral contexts, influenced by the Southernising Criminology movement, analysing some particular elements of this debate in Brazil. Finally, after identifying some of the current limitations of the Brazilian literature, I explain how critical realist research offers two valuable contributions to this scholarship. These two contributions

are then put to use in establishing some of the key premises of the current research, and work as a guide to the direction taken in the design of this research project.

Theorising mass incarceration: a brief overview

Between the late 1990s and early 2010s, discussions of the ‘punitive turn’ were central in the agenda of criminological research in so-called ‘Western countries’ (Cavadino and Dignan, 2006; De Giorgi, 2002; Garland, 2001a; 2001b; Nelken, 2011; Pratt et al., 2005; Wacquant, 2009b). This scholarship emerged to make sense of newly-identified trends and patterns of punishment. Penal changes at that time had two distinct dimensions—a quantitative one and a qualitative one. Quantitatively, incarceration rates and the sizes of prison populations were increasing at an extremely accelerated pace, reaching rates ‘markedly above the historical and comparative norm for societies of this type’ (Garland, 2001b: 2). This quantitative dimension is referred to as mass incarceration, and has co-existed alongside qualitative transformations in punishment, such as the fall of the rehabilitative ideal, the harshening of prison conditions, and the prison focus on incapacitation (Bauman, 1998; Feeley & Simon, 1992; Garland, 2001a; Pavarini, 2007). Both dimensions are considered the main features of the punitive turn, which has been spread across the world. Given the scope of this thesis, my focus here is on the first dimension—mass incarceration.

Several theoretical frameworks have been used to make sense of mass incarceration. Scholars have focused on different domains, such as the structural, normative, political, institutional, and cultural, which has allowed distinct theorisations to emerge. In this chapter, I focus on four approaches: the neoliberal penalty thesis, penal populism, the political economy of punishment, and the agonistic perspective. This choice is justified by two reasons.

The neoliberal penalty thesis and penal populism have been the dominant perspectives applied to understand mass incarceration in Brazil. The political economy of punishment and the agonistic perspective, particularly when combined, offer better conceptual and analytical resources to make sense of mass incarceration in Brazil, as I show in this chapter. Given that this debate on mass incarceration has taken place for decades, this section does not meticulously assess all advances and limitations of these theories but mainly situates the thesis in this literature.

Neoliberalism and punishment: the neoliberal penalty thesis

‘Neoliberalism’ is a nebulous concept to which different meanings have been attributed. It has mostly been understood as an economic policy, a political project, or a rationality. The ‘neoliberal penalty thesis’ emerges mainly from the conception of neoliberalism as a political project. Wacquant, its main exponent, expressly argues that ‘existent neoliberalism’ (Wacquant, 2012) is more than a mere economic policy and less than an abstract rationality in Foucauldian terms. I then limit my brief analysis to Wacquant’s conceptualisation and how it connects to penalty.

Wacquant (2009b): 43) argues that neoliberalism reshapes the state, producing a Centaur State: ‘guided by a liberal head mounted upon an authoritarian body’. This differs from a non-interventionist State and the *laissez-faire* notion which emerges from the conception of liberalism (Smith, 1776/2008). The ‘liberal head’ relates to the causes of social and economic inequality, favouring those in the top of the class structure, whereas the ‘authoritarian body’ takes aim at those at the bottom. Neoliberal state interventions are

based on two main strategies: *workfare* and *prisonfare*. The latter is the one which most interest us for the purposes of this work.

Prisonfare represents the movement from Welfare to Penal State. Through prisonfare the war on poverty becomes a war on the poor. Public expenditure on prisons and repressive activities, instead of on social assistance, becomes the priority of the neoliberal state and means to regulate the poor. Wacquant (2009b) illustrates this with the reversal in investment between the housing sector and the prison estate in the USA during Reagan's government, arguing that the construction of prisons became the main programme for popular housing during that period. As an intrinsic feature of the neoliberal state, penal interventions replace social interventions.

Wacquant identifies symbolic dimensions in the causes of the penal system expansion. Besides the social insecurity caused by neoliberal transformations in the economic and labour fields, he argues that the wave of social demonstrations in the USA during the 1960s posed a threat to the established, white supremacy order. Ghetto, the then-institution responsible for controlling and confining the Black population, became unable to deal with emerging urban ills and resistance movements (Wacquant, 2009b: 196-205). Then, prison assumed its place for two main reasons related to electoral purposes: visibility and morality. The supposed aim of tackling crime is more direct, tangible, and easily measured by prisonfare rather than welfare (Wacquant, 2009b: 161). Besides, penal solutions offer a positive moral rationale for the middle-class in a context of prevailing neoliberal ideology. From a meritocratic perspective, welfare provision is perceived as immoral and represents a 'culture of dependency', with the poor being upheld by public social policies (Wilson and Herrnstein, 1985). The state's penal sector rescues the state's legitimacy instead. In this view, the

expansion of penal policies appeases middle-class' social insecurity. Therefore, mass incarceration in Wacquant's account plays instrumental and symbolic roles.

If visibility has its importance, so does its opposite. Invisibility of both poverty and social inequality is another goal of mass incarceration, hiding the outcomes of neoliberal economic policies (Wacquant, 2009b: 113-150). While facilitating market solutions and the private accumulation of wealth, the neoliberal state needs to deal with its consequences, including structural unemployment (Antunes, 2006; Mészáros, 2010) and the formation of permanent precarious and de-proletarianized sections of the working class (Wacquant, 2009b: 208). Locking the poor up masks increasing poverty. Hence, mass incarceration allows the hiding of poverty and makes the poor into scapegoats of socioeconomic and public problems (Wacquant, 2009b; Bell, 2011).

Whereas Wacquant's analysis is primarily based on the US case, he engages with mass incarceration in other countries. He claims there has been an international diffusion of penal policies and knowledge developed in the USA (Wacquant, 2009a; 2014). The influence of Washington over Europe and Latin America has produced a transcontinental diffusion of public policies to establish neoliberalism worldwide. Mass incarceration, as an intrinsic component of the neoliberal state, is included in these travels. The spread of both rationales and practices has been led by different actors and paths, from think-tanks and intellectuals to entrepreneurs and public agents (Wacquant, 2009a). This is illustrated by the introduction of zero tolerance policing in Brasília following the visit of two senior New York Police Department officials in 1999 (Wacquant, 2009a: 20). Albeit acknowledging differences in culture, language, and tradition (Bourdieu and Wacquant, 1999; Wacquant, 2009a), the expansion of

penal apparatuses around the world is considered by Wacquant the consequence of the universalisation of US strategies and policies.

The accuracy of the neoliberal penalty thesis has been questioned from different angles. First, this perspective fails to observe diverse trends of punishment experienced in other core countries (von Hofer, 2003; Meyer and O'Malley, 2005; O'Donnell, 2008; Pratt, 2008; Snacken, 2010; van Swaaningen, 2013), by taking the most extreme case of mass incarceration—the USA—as the symbol of the contemporary penalty. It also downplays the complexity of cross-country relations (see Cohen, 1982; Aliverti et al., 2023; Aas, 2011; Melossi et al., 2011; Black et al, 2021), reducing US penal policy diffusion to a step towards the internationalisation of neoliberalism. Finally, by focusing exclusively on neoliberalism, this scholarship has been unable to notice other relevant dynamics affecting punishment within and beyond the political level (Cheliotis and Xenakis, 2010; Lacey, 2013; Sozzo, 2017; Dal Santo 2018).

To summarise, the neoliberal penalty is believed to have emerged in a transition from the welfare state to neoliberalism. Mass incarceration is a necessary feature of the neoliberal state, being the state strategy to govern misery, due to its potential to cool down increasing middle-class social insecurity, whilst establishing a political project aimed at favouring private accumulation of capital. Firstly introduced in the USA, mass incarceration has been diffused throughout the world by supranational elites as part of the spread of neoliberalism.

The political economy of punishment

Another relevant theoretical framework in analyses of punishment trends is the political economy of punishment (PEofP). From Rusche and Kirchheimer (1939/2003), through Melossi

and Pavarini (1977), and Hall et al. (1978), to many contemporary scholars, PEofP brings a materialistic approach to criminological discussions. As several scholars have recently analysed the development of this scholarship (De Giorgi, 2013; 2018; Brandariz et al., 2018; Dal Santo, 2021), I here only briefly indicate the directions to where this scholarship has moved and rescue a seemingly forgotten contribution that can help us understand mass incarceration.

The foundations of this scholarship are generally attributed to Rusche and Kirchheimer (1939/2003), whose second edition of the book *Punishment and Social Structure* obtained particular relevance 30 years after its original publication. Many important lessons are extracted from this magisterial work. One is that punishment trends do not correspond to crime rates. Its quantitative correspondence is rather found in the labour market. Prison works as a regulation of the labour market, controlling the size of the reserve army of labour and its consequences, such as wages. Qualitatively, the penal system is thereby linked to the working-class living standards. Life in prison is made deliberately worse than the 'situation of the lowest socially significant proletarian class' (Rusche, 1933/1978: 4). This constitutes the 'less eligibility' principle, meaning that prison life should never be preferable to life in liberty. Consequently, it coerces people into the established order. Therefore, variations on the size of prison populations and the prison standard of life are respectively linked to changes in the surplus labour force and the working-class standard of life.

Rusche and Kirchheimer did not analyse punitive systems in the age of mass incarceration. Nonetheless, several criminologists have analysed mass incarceration through these lenses. After a sequence of quantitative studies explaining punishment trends through changes in unemployment rates in the 1970s and 1980s (e.g. Jankovic, 1977; Greenberg,

1977; Box and Hale, 1985; Laffargue and Godefroy, 1989; Chiricos and Bales, 1991; Chiricos and Delone, 1992) and in response to the subsequent 'culturalist turn' in the sociology of punishment around the 1990s (Sozzo, 2018), some scholars promoted a return of PEOfP by incorporating different elements to make sense of mass incarceration. I now turn to some of these new features.

In the 1980s, most of the PEOp work was based on historical comparative analysis, looking at incarceration and unemployment rates in a single country across time. This comparative approach has become more nuanced in several ways. One way is the inclusion of other variables to measure the living standards of the 'lowest socially significant working-class', as unemployment rates alone ignore levels of exploitation, subordination, and job precarity (De Giorgi, 2002; 2013; 2018; Sutton, 2004). Another way is the expansion of comparisons not only across time, but also places. Scholars have compared different sorts of political economy and their punitive systems (Sutton, 2004; Cavadino and Dignan, 2006; Lacey, 2008). 'Neo-liberal' (Esping-Andersen, 1990) or 'liberal market' economies (Hall and Soskice, 2001) are found to be more punitive than 'corporatists' or 'co-ordinated market' economies. Yet these schemes do not fully explain significant 'intra-group' variations.

Another PEOp new feature is what de Giorgi (2013: 48) calls 'post-reductionist' PEOp. To the structural domain, political, cultural, and institutional elements are added, in a reply to the supposedly economic reductionism of PEOfP (Garland, 1990: 108-9; see however Rusche, 1933/1978; Melossi, 2014). This is how Cavadino and Dignan (2006; 2011), Lappi-Seppälä (2008; 2011) and Lacey (2008) include in their accounts elements such as the influence of intergovernmental organisations, the cultural-ideological tradition, the media impact, models of political institutions, the role and status of professional bureaucracy,

legitimacy of state institutions, and legal or constitutional structures. If these elements were initially thought to relate to political economy, some of them seem to have nothing to do with it—as acknowledged by the authors (Cavadino and Dignan, 2011: 210). Nonetheless, whether these elements are at best mediations of, or independent from, political economy it remains unanswered (Sozzo, 2018).

While contemporary PEOFP scholarship has become more nuanced, the central role of hegemony in early contributions by Hall et al. (1978) and Melossi (1985; 1993; 2000) has not received the same sustained attention as approaches using more quantitative socioeconomic indicators. These authors, drawing on a Gramscian framework, placed hegemony at the heart of their analyses, examining how it connects political economy with the penal system. This offers a distinct and still highly relevant lens for understanding the relationship between political economy and penal power. Given its analytical potential—particularly for making sense of mass incarceration—I return to their work here to briefly revisit some of their key arguments.

Let us first take a step back and return to Gramsci's concept of hegemony and the capitalist state's exercise of power. Gramsci (1948/1977) claims that the capitalist state exercises two forms of power: consent and coercion. Whereas the latter represents the use of force through state apparatuses—police, courts, military—producing authority and violence, the former corresponds to hegemony, enables the formation of civility, and is reproduced by organisations such as church, schools, and trade unions. Hegemony, in Gramscian terms, is the cultural, moral, and ideological dominance of a group over others, determining a shared worldview. As Hall and colleagues (1978: 218) state, hegemony:

ultimately secures [...] the long-term social conditions for the continuing reproduction of capital. The superstructures [civil, political, juridical, and

ideological complexes of the social formation] provide that ‘theatre’ where the relations of class forces, given their fundamental form in the antagonistic relations of capitalist production, appear and work themselves through to a resolution.

Hence, to guarantee the universalisation of the ruling-class worldview, states must defend their hegemony.¹ In so doing, social stability and cohesion are preserved. If the production of consent fails, there is a crisis of hegemony and authority. Rather than consent, the exercise of power turns to coercion and the state coercive apparatuses, developing what Hall and colleagues (1978) call ‘authoritarian consensus’. Direction, produced through consent, is replaced by domination, achieved by coercion.

Bringing this perspective into the criminological field, Melossi (1993: 259) argues that ‘rates of punishment vary with power elites’ perception of, and responses to, critical periods, without respect to changing official crime rates’. Variances in punishment rates are a result of a relation between ‘social structural change—expressed in part by economic indicators’ and changes in ‘vocabularies of punitive motive’. For him, the moral elites’² perception of a possible crisis in their own hegemony—be it due to political, socio-economic, or cultural changes—is crucial to determine their action towards its defence (Melossi, 1993; 2000). The situation of economy³ and the labour market may or may not contribute to the formation of those ‘critical situations’. Hence, elites perceive the prevention of social crises as an ultimate goal.

¹ This is why ‘the ruling ideas of each age have ever been the ideas of its ruling class’ (Marx and Engels 1848/1948; 1932/1974).

² ‘those “authorized” to identify and label social problems’ (Melossi, 1993: 262).

³ What Marx (1867/1928) calls ‘vulgar economics’.

When they feel their dominant relations to be under threat, these elites ‘tighten the belt’ to preserve their hegemony. In practical terms, this means ‘changing representations of crime and criminality’ and, by consequence, making punishment harsher and more frequent (Melossi, 2000: 296). This change in representations reshapes the operation of many social institutions related to crime control. This understanding fits well into Hall and colleagues’ (1978) account of the rise of law-and-order society. The authors consider this movement as the coercive management, by the State, of class struggle and a crisis in hegemony in about the 1960s, provoked by social, economic, and political polarisations happening simultaneously—from the ‘growing weakness of the economic structure of British capitalism’ (Hall et al., 1978: 263), to student revolts and the empowerment of communist parties.

As a weakness, PEofP remains much limited to analysis of core countries. Countries at the periphery of capitalism are not included in those recent comparative works. Several Latin American scholars have recently expanded this approach to Latin American countries. The outcomes, however, are divergent from research limited to core countries (Sozzo, 2016c; 2017; Iturralde, 2019; Dal Santo, 2023a; 2020b; Paladines, 2016; Grajales and Hernández, 2016; Azevedo and Cifali, 2016). Despite moving away from neoliberal economic policies and significantly reducing levels of poverty, inequality, unemployment, many Latin American nations have significantly increased incarceration rates under left-wing governments. This mismatch, however, does not mean this theoretical framework cannot be useful for other contexts. Drawing more on the hegemony perspective, Beckett and Godoy (2008) have more successfully made sense of rising punitiveness as a backlash after a process of expansion and deepening of democracy across the Americas. Other scholars have drawn on PEOp and its materialist approach to explain historical patterns and qualitative dimensions of punishment in Brazil (Cacicedo, 2022; 2023; Giamberardino, 2024; Dal Santo, 2022a, 2023a, 2023b). That

apparent mismatch actually means that relevant dynamics and conditions related to political economy have been neglected or taken from granted—such as colonialism, state building, dependency, and patterns of urbanisation and industrialisation.

In conclusion, recent PEOF studies have contended that countries with more liberal markets tend to have higher rates of imprisonment, which has been the case in core countries, but not in the peripheries. Some of its exponents have incorporated other elements (cultural, institutional, normative) into their analyses, but there has been no agreement on whether these constitute mediators or independent factors influencing punishment trends. Although a little overlooked, the relation between hegemony, perceptions of crises, and increasing punishment is a substantial contribution from this scholarship, which may help us untie the knot of understanding mass incarceration beyond the Global North.

Penal populism: the democracy-at-work hypothesis

Penal populism is another widely used category to explain recent changes of the penal system around the world. This category emerged in the literature as a development of the term ‘populist punitiveness’, first used by Bottoms (1995). By analysing the trends of penal policies in Britain at that time, Bottoms referred to populist punitiveness as the political use of a pre-existent punitive feeling of the public. On that occasion, however, Bottoms did not elaborate this idea fully. Since then, much has been developed by different scholars (Garland, 2001a; Roberts et al., 2003; Pratt, 2007; Sozzo, 2017). Again, as the development of this field has been thoroughly examined elsewhere (Sozzo, 2017; Garland, 2018c; Loader and Sparks, 2017; Dal Santo, 2020a), I here only highlight some of its key premises, claims, and limitations.

Since Bottoms' concept of 'populist punitiveness', several other terms have been used in this literature. Garland (2001a), for instance, uses two different but closely related terms in *The Culture of Control*. 'Punitive populism' is also used to describe a then-contemporaneous British penal policy, while 'popular punitiveness' is presented as 'a strong political current' produced by the media (Garland, 2001a: 158). Despite analysing Britain and the USA, Garland suggests the possibility of observing this phenomenon in other emerging 'late modern societies'. Broadening the research agenda, Roberts and colleagues (2003) used the term 'penal populism' analysing penal trends in other English-speaking countries—Canada, Australia and New Zealand, besides the USA and Britain. They define penal populism as 'the pursuit of a set of penal policies to win votes rather than to reduce crime rates or to promote justice' (Roberts et al., 2003: 5). Once more, penal populism is treated as the political use of a popular demand for harsher punishments.

Developing a more elaborated category, Pratt (2007) argues that penal populism is actually more than an electoral relation between politicians interested in their own electoral success, and a people seeking more punitive policies. Pratt also differentiates 'penal populism' from 'authoritarian populism'. The latter term was first used by Hall and colleagues (1978) in their analysis of then-emergent law-and-order politics in Britain. Hall and colleagues point to the intentional construction of a social crisis entailing race, crime, and youth, which produced an authoritarian consensus among the people. In differentiating between these categories, Pratt denies the emergence of penal populism as an intentional top-down process. Nevertheless, although making efforts to develop a deeper analysis, Pratt offers a more descriptive account, describing features and effects of penal populism, rather than developing a clear category.

None of these authors consider penal populism to be the one and only trend in criminal justice systems, nor necessarily a predominant one. Rather, it is considered a trend that has coexisted with others (Zedner, 2002; Barker, 2009; Loader & Sparks, 2012; Sozzo, 2017). That said, many features of contemporary criminal justice systems are specifically linked to penal populism. Some examples are: the politicisation of the criminal question, which has become a key element in electoral campaigns (Garland, 2001a; Larrauri, 2006; Simon, 2007; O'Malley, 1999; Loader & Sparks, 2016); the loss of experts' credibility and the decline of the rehabilitative ideal, both linked with excessive leniency (Ryan, 1999; Loader, 2006; Pratt, 2007); the expanding popular participation in penal policy-making, particularly victim movements (Garland, 2001a; Matthews, 2002; Ryan, 2005; Pratt, 2007; Zimring, 1996); the return of the retributionist perspective (Barker, 2009); the expansion and harshening of punishment inclusive of and beyond imprisonment; and the existence of a common enemy, the *other* (Garland, 2001a; Pratt, 2007). These are some elements that constitute key features of penal populism.

On its causal determinants, penal populism is predominantly treated as a trend whose roots are in popular claims. Rising crime rates, late modern anxiety, and distrust in experts and institutions are pointed out as the main influences in producing public punitive demands towards penal policies. The idea of late modernity represents Modernity coming close to its exhaustion as a historical period model. Technological development, among other trends, has caused considerable changes in everyday life and social relationships in different areas, such as family, labour, and economy (Young, 1999; 2007). For Garland (2001a), one of the most

important features of late modernity is the rise of crime rates.⁴ In that context, middle-class people, who used to support the then-prevailing penal welfarism, changed their stance, demanding more punitive measures of crime control. Differently, Roberts and colleagues (2003) and Pratt (2007) believe that rising crime rates have only played a minor role. For Pratt, the other mentioned changes caused by late modernity were more relevant in producing a widespread state of social anxiety and ontological insecurity. This state, in turn, has led the public to demand more punitive measures from authorities. In one way or another, consequences of late modernity and changes in public demands are major causes of penal populism.

There are still other alleged causes related to the supposed increase of popular punitiveness. Besides—or in tandem with—rising crime rates and spread late modern feelings, it is argued that the excessive leniency of judges and other criminal justice professionals, in parallel with insufficient levels of prisoners' rehabilitation and crime prevention (Duff, 2001: 6-10), have undermined trust in criminal justice professionals and institutions (Zimring, 2001; Dzur, 2010). Consequently, people have asked for a new way of dealing with crime and criminals. Politicians, on the one hand, have passed tougher laws, whilst criminal justice operators have worked under a more punitive rationale. Therefore, from this perspective, increasing punitiveness has been influenced by distrust in penal institutions and their supposed leniency.

Roberts and colleagues bring another important element to the debate. They highlight how wishes for harsher punishments are often led by an inaccurate impression of

⁴ Garland (2004, 2007/2018a) later acknowledged that not every late-modern society is necessarily a high-crime society.

reality—public punitive demands being based on misperceptions of punishment (Hough, 1996; Hough and Roberts, 1999; Green, 2005). They claim those punitive policies are actually the result of an exploitation, by politicians, of this public opinion based on disinformation (Roberts et al., 2003: 8). This public misinformation on punishment and crime control is directly connected to public opinion manipulation. Many scholars have pointed to the pivotal role of mass media in igniting public feelings on crime and criminals (Green, 2008; Roberts et al., 2003: 59-92; Weber et al., 2021). More than rising criminality, late modern social anxiety, or discredit in penal institutions, popular demands for tougher penal policies are here a consequence of a misconception of the reality, sometimes pushed by the media.

Despite its global popularity (see Dal Santo, 2020a; Fenwick, 2013; Steinberg, 2016; Sozzo, 2018), penal populism has also faced considerable criticisms. Considering the lack of a precise definition, Shammas (2019: 6) claims this is often used as a ‘catch-all term’. Other authors even argue that penal populism is a myth (Matthews, 2005) or a ‘reification in academic minds’ (Tonry, 2007: 1). Another problem is that rather than working as an analytical tool, the label ‘penal populism’ is often used to provide a sense of disapproval (Loader and Sparks, 2017: 98; Garland, 2018c), containing ‘a series of unflattering attributions’ (Sparks, 2000: 197). Penal policies are framed as either vulgar and irrational or believed to be always influenced by conservative forces. By labelling a movement as irrational, one undermines the causes and conditions that make it flourish (Žižek, 2002; 2012; see Hogg, 2013; Dzur, 2010; Shammas, 2016; 2019), assuming that a rational, value-neutral policy is not only possible but better. By reducing it to a product of conservatism, one misses the fact that the expansion of a more punitive legislation is also a result of changing public perceptions of crime and violence and of demands from previously neglected sections of the population (Matthews, 2005; Loader and Sparks, 2012; Cifali, 2016; Ferreira et al., 2018).

Besides criticisms to the way it has been used in the literature, there are also criticisms of 'penal populism' as a category. One issue regards the relationship between the politicians and the people, as it presupposes that politicians give people what they want in a simplistic way. Another issue is the comprehension of 'the people' as limited to a *middle-class* representation (Matthews, 2002; 2005), considering the middle-class as the primary driver of policy making and disregarding the existence of different, opposing social groups and sectors which compose a heterogeneous and conflictive society (Hall et al., 1978: 139-179; Miller, 2008; Barker, 2009; Jones, 2010; Loader and Sparks, 2012; 2017; Koch, 2017).

In conclusion, the penal populism hypothesis is deeply connected to Durkheimian ideas (Durkheim, 1958; 1960). Punishment has a primarily symbolic role, conditioning and being conditioned by society's cultural dimension. Punishment would be nothing but a reaction and remedy to social insecurity and anxiety.⁵ The late modern public, mainly represented by high levels of insecurities and anxieties, is then seen 'as a toxic ingredient in criminal justice' (Koch, 2017).

Struggles and penalty: the agonistic perspective

Another relevant approach to mass incarceration is centred on struggles, human agency, and (the lack of) democracy. This approach may not amount to a fully developed field of scholarship itself. Consequently, this enables us to somewhat eclectically unite scholars who may or may not disagree with each other on theoretical and methodological grounds. Nonetheless, this section puts together middle-range accounts that emphasise human

⁵ Nonetheless, Garland has recently written that 'punishment is a social institution, not an automatic reaction or a mechanical response' (Garland, 2018b: 15).

agency, highlight struggles in a historical perspective, and present themselves as a reply to macro-theories, including contributions from authors such as Pfaff (2017), Barker (2009), Goodman, Page and Phelps (2017), Gottschalk (2006), Loader and Sparks (2004; 2012; 2017; Loader, 2010); Dzur (2010; 2012; Dzur et al., 2016a; 2016b), Miller (2008); Rubin and Phelps (2017), and Slade et al. (2023). For convenience, I refer to them as the agonistic perspective.

Despite the inexistence of a proper scholarship labelled 'agonistic perspective', most of the authors mentioned above are clear in where they situate their work. They expressly make themselves distant from macro, structural theories. Barker (2009: 34), for instance, argues that the 'neo-Marxist' criminological explanation 'is insufficient and unnecessarily totalizing'. In her words, the Marxist approach is 'far too structural to incorporate the people who actually make up the actions and activities of the state' and 'suppresses the human agency that is necessary to put the state in motion and make its political authority and cultural schemas meaningful' (Barker, 2009: 34; see also Rubin, 2021). This sort of criticism is also raised against 'standard theories' (Pfaff, 2017), such as shifts in public opinion, the war on drugs, or the electoral exploitation of law and order (Gottschalk, 2006; Miller, 2008; Goodman et al., 2017; Pfaff, 2017).

This does not mean that structure and economic relations are completely dismissed by those authors. Barker (2009: 34) herself acknowledges that 'economic relations, particularly as they shape social hierarchies, clearly play a role in the formation and impact of punishment policies'. The emphasis, though, is switched onto actors, whose struggles and actions ultimately shape and define the penal system operation⁶ (see Loader and Sparks,

⁶ It is important to remember that the Marxian theory is far from undermining the centrality of social actors. Marx and Engels ([1848]1948) claim that class struggles are the motor force of historical change and that humans make their own history (Marx, [1852]1972).

2004). *Struggle between people*, Goodman, Page and Phelps (2017: xi) argue, 'is the motor force of criminal justice history'. In this view, different groups of people are considered, from politicians, civil servants, moral elites, and academics, to journalists, social movements, and ordinary people, either organised or not. This means that these struggles involve people with distinct levels of power and influence. Prosecutors, for example, are considered key players in leading the US mass incarceration (Gottschalk, 2006; Simon, 2007; Pfaff, 2017), whereas political elites are deemed crucial in reducing incarceration in Finland (Christie, 1999; von Hofer, 2003; Lappi-Seppälä, 2007). Similarly, replacing the focus on larger accounts by daily actions, Pfaff (2017: 30) states:

the war [on drugs] isn't a specific, coordinated set of actions. It isn't the decision to criminalize drugs in the first place... Nor is it any declaration by any one president. It is the decision by state legislators to pass tougher sentencing laws, by county prosecutors to enforce those laws more aggressively, and by city police to arrest drug offenders more frequently.

Relevant actions in the crime control realm are also taken by people other than political and criminal justice decision-makers. Miller (2008), for instance, analyses the influence of citizen groups interests, mobilisations and representations in the US federalism and their relations with changes in crime policies. Similarly, Barker (2009) looks at three US states and explores how patterns of civic engagement, through the mobilisation of ordinary people in the policy-making process, shape penal regimes. From a different approach—but again within US borders—Gottschalk (2006) points out to some unintended outcomes produced by the struggles of ordinary people for claiming rights, such as victim groups, women's movements, and prisoners' activism. These studies illustrate the link between struggles and mobilisations of citizen groups, on the one hand, and patterns of punishment and penal policies in general, on the other.

Another important element here is the question of historicization. Recognising the importance of history in the constitution of current phenomena is not anything new. Nonetheless, authors mentioned in this section tend to go beyond the partially established historical perspective whose initial frame is around the 1970s. The roots of mass incarceration are often located in that decade, be it owing to the rise of neoliberalism, the wake of the Black movement rebellion, the beginning of the war on drugs, the rise of late modernity, or all these events together. These 1970s-centred-approaches fit with what Goodman and colleagues (2017) call ‘pendular logic’ and represent what the agonistic perspective refuses—radical swings or dualist views. Goodman and colleagues are against this so called pendular logic for three reasons: the idea of rupture,⁷ its alleged mechanist view,⁸ and its supposed homogeneity.⁹ Instead, they argue that ‘groups and ideas dominant at one time almost always existed earlier but occupied less powerful positions’ (Goodman et al., 2017: 13). Besides denying drastic and sudden variations linked to structural transformations, authors in this scholarship tend to identify embryonic changes in institutions—which took place much earlier than in the 1970s—as well as slow and cumulative actions that have enabled (or constrained) them to operate as they currently do (or do not do). The former is exemplified by the transformation of prosecutorial power in the US (Gottschalk, 2006; Pfaff, 2017). The latter is represented by the case of War on Drugs, as Pfaff’s quotation above, or by the ‘Three Strikes initiative’ and its role in California’s retributive penal regime (Barker, 2009: 84).

⁷ This conveys replacements of criminal justice regimes, such as rehabilitative by lenient, or punitive by managerial (see Rubin, 2016).

⁸ As if replacements mentioned in the previous footnote were driven by single factors—crime, sensibilities, labour market—producing predictable changes that do not encompass contingency and struggles.

⁹ Ignoring regional and state variations, for instance.

Having established this long-term, cumulative perspective, I now turn to the issue of citizens' group. Recognising the relevance of struggles and the power of agents differentiates this scholarship from that of penal populism. Rather than seeing 'the people' as a roughly homogeneous group demanding harsher punishment, talking about struggles is also acknowledging that different groups of people have different power, influence, representation, and demands. Nevertheless, these differences of power are not restricted to the division between decision-makers and ordinary people. Even when only citizen groups are concerned, some of them are more powerful or can access some public instances more easily than others. This is explored by Miller (2008), who finds that single-issue citizen groups tend to migrate more easily across legislative agendas than broad citizen groups when specific opportunities arise. Goodman and colleagues also see struggles between groups as a key factor in determining the success of the congregate model over the cell-based one in the pre-Civil War US. This happened, they argue, because 'reform organizations that advocated for the Auburn system [the congregate] ... were more organized and better connected than their counterparts' (Goodman et al., 2017: 35). However, Goodman and colleagues do not discuss questions such as 'what is actually behind their better "social networks"?' or 'what did they argue or do to be supported by governors and legislators?'

These power imbalances bring us to the last point to be highlighted here: some authors—some more clearly than others—argue that mass incarceration is a product not of democracy-at-work (politicians delivering what 'the people' want), but of democratic deficit in the development of penal policies instead. There are different approaches taken to sustain this statement. Miller (2008: 117, 167-168) identifies that the federalisation of crime policy tend to make the most vulnerable people voiceless and without representativeness. Rather than not sufficiently insulated from the public, the US bureaucratic agencies are actually too

insulated from those who suffer from crime and violence the most. This lack of democratic participation in penal policy-making processes is observed by several other scholars, who see this as a prime mover of mass incarceration (Johnstone, 2000; Loader and Sparks, 2012; Koch, 2017).

In summary, the agonistic perspective emerges as a reply to macro-theories and monocausal accounts. It emphasises human agency, rejects radical swings or dualist views, and expands its analytical period beyond the 1970s. By looking at meso-level dynamics, it identifies mechanisms through which mass incarceration has been reproduced, shedding light on the role played by groups and institutions in these processes. It also points to the lack of democratic participation in crime control policymaking, as opposed to the democracy-at-work hypothesis. A trap that some authors within this perspective seem to have fallen into is that rather than conjugating human agency within the limitations posed or possibilities offered by the structural reality, intentionality and human struggles are sometimes disconnected from the material domain and dealt with as they had full autonomy over social reality. In trying to avoid abstract, macroscopic analyses, some authors have reduced societal changes to the level of intentionality. Nonetheless, it offers a more nuanced way of analysing agency and penal politics when compared to the penal populism paradigm.

This section has showed different explanations of mass incarceration, from the rise of neoliberalism and its spread as a transnational political project; the ascendance of late modernity and the return of more punitive feelings and public demands; variations of political economy, being liberal market countries more likely to enforce mass incarceration; to struggles between people in different positions of power. In presenting a brief overview of these four perspectives, this section has begun to imply that the PEofP and the agonistic

perspective offer better conceptual and analytical resources, and more nuanced approaches to make sense of penal trends, inclusive of ways to think of penal processes in different places. However, their examples and cases studies are also based on experiences of core countries. The Southernising Criminology movement has demonstrated how the realities of peripheral countries have been marginalised in criminological knowledge (Carrington et al., 2019; Dal Santo and Sepúlveda, 2024). The situation is no different in punishment and society studies (Dal Santo and Sozzo, 2023: 530-531; 2024). For this reason, I now examine how this discussion has unfolded in Brazil.

Southernising Criminology? The Brazilian debate on mass incarceration

Mirroring historical trends in the development of criminology (Carrington et al., 2016) and the wider social sciences (Connell, 2007), most influential theorisations of mass incarceration are usually developed from the realities of core countries. In the last few years, though, the number of works on punishment in peripheral settings included in English-speaking international debates has increased significantly. Several edited volumes and special issues on Africa (Alexander and Kynoch, 2011; Braatz et al., 2022; Morelle et al., 2021), Asia (Ganapathy and Balachandran, 2016; Lee and Karen, 2013), Latin America (Darke et al., 2021; Sozzo, 2022; Hathazy and Muller, 2016; Dal Santo and Sozzo, 2024), and wider global peripheries (Black et al., 2021; Dal Santo and Sozzo, 2023) have recently been published. Most of these works has been innovative in a variety of ways, shedding light on different elements that have shaped penalty in the margins despite overlooked by theorisations from the core.

If rescuing the reference to ‘peripheral penalty’ has helped advancing the theorisation on peripheral settings, one must be careful before drawing comparisons or reproducing

conclusions in the name of 'the periphery'. There are several risks in this exercise. One major risk is essentialising the peripheries, such that everything experienced in a peripheral setting is seen to flow from its peripheral status. Consequently, simplistic responses can be given to explain any and all issues faced in those settings—for example using 'colonialism' or 'slavery' to explain everything experienced in a former colonies or slaveholding settings. This can also lead to extreme relativism and the aprioristic denial of knowledge produced in core countries, as if it were completely useless to make sense of the peripheries. Another major risk is implying homogeneity among peripheral contexts, as if they were all equally peripheral. Longstanding debates of the World Systems and the Dependency theories have discussed categories such as 'semi-peripheries' (Wallerstein, 1979) and 'sub-imperialisms' (Amin, 1974; Marini, 1972, 1977/2000), observing different levels of peripherality. Not only do countries experience peripherality differently, but they are also shaped by distinct historical forces, as well as economic, social, political, institutional, and cultural differences, which are in turn reflected in their penal field. For these reasons, despite significantly influenced by the spirit and approaches of those who have analysed peripheral penalties in different settings, my analysis below focuses on how the debate on mass incarceration in Brazil has taken shape.

I mentioned above that this emerging field 'punishment in global peripheries' has been innovative in different ways. This includes, for example, the prominent role played by different penal institutions within the wider penal system (Li, 2023; Hefetz, 2023, Ben-Natan, 2022; Super, 2022), counter-intuitive trends experienced in changing political regimes (Slade et al., 2023; Haney, 2016; Cheliotis and Xenakis, 2016; Tripkovic, 2016; Sozzo, 2016a), and colonial and imperial influences in penal practices (Jefferson and Martin, 2023; Brown, 2014; Pfungst and Kimari, 2022; Konate, 2018). Regarding the literature on Brazil, original theoretical developments have mostly been linked to studies on prison order and gangs (Dieter, 2023;

Biondi, 2010/2016; Darke, 2018; Dias et al., 2022). The scholarship on mass incarceration has not yet however been fully developed. This limited development has three main features: lack of research on causal mechanisms of mass incarceration; a predominant ‘denunciatory’ approach; and the reproduction of ‘Northern theories’. Below I indicate how these features have shaped the scholarship on Brazilian mass incarceration, before highlighting its own advances.

The first question to be asked here is ‘what scholarship?’. After analysing recent issues published in two of the main peer-reviewed Brazilian journals of Criminology through the analysis of titles and abstracts, I noticed a significant gap in the literature on causal mechanisms of mass incarceration in the country. I analysed the publications of RBCCRIM (Brazilian Journal for Criminal Sciences) and the Latin American Journal of Criminology. The former is a long-standing monthly journal of Criminology, Criminal Law, and Criminal Procedure, whose first issue was published in 1992. The latter is a newly launched journal focused on Criminology, being published twice a year, and having had its first issue published in 2021. In RBCCRIM, 404 papers were published between January 2019 and October 2021. Only five of them discuss causes of mass incarceration. Three of them analyse the Brazilian case (Dal Santo, 2020a; Oliveira Neto et al., 2019; Strano, 2021), one is a theoretical, placeless discussion (Hoffman and Witschoreck, 2020), and one is a translation of Harcourt’s (2019) ‘neoliberal penalty: a brief genealogy’. In the Latin American Journal of Criminology, only two (Mantelli et al., 2021; Carreiro and Rafaelle, 2024) out of the 79 papers published from the first to the latest issue¹⁰ discuss mass incarceration. Similar are the findings of Castelo Branco and colleagues (2019), who identified that only a minor percentage of papers published in

¹⁰ Until March 2025, eight issues were published.

both RBCCRIM and *Revista de Estudos Criminais* (Journal of Criminal Studies) between 2013 and 2017 discusses mass incarceration. A closer look at those papers indicates that they hardly ever address or analyse the causes of mass incarceration. This is not to deny the existence of a scholarship on mass incarceration in Brazil. This scholarship, however, has not more directly focused on causal mechanisms.

Another feature of this scholarship is its predominant denunciatory orientation. About four decades ago, with the emergence of critical criminology in Latin America, scholars discussed whether criminology should be more a scientific enterprise (Novoa Moneal, 1985; 1986) or if it was intrinsically political, as ‘science cannot be separated from social struggle’ (Aniyar de Castro, 1986). In analysing the rise of critical criminology in Brazil between the 1970s and 1980s, Martins (2014) observed that that movement had the denunciation of human rights violations and the inhumane conditions of imprisonment in Brazil as one of its main aspects. This approach consists more of a delegitimising critique of the penal system. Contemporarily, a significant part of the works on mass incarceration in Brazil is mostly descriptive, offering a good overview of Brazilian prisons and incarceration, in what follows that ‘denunciatory’ approach. This includes, for example, the description of incarceration rates in the last decades, the profile of the prison population, and the sorts of crime committed by inmates, then denouncing the penal system’s selectivity and its classist and racist character (Martins Júnior, 2019; Mantelli et al, 2021; Julião, 2020; Pimenta, 2018; Zackseski et. al, 2016; Lemos, 2015; Silva, 2016). It also describes levels and ways of suffering and human rights violations within prisons (Bomfim, 2022; Souza, 2018; Santos and Ávila, 2017), then denouncing the ‘unconstitutional state of affairs’ of Brazilian prisons, as declared by the Brazilian Supreme Court. Some works go beyond the denouncement of suffering linked to prison life and discuss some negative consequences of mass incarceration (Karam, 2022;

Ferrarini, 2019; Ferraz and Joffily, 2019; Sinhoretto et al., 2013; Melo, 2014). Ultimately, these approaches are less concerned with analysing the causes of mass incarceration and more focused on denouncing the failure of prisons and their negative effects (see Gindri, 2018).

The third main element holding back the development of a more innovative scholarship on the causes of mass incarceration in Brazil is another old feature of criminology in peripheral settings: the reproduction of 'Northern theories'. This has happened in Africa (Shearing and Marks, 2011; Agozino, 2003; Sadiki and Steyin, 2022; Igbinovia, 1989; Obioha, 2022; Alemika, 2020), Asia (Lee and Laidler, 2013; Liu et al., 2013), the Caribbean (Cain, 2000), and in Latin America broadly speaking (Santos, 1984; Del Olmo, 1999; 1975; França, 2021; Goyes, 2019). Around five decades ago, Del Olmo (1975; 1981) emphasised that not only mainstream criminology reproduced 'Northern' theories in Latin America, but even critical criminologists were uncritically importing the critiques of their European and North American critical criminologist colleagues, overlooking the particularities and demands of *Nuestra América*. Much of this situation persists. Most of contemporary works aimed at explaining the causes of mass incarceration in Brazil either claim that penal populism is its prime mover or uses Wacquant's neoliberal penalty thesis to explain it. As per Google Scholar, until the 25th October 2023, the Brazilian editions of Wacquant's *Punishing the Poor* and Garland's *Culture of Control* were cited in at least 1,788 and 2,784 works respectively. For context, Garland's Brazilian version of *Culture of Control* is his fourth most cited work ever, being cited more often than his influential *Punishment and Welfare: a history of penal strategies* (Garland, 1985). Wacquant is equally very influential in the Brazilian debate. The Brazilian version of *Punishing the Poor* is his 11th most cited work, whereas the Brazilian edition of *Prisons of Misery* is the 6th, being more cited (2,893) than the sum of its original edition in French and its English translation (2,048).

Following Garland's analysis, many scholars have considered penal populism as the main cause of mass incarceration in Brazil (Paiva, 2014; Pereira, 2020; Andrade, 2020; Carreiro and Rafaelle, 2024). At first glance there are compelling reasons for doing this. One is the significant harshening in legislation. Two main cases are usually highlighted: the Heinous Crimes Law, enacted in 1990, around the time when incarceration rates started rocketing in Brazil; and the 'new' Drug Law, enacted in 2006. Another reason lies in the electoral domain, with the relatively recent election of Bolsonaro and many members of the army and the police, amounting to what has been known as *Bancada da Bala* ('the Bullet Caucus'). While penal populism as one among other electoral trends has indeed been observed in Brazil, penal populism as a causal explanation of mass incarceration has very limited applicability in the Brazilian jurisdiction, which features several significant 'protective factors' (Tonry, 2007; Lacey, 2008), such as coalition-oriented presidential system and an insulated judiciary composed of non-elected judges, as I have extensively discussed elsewhere (Dal Santo, 2020a). Yet, in Chapter Nine, I provide a more complex analysis of the relations between media and judicial punitiveness.

Wacquant's neoliberal penalty thesis has been even more influential in the debates around mass incarceration in Brazil. In analysing ten years of publication of *Revista Discursos Sediciosos*—another influential Brazilian journal of criminology—Gindri (2018) and Keese (2021) identified that neoliberalism is considered the main explanation for the increase of incarceration in the country. As for penal populism, there are also seemingly credible reasons for doing so. In tandem with the increase in incarceration rates, the 1990s is also the period when neoliberal economic policies were enforced in Brazil (Antunes, 2006; Martins, 2011; Sader, 2013). But here is one of the interesting aspects of this Brazilian literature. Most of these works published until around the mid-2010s reproduce the neoliberal penalty thesis in

its integrity, understanding 'neoliberalism' as a political and economic project, and the neoliberal penalty as the new management of poverty (Batista, 2011; Silva and Farias, 2017; Lemos and Ribeiro Jr, 2016; Arguello, 2007; Pedrinha and Souza, 2016). In the late 2010s, Wacquant's theory started to be questioned in Latin America, as imprisonment rates kept rising in many countries across the region even under left-party governments (Sozzo, 2016). Rather than overcoming this thesis, part of the Brazilian scholarship started adopting 'neoliberalism' not as an economic or political model, but as a wider rationality (Rosa et al., 2017; Leal, 2020; Serra, 2019; Lemos, 2016; Bozza, 2015; Minhoto, 2020). Despite this 'adaption' being contradictory to Wacquant's thesis, this section of literature in Brazil still speaks in the name of the 'neoliberal penalty thesis', reproducing most of its canons. In Chapter Eight, I explore a more indirect way in which neoliberalism and mass incarceration intersect, particularly through the rise of *concurseiros*. Yet, just as with penal populism, I have elsewhere explained some significant limitations of the neoliberal penalty thesis to explain mass incarceration in Brazil (Dal Santo 2020b). Rather than emerging from welfare retrenchment, mass incarceration followed a period of state terrorism under the dictatorship and has persisted alongside an unprecedented expansion of social policies.

Processes of theory importation are sometimes more interestingly done than others though. By analysing processes of travels of the criminal question, Sozzo (2001: 358-379) claims that every process of translation has a creative element. The translator, he claims, interprets its object of translation and gives it a meaning from another linguistic and cultural reality. This results in some metamorphosis of discourses and practices in a given national context. The problem is that this adaption and creativity are not always sufficient in terms of depth and essence. For example, most of the works explaining mass incarceration in Brazil through penal populism or neoliberalism also claims that historical (slavery, colonialism, and

military dictatorship) and contemporary (dependency) elements intensify the effects of penal populism or neoliberalism. Even Wacquant (2003; 2006) acknowledges it. Merely mentioning that the country's authoritarian legacy makes things worse does not explain how nor why, and so it does not consist of a sufficient adaptation. This is mostly the case of works that reproduce an 'essayistic' tradition with no empirical research—another historical feature of the Brazilian and Latin American critical criminology literatures (Gindri, 2018: 71-73; Martins, 2014; Sozzo, 2001; Galleguillos, 2023; see, however, Carvalho, 2023; Carvalho and Mattos, 2021). The movement here seems to be firstly selecting a causal explanation, then superficially adding local specificities to the theoretical construction, but merely naming and not properly engaging with those particularities.

There are works that, however, go beyond this model of superficial adaptation. For example, Carvalho (2010) and Semer (2019) have successfully identified mechanisms through which mass incarceration has been reproduced in Brazil. Both authors have analysed judicial activity and identified how judges have boosted mass incarceration. Carvalho looked at the imposition of sentence length at higher courts. Semer researched the judicial activity of São Paulo Criminal Court when sentencing drug trafficking. Both have greatly advanced in data production and in identifying important mechanisms for the reproduction of mass incarceration. They have not, however, been as successful in making sense of their own findings. Carvalho explains judges' punitive decision-making with penal populism, whereas Semer explains it with Cohen's (1972) moral panics. The problem with this is not the abstract use of a theory originally developed from a different reality—I do not engage in nativist critiques and explicitly discuss this elsewhere (Dal Santo and Sepúlveda, 2024). The problem is rather in its concrete use. As I demonstrate in the following section, they both mistake essence by appearance. The issue here goes in the opposite direction to the one described in

the previous paragraph: rather than firstly picking up an influential theory and superficially adding local specificities without deeply engaging with them, these authors firstly engage with local specificities, but then make sense of it from an influential theory, without properly engaging with the theory itself. There is important empirical research conducted here, but this is followed by a limited process of theorisation, where findings are adapted to fit predefined categories and concepts.

These are three features that have held back a more complete development of the scholarship on mass incarceration in Brazil. It does not, however, mean that the three of them perfectly represent the whole scholarship, nor does it mean that there are not lessons to be taken from it. Even though not addressing mass incarceration directly, several other studies provide us with important insights, data, and tools to make sense of contemporary penalty in Brazil. I mentioned above how Semer (2019) and Carvalho (2010) have identified spaces through which judicial activity has been extremely punitive. Similar has been done by other scholars, especially in the context of sentencing drug trafficking (Jesus, 2018; Valois, 2017) and enforcing pretrial detentions (Silva, 2016; Zackseski and Gomes, 2016). I have also argued that most of the scholars who have insufficiently adapted Northern theories have at least claimed that slavery, colonialism, and the military dictatorship have influenced Brazilian contemporary punitiveness, even though not addressing how nor why. There are, however, scholars who have analysed the relations between punishment and social structure in slaveholding Brazil (Cacicedo, 2022; Giamberardino, 2024; Koerner, 2001; Dal Santo, 2023b), or the influences of slavery abolition in the development of penal institutions (Teixeira et. al, 2016; Mayora and Garcia, 2013; Flauzina, 2006; Piza, 1988; Souza, 2022; Dal Santo, 2017). From different lenses, other scholars have analysed the process of democratic transition after the military dictatorship and its impact in the penal system (Marques, 2017; Salla, 2007;

Rodrigues, 2017). Other aspects that have influenced contemporary penalty in Brazil have also been carefully analysed, such as the political domain under left-oriented presidential governments (Cifali and Azevedo, 2016; Martins, 2018; Dal Santo, 2020b), and the variations in the Brazilian state institutional capacity to punish (Jesus Filho and Fonseca, 2017; Fonseca, 2018; Dal Santo, 2023a). Despite not always focusing on mass incarceration, all these works have challenged reliance on Northern premises of universality and analysed contemporary and historical aspects of punishment in Brazil in their own terms. Throughout this thesis I engage with this rich scholarship.

Finally, another important feature of criminological-related knowledge produced in global peripheries is the fact that not always this knowledge has been produced under the label of 'criminology' (Carrington et al., 2019: 183; Alvarez et al., 2020). For this reason, this thesis does not only draw on the field of criminology, but also engages with Brazilian history, sociology, political sciences, and political economy literatures. This takes place mostly in Chapters Four and Five, where I analyse punishment, incarceration, and social control in Brazil between the 16th and the 20th centuries.

In summary, a more independent Brazilian literature on mass incarceration has started to take shape. While the local literature has advanced more towards other directions, it has not yet fully developed in relation to understanding the causes and conditions of possibility for mass incarceration. Most of the literature aimed at explaining mass incarceration has uncritically reproduced critical theories developed to make sense of core countries, such as penal populism and the neoliberal penalty thesis. Sometimes this has been the result of lack of empirical research. Other times this has been the outcome of issues with theorisation. I now turn to the question of how to overcome these shortcomings.

Two realist contributions

Current problems of the discussion of mass incarceration in Brazil take us back to old issues raised at the very foundation of critical criminology in Latin America in the 1970s and 1980s, such as the reproduction of theories originally developed in core countries. The dominance of the dualism penal populism-neoliberal penalty thesis has produced another problem: analyses on the causes of mass incarceration in Brazil have either been voluntarist or holist. In the former, it is either a matter of politicians' or criminal justice professionals' willingness to benefit from a tough-on-crime stance. In the latter, it is the structural changes produced by neoliberalism that have led to an inevitable expansion of the criminal justice system.

How can these problems best be overcome? To some extent, these matters relate to issues pertaining to philosophy of sciences. To overcome them, my research is informed by Critical Realism (Bhaskar, 1975/2008; Sayer, 2000; Archer, 2000). To the issue of either voluntarist or holist accounts, Critical Realism approach on the 'agency vs structure' debate is very helpful. Another element to be taken from this scholarship is the stratification of social reality—its differentiations between 'the empiric', 'the actual', and 'the real'—whose considerations are helpful to make us adequately transit from the level of appearance to the level of essence—and, in so doing, go beyond the reproduction of those specific Northern theories. In this section I engage with this literature on Critical Realism to establish some premises that are central in my research design and methods, and for me to establish a defined conception of social reality and analyse my data accordingly.

Critical Realism is a branch of philosophy of sciences—just as positivism, interpretivism or constructivism—meaning that it is a theory of what science is and does

(Gorski, 2013). Despite not being a theory of society, it tells us what and how we can know about society. In criminology, the term '(left) realist criminology' has been used since the 1980s, having emerged as an opposing perspective to mainstream and positivist criminologies, but also to 'left idealists'. Shortly, the main premise of that left realist movement was to 'take crime seriously', going beyond the critique of the penal system and focusing on proposing concrete responses to crime, particularly given the high levels of victimisation and violence experienced by the working class and other vulnerable groups (Matthews and Young, 1992; Young and Matthews, 1992; Lea and Young, 1984; Kinsey et al, 1986; Young, 1975). It was only in 2014 that Roger Matthews pioneeringly drew on Critical Realism to revise Realist Criminology, what he framed as a movement 'from left realism to critical realism' (Matthews, 2014: 28). It is more with this latter work that this thesis engages.

Rather than synthetising the literature on Critical Realism, I here stress how it can advance our contemporary understanding of mass incarceration in Brazil. There are two key aspects of Critical Realism that are crucial to this immediate task. The first one is on the 'agency vs structure' debate, which is part of a longstanding discussion within social theory. On the one hand, there is an idea that because there is no society without humans, society is the sole product of human agency. Therefore, understanding human agency corresponds to understanding society. This conception of knowledge and society may lead to some sorts of 'voluntarism', where all social reality complexities are reduced to individual intentionality and action unconditionally determining social forms. In our discussion on mass incarceration in Brazil, this approach often takes shape as the 'penal populism' argument, where mass incarceration is considered the unmediated product of human agency, more precisely the voluntary and purposeful action of self-serving politicians and criminal justice professionals. On the other hand, there is the idea that society exists and is reproduced basically

independently of human agency. Individual behaviour is determined by social structures, and therefore to understand social phenomena one does not need to be concerned with human agency. This conception of knowledge and society leads to holist analyses that may sometimes fall into structural determinism. In the context of Brazilian mass incarceration, this often assumes the form of the neoliberal penalty thesis, where rising incarceration rates are the inevitable product of structural changes, including rising poverty and unemployment.

For Critical Realism, there is no 'either agency or structure', since they are distinct strata of social reality. Neither is human agency determined by social structures, nor does it determine them. Nor is society merely the product of individual actions, but neither does it exist in spite of them. Human action does not take place in a vacuum. Social forms pre-exist people's intentional action and autonomy and simultaneously enable and constrain human agency. In so doing, structure is reproduced or transformed—not because society consists of individuals, but because it 'expresses the sum of the relations within which individuals stand' (Marx, 1939/1980: 265). As Bhaskar (1975/2008: 68) puts it, 'conditions change, but they do not have the power to change. Only things, and materials, and people have "powers"'. From these premises, the analysis of intentionality and daily action disconnected from the material reality that both enables and constrains, or on the structural domain in spite of human action that reproduces or transform social structures, is inadequate or limited. Critical Realism is primarily concerned with causal relations and mechanisms that generate the actual phenomena of the world, as well as with the conditions and prevailing circumstances that make those phenomena possible. This helps us design research capable of overcoming both structural reductionisms and microscopic approaches, grasping the interplay between structure and agency, between structural conditions and everyday action and intentionality,

then understanding how this interplay has produced and reproduced mass incarceration in Brazil. This takes us to the second main issue.

In the previous section, I claimed that authors such as Semer (2019) and Carvalho (2010) produced valuable research, revealing crucial data and identifying key mechanisms in the reproduction of mass incarceration. Despite greatly describing the judicial relevance in that process, I argued that they have failed to explain why judges act as they do. The use of ‘penal populism’ and ‘moral panics’ to make sense of that derives from mistaking essence by appearance. As also observed in my empirical work (Chapters Six and Seven), judges have indeed justified punitive measures with concepts such as ‘popular outcry’ and arguments such as ‘the good society is tired and afraid of criminality’. Semer and Carvalho have taken for granted that judges were being more punitive as a mere response to that public mood, just as expressed in judicial reasoning. This coincides with two influential criminological accounts, which they have then reproduced to explain their findings. However, as I develop in Chapters Eight and Nine, judicial punitiveness is a product of a much more complex reality, beyond penal populism or moral panics. To avoid falling into the trap of mistaking essence by appearance, Critical Realism’s stratification of the social world is vital.

For Critical Realism, social reality is stratified in three different layers or ontological domains: the real, the actual, and the empirical (Bhaskar, 1975/2008; 1979/2014). Bhaskar (1979/2014: 665) argues that:

the domain of the real consists of all the ‘mechanisms’ that exists in the world, which is to say, of all various levels and types of entities with their various powers and tendencies. (...) The domain of the actual consists of all mechanisms that have been activated, even if they have not been observed. (...) The domain of the empirical, finally, consists of all mechanisms that have been activated and observed.

Although this may read too complicated or abstract, Sayer (2000: 12) provides us with a concrete illustration: while labour power—the capacity to work—belongs to the domain of the real, labour—the event of working—and its effects pertain to the strata of the actual. When labour is observed, it corresponds to the empirical level. Following from this, not only should we not identify the real with the empirical—the world being at the disposal of our senses and corresponding to what we observe and experience—but also the real may not be accessible to immediate observation, and it exists despite of our correct understanding of it. Bringing it to our discussion, it is not because judges justify their punitive decisions with public opinion that public opinion is really and actually what has shaped their decision-making process. If we are to understand not only how but why judges have behaved as they have, we need to go beyond the empirical level—in our context, challenging the discursive level and the official reasoning of legal decisions. Doing so also provides us with tools to make sense of our own reality, where there may be different powers and relations at play, as well as distinct conditions and prevailing circumstances.

Critical realism goes much further than these two points briefly elaborated here. For now, the intention was to start establishing the analytical framework used throughout this thesis. Whilst these points are not entirely new, criminological studies rarely possess a clear philosophy of science orientation, leaving their premises to be presumed. This is not necessarily a problem. However, having established ideas on what science is and does, how knowledge is made possible, and how the social world can be accessed, helps not only in terms of clarity and coherence, but also provides tools to deal with issues that otherwise may not sound trivial. Critical realist premises on the agency vs structure debate, and on the stratification of the social world are crucial for us to overcome concrete limitations of the literature on mass incarceration in Brazil.

Conclusion

As Sayer (2000: 76) once remarked, ‘it is one thing to grant respect to the knowledge of others, but quite another to grant them immunity from external criticism’. This spirit has guided the first chapter. Broadly situated in punishment and society, this work integrates the emerging Southernising Criminology movement, while informed by Critical Realism. In the first section, I have engaged with four theoretical frameworks influential in the debates on the causes of mass incarceration. Despite having significant theoretical and empirical limitations for peripheral countries, two of them remain very popular in Brazilian scholarship—Wacquant’s neoliberal penalty thesis, and penal populism, especially in its derivation from Garland’s work, as shown in the second section. In the third section, I have discussed how Critical Realism can help address some of the current limitations in the Brazil literature. One main issue is the articulation between structure and agency. It is exactly on this point that the two other theoretical frameworks discussed in the first section come into play. When articulated, the political economy of punishment and those agonistic perspectives can be useful for understanding mass incarceration in Brazil—provided they are not applied as ready-made imports from the core to the periphery. As the Southernising Criminology project sustains, penalty is shaped by distinct powers, relations, historical trajectories, and conditions across settings. This thesis is thus developed from: (i) the theoretical advances and limitations of the political economy of punishment and agonistic perspectives; (ii) the concrete, specific structural, historical, institutional, normative, and cultural realities of Brazilian society; (iii) the challenges posed by Southern and Brazilian literatures; and (iv) a

Critical Realist approach—together providing a framework to explain the production and reproduction of mass incarceration in Brazil.

Chapter Two

The power to incarcerate

Criminal Justice, judges and sentencing in Brazil

In the previous chapter, I situated this thesis in the broader literature on mass incarceration and established my theoretical framework. Throughout this thesis, I engage with the Brazilian criminal justice system, particularly analysing judicial decision-making. As anticipated in the previous chapter, the particular context of Northern countries—from where most of the most influential literature on mass incarceration comes—has resulted in two fields of research that rarely intersect—one on mass incarceration and another on sentencing. In my research, as better explained in the following chapter, these fields are brought together. For this reason, I engage with a more specific literature on sentencing in this chapter. Given the significant legal, procedural, and institutional particularities of the Brazilian criminal justice and sentencing, I start by analysing how and why judges have expanded their ultimate power to incarcerate in the Brazilian jurisdiction, differently from their counterparts in Northern countries such as the UK and the US. In the second section, I engage with the literature on sentencing, particularly on factors influencing judicial decision-making. In the third, I analyse how analyses on the relations between sentencing and mass incarceration have been made, particularly in the Brazilian case, highlighting their advances and current limitations.

Criminal justice and the power to incarcerate

In both adversarial and inquisitorial models of justice, judges have traditionally been a key figure holding the ultimate power to establish a penal sanction. In an adversarial model, judge's decision power is exercised once accuser (prosecutor) and accused (through defence attorney) each make their case, with the judge being a passive actor. In an inquisitorial model, besides judging, the judge combines the responsibility of accusing, actively seeking evidence (Roxin, 2003; Ferrajoli, 1989; Coutinho, 2009). In either way, judges are decisive players in the process of sending someone to prison. One could then expect judges' activities to be closely analysed by punishment and society scholars, particularly those looking at mass incarceration. However, for different reasons, judges have been mostly overlooked in the key debates on mass incarceration, especially those based on core countries. I now briefly explain why they have been marginalised in that literature, and how these reasons do not entirely apply to the Brazilian context.

In the US, scholars have drawn attention to prosecutorial activity, claiming that prosecutors have played a significant role as drivers of mass incarceration (Pfaff, 2012; 2017; Simon, 2007; Lynch, 2023; 2016). In the US jurisdiction, 'prosecutors have increasingly encroached on the judicial role' (Lynch, 2023: 1313). What was supposed to be an ultimate power to establish a penal sanction possessed by judges has become in practice a power mostly held by prosecutors. This power has been exercised through two mechanisms that relate to changes in sentencing structure and criminal statuses since the 1970s: charging and plea-bargaining. On the one hand, Pfaff (2017: 72) argues that rather than lengthier prison sentences, it is prosecutorial aggressiveness pushing up guilty pleas that 'have been the one most responsible for overall prison growth'. This, in turn, relates to plea bargain and

mandatory sentences. In the US, the vast majority of people in prisons are not properly sentenced by a judge. Prosecutors use their charging power to threaten defendants with tough prison sentences, and then propose deals, which are called plea bargains. In over 90% of the cases defendants end up pleading guilty (Pfaff, 2017: 132; Alexander, 2017: 20). Owing to these particularities of the US criminal justice, prosecutors are considered more significant drivers of mass incarceration, which leaves judges and sentencing marginalised in this scholarship.

In the UK, the marginalisation of judges and sentencing is not too different. In most Western European countries, punishment and sentencing practices have been often seen as tolerant or lenient (Whitman, 2003; Downes, 1988; Tonry and Frase, 2001). The preservation of judicial discretion is considered one major reason contributing to the mildness of penal climates in countries such as the Netherlands (Tak, 2001), Finland (Lappi-Seppala, 2001), and Germany (Weigend, 2001). However, just as in the US, UK judges have lost much of their discretion. In the UK context, this has been the case since the introduction of sentencing guidelines, as well as mandatory and mandatory minimum sentences. Whilst the previous indeterminate sentencing was criticised by some due to its inherently larger space for discrimination (see Matravers, 2000, 13), others believed that discretion was often used in favour of criminals—be that by judges or parole authorities, both generally seen as excessively lenient (Ashworth, 2001; 2015; see Mauer, 2001; Whitman, 2003; Tonry, 1998). So these more rigid and determined sentencing structures were introduced to improve fairness, consistency and predictability (Padfield, 2013).

In the UK, judges still have a little more discretion than US judges. The UK system is a sort of step-by-step process, with the first one being the selection of one out of three ranges

of sentence length as per the crime seriousness. The definition of sentence length range also establishes the starting point sentence. After that, there are eight following steps through which the court analyses different factors related to the crime and the defendant and then reaches a final sentence (see Ashworth and Roberts, 2012; Campos, 2017). For a few crimes, final sentences are not determined through sentencing guidelines—which still reserves a little discretion to the sentencer—but are predetermined by mandatory sentences, as the case of homicide. In the end, most cases reaching criminal courts in the UK ends up with defendants pleading guilty. Differently from the US though, this is not due to plea bargain, but reflects the fact that guilty pleas may reduce a sentence length to up to a third. Ashworth and Roberts (2012: 879) report that ‘over 90 per cent of cases in magistrates court and almost three-quarters of cases in the Crown Court involve guilty pleas’. Both the high percentage of guilty pleas and the little discretion possessed by judges in the sentencing process result in little space for judges and sentencing in discussions on incarceration trends in the UK.

The situation of judges—as well as the structure of legal institutions and procedures—is significantly different in Brazil. While prosecutors are undoubtedly important players (see Leão, 2023; Azevedo et al., 2022), judges retain that ultimate power to define a penal sanction in the Brazilian criminal justice system. In contrast to the US and the UK, not only have Brazilian judges preserved a significant amount of discretion, but in some significant legal situations they have actually had their discretionary power increased. This is the case, for example, of ruling on drug-related crimes, establishing non-custodial sentences, and defining precautionary measures. Enacted in 2006, the current Drug Law decriminalised drug use, but did not establish any criterion to differentiate drug use from trafficking, leaving it entirely at the judge’s discretion. Enacted in 1998, the Law on Alternative Sentencing created several non-custodial penalties, establishing formal requirements but never imposing their

application to any situation, but granting judges with the possibility of determining alternative punishments that did not exist before. The Law on Alternative Precautionary Measures, enacted in 2011, similarly created several non-custodial precautionary measures, allowing but not obliging judges to establish them rather than pretrial detention. Therefore, rather than new legislation following a pattern of reducing judicial discretion and constraining judges to impose more punitive measures, Brazilian recent legislation has increased the importance of judicial discretion and even expanded non-custodial measures at their disposal.

Not only has judicial power not been superseded by prosecutors, but the power of judges is actually larger in Brazil. Despite the Brazilian Supreme Court sustaining that the Brazilian criminal procedure is aligned with an accusatorial model (Madeira, 2016), several scholars argue that the Brazilian criminal justice is at least mixed (Badaró, 2015; Nucci, 2012), moderately inquisitorial (Fandiño and González, 2018), or neo-inquisitorial (Lopes Jr., 2012). Regardless of how it is called, the fact is that criminal procedure in Brazil possesses significant inquisitorial traits that grant the judge with a larger amount of power, being inspired by the *Codice Rocco*—the Italian Criminal Procedure Code under fascism (Coutinho, 2009; Gloeckner, 2018). For example, judges have a larger role in overseeing the investigation and gathering evidence, being allowed to order investigative procedures and actively question defendants and witnesses at trial. Besides retaining inquisitorial powers, the influence of judges in incarceration does not end at the trial stage. In places such as the UK and the US, parole boards are responsible for penal oversight, in such a way that prison sentences are supervised under an administrative section. In Brazil, supervision of prisoners and sentences in general is judicialized. Correction judges are responsible for overseeing the serving of sentences and ultimately deciding on aspects such as prisoners transfer to more or less restrictive prison facilities, conditional release, deduction of penalty, and even to merely declare the prison

sentence has been fully served, so the inmate can be permanently released. Therefore, Brazilian judges have a more comprehensive role, holding significant power from investigation oversight to prison sentence oversight, not being limited to courtroom proceedings.

There are two other aspects of the Brazilian criminal justice system that result in a significantly larger role of judges. One regards plea bargain. Since 1995, the Brazilian criminal justice comprises its own sort of 'plea bargain'. It is, however, significantly different from that of the US. In Brazil, negotiated justice can only take place under the jurisdiction of Special Criminal Courts, where only minor offences are judged. These minor offences may be misdemeanours or crimes to which imprisonment is not a possible penalty. This means that prosecutors have not usurped judges' ultimate power to determine a prison sentence in the Brazilian context. There is indeed a noticeable trend of 'Americanization' of justice. However, as scholars have claimed, travels of penal policies and practices more often than not imply degrees of metamorphosis (see Sozzo, 2001; Langer and Sozzo, 2024). If these metamorphoses still allowed some degree of switch of power to incarcerate from judges to prosecutors in other Latin American jurisdictions, such as in Argentina and Chile (Sozzo, 2024; Langer and Sozzo, 2024), this has not been the case in Brazil.

The other difference relates to sentencing statutory frameworks. In the UK, despite plea bargaining not being permitted, guilty pleas are the norm, not the exception. As we have seen earlier, this is mostly due to sentence discounts provided for in sentencing guidelines. In the Brazilian jurisdiction, although guilty pleas may also work as a mitigating factor, they are extremely uncommon—which is also identified by my empirical research. Looking in more detail to the Brazilian sentencing statutory framework help us understand not only why guilty pleas are rare, but first and foremost it allows us to measure the amount of discretion (and

therefore power) Brazilian judges hold. Apart from security measures imposed onto non-imputable people with mental disorders, the Brazilian criminal justice does not comprise indeterminate sentencing. The national penal law does provide statutory guidance, which is however 'relatively sparse, leaving much to judicial discretion to resolve' (Roberts, 2017: 395). Brazilian sentencing is a three-step process. The Brazilian penal legislation establishes offence-specific minimum and maximum imprisonment terms. For example, for robbery, the code establishes a prison sentence between four and ten years. The first sentencing step is established by the Penal Code article 59. As per this article, the judge considers eight different factors to define a preliminary imprisonment term within the offence-specific minimum and maximum margins, which should be 'necessary and sufficient to disapprove and prevent crime'. In this first sentencing step, the judge considers the following factors: defendant's culpability, antecedents, and personality; crime motivations, circumstances, and consequences; and the victim's behaviour. As Campos (2017) observes, article 59 does establish the factors to be considered, but does not provide legal definitions for those factors, nor does it inform how or when these circumstances should be considered favourable or unfavourable to the defendant. The lack of conceptual clarity gives judges significant discretion to define each of those factors as they wish. This initial, preliminary imprisonment term established at this first sentencing step is called *pena-base*.

In the second sentencing step, the judge considers the aggravating (Penal Code articles 61 and 62) and mitigating (articles 65 and 66) circumstances. Article 61 establishes that the

following circumstances ‘always aggravate the sentence length, when they do not constitute or qualify¹ the crime’: when the defendant is recidivist, or if they committed the crime:

- a) for a futile or baseless reason;
- b) to facilitate or ensure the execution, concealment, impunity or advantage of another crime;
- c) through betrayal, by ambush, or dissimulation, or other resource that made the victim’s defence difficult or impossible;
- d) using poison, fire, explosives, torture or other insidious or cruel means, or which could result in common danger;
- e) against ascendant, descendant, sibling or spouse;
- f) with abuse of authority or taking advantage of domestic relationships, cohabitation or hospitality, or with violence against women in accordance with specific law;
- g) with abuse of power or violation of duty inherent to a position, office, ministry or profession;
- h) against children, people aged 60 and beyond, sick people or pregnant women;
- i) when the victim was under the immediate protection of the authority;
- j) in the event of fire, shipwreck, flood or any public calamity, or of private misfortune of the victim;
- l) in a state of previous, intentional drunkenness.

Art. 62 establishes aggravating circumstances for crimes specifically committed by two or more people. The list of aggravating situations is therefore nominal and exhaustive.

In relation to mitigating situations, besides determining concrete situations, the penal code establishes a generic mitigating situation. As per article 65, the specific circumstances ‘that always mitigate the sentence’ are: if the defendant was aged 21 or below on the date of the criminal incident, or aged 70 or beyond when the sentence is handed down; if the defendant does not know the law; or if the defendant has

- a) committed the crime for reasons of relevant social or moral value;
- b) by their own will and efficiently sought to avoid or lessen the consequences immediately after the crime, or have repaired the damage before the trial;

¹ ‘Qualify’ means giving the crime a different category. For instance, still within the robbery example, if violence employed results in serious bodily injury, the minimum and maximum sentence margins change to seven and eighteen years, rather than four and ten. In this case, the consequence of the crime does not merely ‘aggravate’ the sentence length, but ‘qualifies’—recategorizes—the crime.

- c) committed the crime under coercion that they could resist, or in compliance with an order from a higher authority, or under the influence of violent emotion, provoked by an unjust act on the part of the victim;
- d) spontaneously pleaded guilty before the authority;
- e) committed the crime under the influence of a tumultuous crowd, if they did not provoke the tumult.

In addition to these specific circumstances, article 66 establishes that the penalty may also be reduced due to other relevant circumstances not expressly mentioned in the penal code. In so doing, the code grants the judge a significant amount of discretion to mitigate the sentence if there is any relevant factor unforeseen by the law. Just as with the first sentencing step circumstances (article 59), the code does not specify the weight of these aggravating and mitigating factors. Therefore, how much these circumstances aggravate or mitigate the sentence is entirely at the judge's discretion. Differently from the first stage, the law does not expressly forbid the sentence length to go below or beyond the offence-specific minimum and maximum range once aggravating and mitigating factors are considered. By considering aggravating and mitigating factors, the judge comes to an intermediate imprisonment term.

The third step is when the judge analyses if there are any *causas de redução de pena* (circumstances for sentence reduction) or *causas de aumento de pena* (circumstances for sentence increase).² There are two sorts of circumstances for sentence reduction or increase: the generic ones, which apply to any and all crimes, and the specific ones, which are particular to a specific crime. One example of a generic circumstance for sentence reduction is the crime in its attempted form. Penal Code article 14 establishes that the sentence imposed to any attempted crime must be reduced by a margin between one and two thirds. So, in a hypothetical scenario, if a judge comes to an intermediate imprisonment term of six years for

² Though 'mitigation' and 'aggravation' could be grammatically more adequate than 'circumstances for sentence reduction' and 'circumstances for sentence increase', I preserve the literal translation from Portuguese to avoid confusion with those factors at the second sentencing step.

an attempted robbery, they must in the third sentencing step choose a fraction between one- and two-thirds to reduce the sentence. If applying the maximum reduction fraction (two-thirds), the six-year intermediate imprisonment term becomes a two-year final imprisonment term; if applying the minimum reduction fraction (one-third), the final imprisonment term becomes of four years.

Besides generic circumstances of sentence reduction and increase, there are also those specific to each offence. Let us keep robbery as the example, as this is the offence plays a larger role in my empiric research. Penal Code's article 157, which defines the crime of robbery, does not include any specific circumstance for sentence reduction. It does, however, establish several circumstances for sentence increase. As per the second paragraph of article 157, the intermediate imprisonment term is increased from one-third to one-half

- ii) if the crime is committed by two or more people;
- iii) if the victim is on a value transportation service and the defendant is aware of this circumstance;
- iv) if the stolen good is a motor vehicle that will be transported to another state or abroad;
- v) if the defendant keeps the victim under their control, restricting the victim's freedom;
- vi) if the stolen good is any explosive substance or any accessory that, in combination with other substances or alone, enables the manufacture, assembly or use of an explosive substance [this is a new circumstance of sentence increase added by Law n. 13,654 of 2018];
- vii) if the violence or serious threat is carried out using a melee weapon [this is a new circumstance of sentence increase added by Law n. 13,964 of 2019].³

Regardless of being generic or specific, circumstances of sentence reduction or increase have their margins of reduction or increase expressly given by the criminal code. These margins are given in fractions, as the examples showed above. Despite minimum and maximum margins

³ Until 2018, the violence or serious threat carried out with the use of a gun was another cause of sentence increase between a third and a half. However, Law n. 13,654 of 2018 established a larger fraction of increase of two thirds for this circumstance.

being imposed by legislation, the judge still holds discretion to impose the fraction they find most adequate within the given range. This makes circumstances of sentence increase and reduction different from aggravating and mitigating factors, whose actual influence on a sentence length is not determined by legislation but left entirely at the judge's discretion. Once the fractions of increase and/or reduction are considered in relation to the intermediate imprisonment term, the third sentencing step is concluded and a final imprisonment term—or sentence length—is reached. This brief explanation of the three-step sentencing procedure in the Brazilian jurisdiction makes it clear that despite possessing statutory guidance and not comprising indeterminate sentences, Brazilian sentencing grants judges with a huge amount of discretion.

Overall, particular legal, normative, procedural, and institutional features of the Brazilian criminal justice result in a much larger power to incarcerate—and therefore influence on incarceration trends—held by judges. This, in turn, makes the analysis on sentencing more relevant for studies on mass incarceration in Brazil. This is what I do next.

General dynamics and extrajudicial influences over judicial decision-making

Discussions on factors influencing judicial decision-making are not new. Legal formalists hold a view of judges as neutral, apolitical and purely technical agents, detached from preconceptions, world views, meta-rules, and life experience. Borrowing Zaffaroni's (1995) words, this, however, is an absurd fiction, an inconceivable image, an anthropological impossibility. Neutrality and complete detachment from reality are simply unachievable for human beings, who are inevitably social beings—and, as judges, who 'are part of the machinery of authority within the State and as such cannot avoid the making of political

decisions' (Griffith, 1977: 195). Insofar as an unachievable neutrality does not prevent the judiciary from being independent, both Zaffaroni and Griffith argue that what is crucial is to understand the basis on which legal decisions are made. Much has been said about it in legal and criminological literatures.

By looking at judicial decision-making from different angles, scholars have claimed the influence of diverse extrajudicial elements. Race, for example, is a widely explored factor. Both in Brazil and abroad, the different ethnicity between those who judge and those who are judged is believed to play a central role in differential treatment of defendants. Racism is then pointed as an element resulting in tougher sentencing and the overrepresentation of ethnic minorities in the prison system (Hood, 1992; Alexander, 2017; King, 2017; Sellin, 1928; 1935; Hagan, 1974; Forman Jr., 2017; Mauer, 2006; Adorno, 1996; Alves, 2017; Moreira, 2019). Class differences have also been widely pointed as a major influence on judicial decision-making (Griffith, 1995; Matthews, 2014; Leonídio, 2019; Quinney, 1977: 138; Gabel, 1982; Tonry, 1997; Jankovic, 1978; Hagan, 1974; Jesus et al., 2011). This is why Matthews (2017: 584) emphasises that

prisons in America and other countries may house a disproportionate number of people drawn from ethnic minorities, but there are as many black or Hispanic middle-class professionals in prison as white middle-class professionals. That is, virtually none.

Gender is another factor commonly highlighted as influencing how judges rule differently beyond legal reasons (Rodriguez et al, 2006; Daly and Bordt, 2006; Hedderman and Gelsthorpe, 1997; Daly and Tonry, 1997). There is, therefore, a well-established field of research discussing how differences between the profile of judges and those judged affect sentencing outcomes.

Discussions on extrajudicial elements influencing judicial decision-making also include analysis of smaller dynamics unrelated to the profile of judges and defendants. Danzinger and colleagues (2011) claim that ruling several cases in a repetitive sequence increases the likelihood of rulings in favour of the status quo. They observe that 'the likelihood of favourable ruling is greater at the very beginning of the work day or after a food break than later in the sequence of cases' (Danzinger et al, 2011: 6890). Despite legally irrelevant, this research suggests that the period a case is judged may lead to different outcomes. There has not been a work with similar approach on the Brazilian jurisdiction.

Besides extrajudicial factors resulting in different sentencing outcomes, scholars have also paid attention to the culture of judiciaries and how this affects institutional patterns of decision-making. Several scholars have claimed that judicial decisions and practices are shaped by the culture of a people. As mentioned earlier, an institutional pattern of milder sentencing and punishment in different Western and Nordic European countries is usually explained by a greater social culture of solidarity and tolerance (Lappi-Seppala, 2001; 2008; 2011; Pratt, 2007; Whitman, 2003; Downes, 1988). Other studies have looked at how changing cultural sensibilities affected the popular legitimacy of the state use of force, as the case of post-Nazism Germany (Savelsberg, 2011) and post-Fascism Italy (Melossi, 2001; Pavarini, 1994). There are also studies highlighting a political will to reconstruct a national identity, as the case of Finland in relation to Soviet Union and Scandinavia (Christie, 1999; Lappi-Seppala, 2007; 2016). In the Brazilian case, authoritarian experiences such as colonialism and dictatorships and violent social relationships dating back to slavery are often pointed out as defining features of the national sociability, significantly affecting the judiciary, particularly by shaping its authoritarian tradition and culture (Mascaro, 2018: 37; Casara, 2017a; 2017b; Neder, 1995; Batista, 1990; Pastana, 2009; Gloeckner, 2018; Pereira and Ungar,

2004). Shortly, because members of an authoritarian society and located in an authoritarian institution, judges are believed to reproduce authoritarian practices.

Although in a more descriptive way, a number of other studies have grasped common patterns of sentencing by Brazilian courts. For example, Rodriguez (2013) claims that judicial decision reasoning is less argumentative and more personalistic, opinion-based in Brazil. He highlights the ‘invocation of authority’: judges make wide use of citations—of doctrine, previous decisions, and even foreign legislation—as sources of authority. These citations are not used to corroborate judicial reasoning, nor to set the grounds to be further explored and discussed. Citations are the arguments themselves, employed in a de-contextualised manner and without any further analysis following from them. By ‘opinionated’, Rodriguez illustrates the system of collegial decisions in practice, which are formed from the aggregation of ‘opinions’ by the different judges involved in the sentencing process. There is no final, unified reasoning, even when judges agree on the same final sentencing outcome. These traits do not necessarily reflect a people’s culture but are more the reproduction of a legal tradition (see Neder, 2000).

This opinion-based character of Brazilian sentencing is also observed by other authors. For example, Streck (2016; 2019) analyses abusive decisions, which are against the law in the books, but that represent consistent patterns of the ordinary judicial decision-making. In several cases, judges even acknowledge the law, but argue they disagree with it, and therefore amend the law themselves in their role of sentencers. On certain occasions, rather than being against the letter of the law, these punitive amendments are made by first-instance judges and appellate judges against legal precedents set by higher courts—which is more often the case of the São Paulo Court of Justice (hereinafter TJSP) (Bottino, 2016). These confrontations

with legislation and against legal precedents set by higher courts seems to have a single direction: usually towards more punishment.

Overall, we can here identify two main directions of sentencing studies. One is aimed at explaining different sentencing outcomes, including sentencing disparities and over- or under-representation of certain groups in prison population. The other direction of sentencing studies is to explain not differences, but institutional standards and patterns. The former is particular the case of those studies on extrajudicial factors related to the profile of judges and defendants. The latter regards mainly those studies on institutional and social culture and legal traditions. Both of them are certainly valuable and may well help us understand how judges arrive at a sentencing outcome. Ultimately, however, they cannot explain mass incarceration, unless given in conjunction with other explanations. For example, if judges have historically been white and drawn from upper middle-class backgrounds, why or how would race and class explain not only sentencing disparities but mass incarceration? In terms of institutional cultures, if these analyses are aimed at explaining continuities and institutional standards, how would they explain the rise of mass incarceration, which represents a new dynamic or pattern? Why has not an authoritarian tradition always promoted high incarceration rates? How is this authoritarian culture reproduced institutionally? As these questions are left unanswered, I now look at a more specific literature aimed at linking sentencing and mass incarceration in Brazil.

Sentencing and mass incarceration in Brazil

In the previous chapter, I highlighted the works by Carvalho (2010) and Semer (2019) among the most relevant contributions to understanding mass incarceration in Brazil. These authors

do not merely analyse how judges decide but also attempt to provide an explanation for judicial decision-making. Having identified a punitive sentencing standard, they justify judicial punitiveness as influenced by moral panics and guided by penal populism. These, and other Brazilian works (e.g., Gomes and Almeida, 2013; Andrade, 2020), reproduce an idea that judges have yielded to mass media and a supposed popular opinion demanding harsher sentences. There are two illustrations more commonly given to corroborate this hypothesis. One is excerpts of legal reasonings commonly given to justify harsher sentences, such as ‘society is tired of crime’ and ‘good citizens live with fear’. Another is the famous Car Wash Operation, a supposedly ‘anti-corruption’ probe literally conducted by then-judge Sérgio Moro. Put shortly, despite all illegalities committed by then-judge Moro (Greenwald et al., 2019; Greenwald and Pougy, 2019; Fishman et al., 2019), his mediatic exposition as a fearless, tough-on-crime judge granted him some popularity. His example is then used to corroborate the understanding that judges have passed tougher sentences to meet public expectations and obtain not only legitimacy but also popularity.

As we can see, this explanation is aligned with the most influential discourses coming from the North (e.g., Green, 2005). For media and popular opinion to significantly influence judicial decision-making in these terms, a few premises must occur. First, what judges formally state in their reasoning is indeed their real reasoning. Second, not only do judges care about what ordinary people think, but they seek popular legitimation. Third, and as a consequence, judges genuinely do what people want. Fourth, the source of judicial punitiveness would therefore be public opinion, and not their own thinking and worldview. In the previous chapter, I highlighted some flaws of penal populism as a causal category to explain mass incarceration. Elsewhere, I have shown in detail how many of these premises are not concretely observed in the Brazilian reality (Dal Santo, 2020x). To start establishing some

foundations for some key claims of this thesis, I now touch upon issues related to the institutional design of the Brazilian criminal justice.

As per the punishment and society scholarship concerned with mass incarceration, despite the political realm being the major space through which penal populism flourishes and promotes tougher punishment, the judicial domain may also be affected. This, however, usually depends on certain aspects, such as the level of professionalisation and bureaucratisation of the criminal justice, or distribution of decision-making power among different professionals (Savelsberg, 1999; Lappi-Seppala, 2006; Pratt, 2007; Lacey, 2008; 2012; Cavadino and Dignan, 2011). The penal populism hypothesis assumes that a permanent civil service is less likely to constitute a more emotionally guided punitive system. In the permanent civil service model, judges and prosecutors are career professionals, recruited from competitive and technical public examinations, highly specialised and independent technocrats with professional stability. These judges are considered insulated from political influences and public expectations. In criminal justice systems less professionalised and bureaucratised such as the US model, where judges and prosecutors are elected, these actors are believed to be too exposed to popular opinion and demands. There is more room for a relationship of democratic scrutiny and popular evaluation of the performance of those judges and prosecutors, which makes them more prone to yield to populist decisions more easily.

In Brazil, judges are not elected, nor are they appointed by the Executive power—apart from very exceptional cases. Brazilian judges are within the bureaucratic category who are recruited through civil service entrance examinations. After a two-year probationary period, they obtain constitutional safeguards such as life tenure, irremovability (or non-transferability), and irreducible remuneration. At least in principle, they are independent,

insulated professionals who do not depend on popular or political scrutiny. Furthermore, despite judges as a category concentrating a huge amount of power regarding incarceration trends, the institutional, normative, and procedural features of the Brazilian criminal justice result in judicial power being distributed in different ways. For example, defendants have the constitutional right not to have their punishment enforced until their sentence has *res judicata*, meaning that in principle, their punishment is not enforceable right after trial. In addition to the Court of Appeal, a case can be appealed to the Superior Court of Justice (STJ) and then to the Supreme Federal Court (STF). Apart from first-instance sentence, all decisions are collegial, being made by a group of judges. Furthermore, Courts of Appeal have a more interventionist culture in Brazil. Different from other traditions (Freiberg, 2001; Tata, 2009) sentences do not need to be considered manifestly inadequate, disproportional, or excessive to be amended. Judicial responsibilities and decision-making power are therefore distributed, and not concentrated in the hands of sole judges. All these factors challenge reliance on the penal populism hypothesis to explain judicial punitiveness and mass incarceration in Brazil, demanding a more complex and detailed explanation—even if it is to explain why and how all these constitutional safeguards and procedural and institutional features of the Brazilian criminal justice are ineffective in practice.

Besides these works that attempt to explain judicial punitiveness, there is a more descriptive literature aimed at revealing how punitive judicial decision-making is, notably in legal situations that boost mass incarceration. There are two legal situations that stand out in these studies: drug trafficking and pre-trial detention. This methodological preference makes sense in the Brazilian context, as these two legal situations significantly affect the size of the prison population and rest on vague legal concepts subject to judicial discretion. The percentage of prisoners convicted for drug trafficking has varied from around 25% to around

35% in the last decades (Ministry of Justice, 2009; 2016; 2019). Pre-trial detention, in turn, have long and widely been used as anticipated punishment, not only in Brazil but in the wider Latin America (Carranza et al., 1983; Zaffaroni, 1989). Today, only half of the Brazilian prison population comprises prisoners who have against them a definitive prison sentence.⁴ I now briefly summarise some established findings and claims on these legal situations and how they relate to mass incarceration.

Drug trafficking is the crime that has received the most attention from researchers analysing the influence of judicial decision-making on mass incarceration in Brazil (e.g. Semer, 2019; Machado et al, 2018; Campos, 2015; Valois, 2017; Jesus, 2018; Jesus et al., 2011). Research has shown important dynamics, from the weakness of the body of evidence considered by judges enough for convictions, up to a systematic more punitive decision-making than allowed by law. Most drug trafficking cases starts with police patrol activity leading to arrests in flagrante delicto—which are almost always converted into pre-trial detention (Semer, 2019: 280-281; Trombini, 2018; Barreto, 2017). This has several implications. For example, hardly ever there are actual investigations. Consequently, who goes to prison is not the drug lord, but the small drug dealer who sells drugs at the retail stage. Despite the widely known history of police misconduct—from police killings and torture to made-up or forged flagrant arrests and home search without warrant (Zaccone, 2015; Barcellos, 1992/1997; Huggins et al., 2002; Pinheiro, 1991; Misse et al., 2011; Verani, 1996; Willis, 2015; Dal Santo, 2020c; 2022; Soares, 2019)—a conviction is usually supported by a single piece of evidence: police statements by the police officers who make the arrest. In parallel, accusations of police misconduct by defendants are systematically disregarded by

⁴ In May 2024, 28.6% of all inmates had not been sentenced at all, while 21.4% were detained while awaiting appeal. Available at: <https://portalbnmp.cnj.jus.br/#/estatisticas>

judges, even when body examination reports show injuries suffered by defendants (Semer, 2019: 308). In some way, judges have not merely overlooked police vigilantism and arbitrariness, but actually ratified them.

Besides showing how judges carelessly embrace police questionable statements, these studies provide other findings that definitively bury the idea of leniency from judges. Most charges are of cases of small quantities of drug seized without any other irrefutably or possibly incriminating elements, such as significant amounts of money (Semer, 2019: 157-173). This, in turn, allows margins of doubt on whether it is a matter of drug user or trafficker. Class relations come at play here, as individuals of lower classes are less likely to be considered drug users than middle-class individuals, even when caught with similarly small quantities of drugs (Jesus et al, 2011). Furthermore, Brazilian Drug Law establishes that when defendants are first-time offenders and are not part of an organised crime group, their sentence length can be reduced by from one-sixth to two-thirds—a good example of a *cause of sentence reduction* previously mentioned. In those cases, an imprisonment term may be set at one year and eight months, which allows the prison sentence to be replaced by non-custodial sentences. Depending on the case circumstances, a defendant convicted for drug trafficking is not mandatorily sent to prison. However, judges do not always apply this sentence reduction; when applied, it is rarely at its maximum range (two-thirds); and, finally, even when its maximum range is applied, the most defendants are still sentenced to prison rather than being given non-custodial sentences (Semer, 2019: 254-258; 267-271). The consistently punitive judicial decision-making are also observed in other legal stages. In most cases, people convicted for drug trafficking are sentenced to closed prisons, despite the law authorising semi-open or open prison as their initial prison regime—depending on their sentence length. Conviction rates are quite high too, reaching around 80% across the country (Semer, 2019:

237). Ultimately, for keeping punitive decisions in almost all stages of drug-trafficking proceedings, judges are considered key drivers of mass incarceration, particularly given the relevance of drug trafficking in the size of the Brazilian prison population.

Besides drug trafficking, several researchers have analysed judicial decision-making in pre-trial detention as a key driver of mass incarceration in Brazil. While there are significant theoretical debates on their moral issues (Duff, 2013), scholars have shown how pretrial detention has worked as an anticipated prison sentence, rather than a precautionary measure (Silva, 2016; Samuel, 2018; Barreto, 2007). Research shows how despite legally framed as an exceptional measure, pre-trial detention remains the standard in the Brazilian criminal procedure, even after the legislative introduction of several less restrictive precautionary measures. The frequency of its enforcement varies according to different sorts of crime, being more often imposed in cases of crimes such as robbery and drug trafficking (Azevedo and Sinhoretto, 2018; Azevedo et al., 2022). Scholars have highlighted the weakness of judicial reasoning when establishing pretrial detentions. The legislation defines three situations where a pretrial detention may be imposed: when the defendant poses risks to the investigation, when there are indications the defendant might flee justice, or when the defendant poses risks to the public order. Pre-trial detention is predominantly justified by the preservation of public order (Silva, 2016; Azevedo and Sinhoretto, 2018; Trombini, 2018)—the only legal situation based on an abstract concept (risk to ‘public order’), granting judges with huge amount of discretion. Many have looked at how judges fill in this discretionary gap and understood ‘public order’ in practice, noticing several constant illegalities (Choukr, 1993; Zackseski and Gomes, 2016; Streck, 2019; Silva, 2016; Vasconcellos, 2010; Trombini, 2018). Within the idea of ‘preserving public order’, judges commonly justify pretrial detention as a way to protect the criminal justice legitimacy, as a response to ordinary citizens being

concerned with rising criminality, because the offence committed is a serious crime, or because the defendant is recidivist. Finally, there have also been attempts to understand extra-legal dynamics influencing judicial decision-making to impose a pre-trial detention, with particular relevance given to class (Jesus et al, 2011), race (Adorno, 1996; Khan, 2024), media pressure and public opinion (Rigon and Silveira, 2015; Xavier, 2015), and even institutional integration and acceptance by judges' peers (Trombini, 2018; Valença, 2012). Just as with drug trafficking, judges are pointed as responsible for mass incarceration owing to their punitive decision upon pretrial detention.

Another relevant—and specific—aspect of research on judicial decision-making and mass incarceration in Brazil concerns the role of correctional judges. Scholars have argued that the judicialization of prison oversight has produced counterproductive outcomes (Teixeira and Bordini, 2004; Cabral, 2018; NPEPEP, 2024; Shimizu, 2019; Cacicedo, 2018). The most common observation is that the request for criminological evaluations has been purposefully used against prisoners, either to prevent the granting of certain prison rights when inmates have met their objective requirements, or simply to delay the granting of those rights until the evaluations are conducted. Studies have also shown that most prison rights requests are denied by correction judges (Teixeira and Bordini, 2004). This alone does not tell us much about judges punitiveness, since they may have concrete elements to deny those requests. However, in many cases, even when all formal and objective requirements are met, and the criminological evaluation report is favourable, requests are still denied (Teixeira and Bordini, 2004). When prison rights requests are granted by correction judges, this usually happens significantly after the time range established by law, so that prison rights—including prison type progression and conditional release—are granted with significant delays, keeping inmates incarcerated for longer than they should. Cabral (2018) observes that despite

requesting criminological evaluations, judges hardly ever consider or discuss them on their judicial decisions over those requests. This corroborates the understanding that these requests are made purely against inmates, having at least guaranteed delaying effects. Overall, studies on judicial decision-making at the correction department have not only shown how judges concretely contribute to mass incarceration, but also proven false a platitude that the Brazilian correction system is too benevolent, as if prisoners had too many rights that would grant them a rapidly and early release (Teixeira and Bordini, 2004; Cacicedo, 2018; Shimizu, 2019).

By the time I started my DPhil, while 29% of the total prison population were imprisoned for drug trafficking, 32% were imprisoned for robbery (Ministry of Justice, 2019). Yet little to no attention has been paid to sentences of robbery within the scholarship that intersects mass incarceration and sentencing. Existing research on sentencing robbery in the Brazilian jurisdiction is divided in two main approaches. One is concerned with revealing the classist nature of the criminal justice and identifying 'criminal selectivity' (Vegh Weis, 2017) in practice. For this purpose, scholars have compared sentencing in different sort of offences related to misappropriation and stealing (Ferreira, 2010; Goranov et al., 2018). These studies highlight a significant difference in sentencing patterns and outcomes, with judges being much more moderate and legalist with white collar crimes than with defendants charged with offences considered of lower classes. There is another sort of studies which are primarily concerned with identifying general trends and patterns in sentencing robbery charges (Ferreira, 2014; IBCCrim and IDDD, 2005). While Ferreira (2014) highlights certain automatism in sentencing despite the differences and similarities between concrete cases, the research conducted by IBCCrim and IDDD (2005) emphasises features similar to those observed in drug trafficking sentences, such as a punitive standard often justified by generic cliches rather than

the law. Probably due to the premise that robbery is a violent crime, this offence seems to be a less contested and disputable legal situation, resulting in significantly less attention from researchers intersecting mass incarceration and robbery sentencing.

Conclusion

For different reasons, most of the most influential international literature on mass incarceration has not focused on judges and sentencing. In this chapter, I have explained why this has been the case. I have also shown that, differently from the realities of the USA and the UK, judges have not only retained discretion and the ultimate power to incarcerate but have had these powers increased. For this reason, I have engaged with some relevant literature on sentencing, particularly those focused on extrajudicial influences and their impact in sentencing disparities, and those focused on identifying particular cultures of judiciaries and how they shape institutional patterns of decision-making. In Brazil, much has been said on how class and race influence judicial decision-making, and on how the Brazilian judiciary is shaped by an authoritarian tradition. However, not so much has been said on how sentencing disparities result in mass incarceration, or on how an authoritarian culture is reproduced institutionally. When looking at a literature more focused on intersecting sentencing and mass incarceration, I have identified two main approaches. One is more descriptive and centred on identifying how judicial punitiveness is materialised in cases of drug trafficking and pretrial detention, overlooking robbery—the offence with the larger representation in the prison population by the time I started working on this thesis. Another approach is more analytical and usually points to media and the public opinion as the main drivers of judicial punitiveness. Despite aligned with the influential, international literature,

this latter approach fails to consider how legal, procedural, and institutional particularities of the Brazilian criminal justice challenge this penal populism hypothesis. Ultimately, the Brazilian reality demands a more complex and detailed analysis to make sense of judicial punitiveness and mass incarceration.

Chapter Three

Methods

Scientific research is ultimately aimed at advancing our understanding of the world. Scientific claims and statements are based on the analysis of researchers over their findings. But how do we get to our findings? Here lies the importance of methods for scientific research. Methods are the procedure and techniques employed to address the set of research questions posed. Our methods establish the possibilities and limitations for us to acquire knowledge on our research object. In so doing, they define what we can and cannot know, and grant—or do not grant—legitimacy to our findings and claims. Establishing adequate and coherent methods are crucial for scientific research to achieve its aimed goals.

How was it possible for mass incarceration to be produced in a transition from dictatorship to democracy, and then reproduced in a context of significant economic growth and social inclusion in Brazil? To deal with this puzzle, I organised my research questions in two groups. The first set of questions is based on a wider interrogation: why were incarceration rates so low in Brazil until 1990? Building upon this major question, and informed by the political economy of punishment, other questions have helped guide my research: how did Brazilian social relations and political economy affect punishment trends in Brazil until 1990? How have colonialism and slavery, and their long-term effects, shaped and influenced Brazilian penal practices? How have military dictatorship and the subsequent transition to democracy impacted crime control? By answering all these questions, another

major issue is addressed: how can historical events absent in Northern literature, but central in the development of peripheral states and societies, reorient the debate on punishment in global peripheries?

Structuring my second set of questions, I ask how mass incarceration has been reproduced in times of economic growth and inclusion. Given the context detailed in the introduction and in the previous two chapters, and informed by the agonistic perspective, I focus on addressing the role of judges in this process. How did judges decide on criminal matters throughout the 2010s? How do they behave when holding considerable discretion? How are these spaces of discretion filled by them? What dynamics most influence decision-making processes in those situations? By addressing these two sets of questions, this study also tells us about the purchasing of ‘Northern’ theories on mass incarceration in peripheral settings.

To answer all these questions, I employed different, complementary methods. In this chapter, I explain my methodology and methods, discussing their potentialities and limitations, and some main methodological issues I faced during my research. Before discussing these issues, I establish some key premises and philosophical foundations of critical realism, the philosophical approach to understanding science that guides this thesis— influencing, for example, the design of this research. After that, I discuss each method employed in this research, comprising archival research, court-file analysis, in-depth qualitative interviews, and online participant and non-participant observation.

Premises and research design

The first premise for us to consider is that critical realist research is oriented by an explanatory framework. From a critical realist approach, what causes something to happen, and on what circumstances, are the ultimate objects of scientific understanding—which differs it from post-modern research philosophies, such as interpretivism and constructivism. For critical realism, a causal analysis is based on the identification of causal mechanisms, structures, and powers, and understanding how they come together to produce something. Unlike positivism, however, critical realism does not believe causation can be understood by the mere repetition or regular succession of events (Sayer, 2000: 15), given the stratification of reality, briefly discussed in Chapter One. An explanatory framework must therefore:

acknowledge and incorporate (a) pre-existent structures as generative mechanisms, (b) their interplay with other objects possessing causal powers and liabilities proper to them in what is a stratified social world, and (c) non-predictable but nonetheless explicable outcomes arising from interactions between the above, which take place in the open system that is society (Archer, 2013: 377).

The second critical realist premise affecting my research design is that society is considered an open system. Closed systems are those in ‘which constant conjunctions occurs’, whereas in open systems ‘no constant conjunction or regular sequence of events is forthcoming’ (Bhaskar, 1975/2008: 23). In open systems, several mechanisms and forces are simultaneously at play. Some may reinforce each other, whereas others may neutralise each other. While certain powers may be exercised in an unrealised manner, others may be even unfulfilled or untriggered. In Chapter One, I used labour power, labour, and the observed labour as illustrations distinguishing the domains of the real, the actual, and the empirical. Let us now think of an unemployed person. The fact that someone is unemployed does not mean that they do not have the power to work. There may be other elements at play—‘offsetting factors’ or ‘countervailing causes’ (Bhaskar, 1975/2008: 88)—preventing that labour power to be

exercised in a specific context. And besides the multiplicity of mechanisms and powers concurrently at play, one cannot ignore human agency. Human beings have the power to act in a purposeful manner. Individuals may act differently under the same external circumstances. Likewise, individuals may be exposed and subjected to different external circumstances, even if, for example, simultaneously occupying the same position in the same institution. Ultimately, humans are capable of communication, creativity, and resistance (Marx, 1852/1972: 10). The openness of social reality therefore emphasises contingency and intentionality.

The openness of social reality also highlights the importance of historicity. A critical realist research agenda cannot withhold investigating the socio-historical relations of a given society. As Manicas (2013: 325) argues:

particular contingent events, as well as the irreducible embeddedness of mechanisms in a historically sedimented social reality which has not lost its historicity or particularity, will make for differences of all sorts [in different societies].

One can think, for example, of slavery and slavery abolition, and see how they have shaped societies such as Brazil and EUA differently—for instance, in terms of racial miscegenation (Oliveira 1996; Nascimento, 1979/2016; Andrews, 1985) or agrarian reform (Bowen, 2021). Colonialism too has shaped Latin America, Africa, and Asia differently—and even within Latin America, its features, effects, struggles and conditions for independence were different (Ribeiro, 1970/2021; Cueva, 1983; Frank, 1967; Bagú, 1949). Contemporaneous military dictatorships in Latin America also had significantly distinct practices, just as their respective overcoming took place under different conditions and producing different consequences (Pereira, 2008; Brito, 2001). Because operating and taking place in open systems that are societies, the same powers, mechanisms, and historical events can produce different

outcomes. A critical realist research must therefore pay particular attention to historicity and situatedness of its research object. While history alone does not explain the present, understanding the historical development of a certain phenomenon is a necessary condition for making sense of its present (Marx, 1939/1980).

Because of all these features of society (an open system), for an explanatory framework to be possible, the causal analysis must provide a resolution of the phenomenon into its different components, portraying the outcome of a multiplicity of causes, and identifying necessary and contingent social relations that have determined a concrete outcome. These are some of the major premises that guided me defining my research questions and designing my research. Based on these premises, my research plan consists of a combination of multiple stages, mainly qualitative but also including quantitative methods. To address the first set of questions (why were incarceration rates so low in Brazil until 1990?), I rely on a thorough and systematic socio-historic study of the Brazilian reality, mostly through the analysis of secondary data, but also coming from primary data obtained through archival research. To answer the second set of questions (on the role of judges in reproducing mass incarceration), I mostly rely on the analysis of primary data, that would be obtained through court-file analysis, court observation, and in-depth interviews. However, having started my DPhil in October 2019, my research was significantly affected by the COVID-19 pandemic. Some of my initially planned methods became unfeasible and others were significantly constrained. Some new possibilities emerged. In the following sections, I discuss each of the methods I employed in my research, also highlighting how they were affected by the pandemic.

Socio-historical analysis: archival research and secondary data

My socio-historical analysis of the Brazilian state and society is based on the use of both primary and secondary sources. My primary data comes from archival research, particularly official state documents, such as yearbooks and reports. I also draw on national surveys conducted with thousands of judges over the past three decades by the National Council of Justice (CNJ, 2014) and the Brazilian Association of Judges (Sadek, 2006a; 2006b; 2015; Vianna et al, 1997; 2018). I further engage with the rich contribution of other scholars who have researched aspects related to political economy, social control, and punitive practices in different regions and periods in Brazilian history. Regarding my archival research, I have mostly drawn on statistical yearbooks organised by the Brazilian Institute of Geography and Statistics (IBGE) and on annual reports organised by the Brazilian Ministry of Justice (MJ). Historical research has some intrinsic methodological issues (e.g., Bosworth, 2001), but it can be even harder in contexts beyond the Global North, where state institutionalisation and modernisation are relatively recent trends (see Fonseca, 2018). If 'Paris is full of archives and libraries for any researcher interested in crime and punishment of the past' (Bosworth, 2001: 434), this is definitely not the case in Brazil.

The Brazilian state developed a national system of prison statistics (Infopen) only in the 2000s, with the first compiled report published by the Ministry of Justice in 2004.¹ Before 2004, some statistics of the Brazilian criminal justice system used to be published in national

¹ All these annual reports are available at official websites of the Brazilian Ministry of Justice. They used to be available at the National Prison Department website, which is no longer available: <http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen/relatorios-analiticos/br/>. Reports are now accessed here: <https://dados.mj.gov.br/organization/depen> and here: <https://dspace.mj.gov.br/handle/1/14>

statistical yearbooks published by IBGE.² The first National Statistical Yearbook dates back to 1916. The following yearbook was published only twenty years later. Since 1936, they have been published annually. All these yearbooks provide information of many broadly different domains, such as geographical, economic, and social. Concerning the criminal justice, these yearbooks provide only and at best information on convicted prisoners—meaning that pretrial detainees are excluded. From the late 1970s, there is not even information on any category of prisoners, but only on annual arrests. Besides discontinuous information on convicted prisoners and arrests, these statistical yearbooks include information on public security personnel. IBGE yearbooks are not, therefore, specialised in prison and criminal justice, and have not consistently released the same sort of information.

The specialisation of Infopen reports does not mean issues of inconsistency have been solved. Just as IBGE yearbooks, not every Infopen report published by the Ministry of Justice has systematically contained the same pattern of information. Since the publication of its first report, mechanisms of data collection and analytical processes of Infopen have been ‘continually improved’ (MJ, 2017). The Ministry of Justice claims that 2014 is the year that represents a turning point in relation to the process of improving Infopen methodology, including a more significant reformulation in data collection instruments, the incorporation of better mechanisms to analyse the quality of information collected, and the inclusion of detailed analytical reports. Consistency of official data on crime and punishment is therefore a matter of the 21st century in Brazil.

² These national statistical yearbooks are also made available online in an IBGE digital library. Available at: <https://biblioteca.ibge.gov.br/biblioteca-catalogo?id=720&view=detalhes>

Besides consistency, the information provided by the Ministry of Justice on improving methodology highlights another issue to be flagged: data reliability. Indeed, this is a problematic aspect of doing historical research based on official archives in Brazil. In addition to the potential manipulation of yearbook data during authoritarian periods, the accuracy of the information may also have been limited by the material constraints on data collection practices throughout the 20th century in Brazil. In any case, these archives are the only sources of quantitative information on punishment and crime control for that period. Even if not completely accurate in details and specific numbers, they may represent approximate trends across time, which are rich for comparative purposes. If not even that, in the worst-case scenario, they would at least represent what a specific government wanted to portray in a specific time, leaving us to analyse why that was the case. Other sorts of data are therefore needed.

These official yearbooks and annual reports provided me with quantitative data on criminal justice issues. They cannot, however, give us the full picture. Qualitative data analysed in the context of my sociohistorical research came mostly from accounts produced by other scholars. I looked at the wider Brazilian social theory seeking qualitative data and raw materials not only from criminological studies, but from disciplines such as political sciences, sociology, political economy, history, and anthropology, as well as from accounts of journalists (see Carrington et al, 2019b; Dal Santo and Sepúlveda, 2024; Zaffaroni, 2024). As reminded by critical realism, theory plays an important role in understanding social realities (Collier, 1994: 51; Danermark et al., 2005: 23). As Bhaskar (2013: 225) states:

society, as an object of inquiry, is necessarily 'theoretical', in the sense that ... it is necessarily unperceivable. As such it cannot be empirically identified independently of its effects; so that it can only be known, not shown, to exist.

On this regard, the pandemic and the consequent increasing change in activities from in-person to remote allowed me to engage in another form of data collection and selection. I attended two intense, online courses that played a major role in understanding Brazil from a socio-historic perspective through a systematic, organised study. Both courses were offered by IEELA (Institute of Latin American Studies) of the Federal University of Santa Catarina. They were aimed at introducing some central topics, discussing key concepts and categories, and identifying relevant bibliography. The first course was titled *O que ler para entender a América Latina* (What to read to understand Latin America) and covered topics such as: 'Latin America: a continent with theory'; 'the pre-Colombian people'; 'the European colonialism'; 'the dependency'; 'the question of nationalism'; 'the State in Latin America'; 'democracy in Latin America'; 'the military question in Latin America'; and 'the need to Latin Americanise the Brazilian thought'. The second course was titled *O que ler para entender o Brasil* (What to read to understand Brazil) and discussed themes such as: 'Brazil's colonisation'; 'the independence process of Brazil'; 'Empire of Brazil'; 'slavery in Brazil; '(slave) abolitionism'; 'the Coup d'Etat of 1964'; and 'Brazil after the dictatorship'. Altogether, both courses amount to a workload of 240 hours which were extremely helpful for my socio-historical analysis of Brazil, particularly in locating adequate secondary sources of data and analysis.

Overall, my socio-historical analysis of Brazil and its trends of punitive practices and control is based on archival research and the analysis of secondary data. This analysis is mostly presented in Chapters Four and Five.

Court-file analysis: the immediacy of the empiric

I have earlier argued that the ultimate goal of a critical realist research is to explain something. Explanatory social research informed by critical realism usually rests on a comprehensive description of the phenomenon's immediacy to start with. Before moving to the abstract, the research must provide a thorough description of the immediately evident aspects and features of its object. The complexity of a research object may demand a description using both qualitative and quantitative methods. Whereas the former can generate causal explanations—'though not necessarily representative ones'—the latter is able to produce descriptive generalisations—'lacking in explanatory penetration' (Sayer, 2000: 22). In this research, I have engaged in court-file analysis, which represents a necessary step to identify and assess the role judges have played in reproducing mass incarceration.

In the previous chapter, I highlighted the significance of judges in the Brazilian jurisdiction. The sentence handed by a judge is the judge's end product. It is the outcome of their activity in all its immediacy. Sentences (*sentença criminal*, which in Brazil combines both the judgement of a trial and the sentencing process) are here treated as the empirical—not merely in the sense of being findings extracted by my research, as commonly and more loosely used in the wider literature; but empirical in the sense of being the immediately observed ontological strata, as presented by critical realism. Conducting an extensive (quantitative) and intensive (qualitative) court-file analysis can be helpful in different ways. It can tell us, for example, the concrete meaning of abstract concepts, and identify the outcome of large discretionary power on judges' hands. It may show potential variations or inertia across different broader socio-economic-political contexts. It can tell us how judges deal with changes in legislation—both more tolerant and punitive changes. It may help us identify how punitive or lenient judges are, and what their reasonings tend to be. It may give us an approximate dimension of cases that could have not ended up in imprisonment. It can allow

us to identify some common patterns and regularities, as well as inconsistencies and contradictions. In the end, it may provide us with significant descriptive information, including possible effects of hidden causal powers.

In the previous chapter, I also indicated how studies intersecting mass incarceration and sentencing are mostly limited to drug trafficking and pretrial detention. Despite being the only crime responsible for imprisoning more people than drug trafficking, the Brazilian literature has overlooked judicial decision-making in robbery charges. Besides its quantitative relevance, cases of robbery may too be defined by a generic concept and discretionary margins, just as pretrial detention and drug trafficking. A robbery can be differentiated from theft by the occurrence of ‘serious threat’—a legal concept to which several different meanings can be given in practice. While punishment to robbery is imprisonment, thefts can be punished with alternative sentencing. Given the relevance of robbery to the Brazilian mass incarceration, the margin of subjectivity for its definition, and its marginalisation in the literature, I decided to focus my court-file analysis on charges of robbery.

As also mentioned earlier, an imprisonment sentence cannot be legally served before a defendant has pursued all means of appeal in Brazil. This means that a first-instance sentence—my object of analysis—cannot trigger the start of an imprisonment sentence. At this proceeding stage, incarceration can only be legally justified as preventive detention while awaiting pending appeals. Even if a defendant is arrested in *flagrante delicto*, remains on remand until their trial, and is sentenced to imprisonment, the judge must justify the maintenance of a preventive detention in the conviction, not being enough to simply claim the defendant has been found guilty, nor being legal to determine the beginning of the prison

sentence. In this context, court-file analysis allows me to analyse legal reasonings given to justify preventive detention too.

Considering the wide extensions of Brazil and their consequent practical implications for conducting research, I needed to define a spatial scope for my research. Since my original research design, I planned to limit my court-file analysis to decisions handed down by TJSP judges, more specifically those working in Criminal Courts of the Barra Funda Criminal Courthouse (hereinafter 'Barra Funda judges' and 'Barra Funda criminal courts'). This choice is mostly based on issues of significance, practicality, and coherence. São Paulo state is responsible for roughly a third of the total Brazil population: 263,078 out of 855,921 inmates when I started my research.³ Barra Funda Criminal Courthouse has been the largest Criminal Courthouse in Latin America since its inception in 2000. Over 132,000 cases are being currently processed in the 32 Barra Funda criminal courts (TJSP, 2023). Its quantitative relevance would be enough to justify this methodological choice. However, practicality and coherence also played an important role in this decision. My original research design included not only court-file analysis, but also ethnographic research consisting of court observation and interviews with judges at the Barra Funda Criminal Courthouse. Considering the planned connection of these three methodological stages, limiting the analysis of sentences to those handed down by Barra Funda judges would make more sense, being more practical and coherent. And so I decided.

I did not face problems with accessing sentences online. The TJSP website contains a public digital repository of court rulings, where all digital sentences handed down within this

³ Data collected from *Banco de Mandados de Prisão* of *Conselho Nacional de Justiça* in December, 2019. Available at <https://portalbnmp.cnj.jus.br/#/estatisticas>

jurisdiction are stored and made available in PDF format.⁴ This is not a database of sentencing data and statistics, but rather a tool for legal consultation. Despite open to the public, this tool is used more frequently so that parties involved in a given case (or interested third parties) can check any updates on the case proceeding progress or even seek concrete information within the case itself. There are seven fields of search made available in this platform: 'free search', 'case number', 'class', 'topic', 'judge', 'date', and 'court'. Only the 'free search', 'case number', and 'date' allow open answers to be entered; all the other fields are restricted to pre-given selectable answers. The 'class' field entails the different areas of law (e.g., criminal or civil case) and, within it, the different categories of proceeding stages (e.g., precautionary measures, criminal complaint, or appeal); 'topic' refers to the main topic judged in the case (in criminal cases, it refers to the categories of crime, for example robbery or homicide); 'judge' allows a search based on sentences handed down by a specific judge; and 'court' allows the selection of sentences handed down within a specific court.

I used this sentence bank search tool as follows. On 'topic', I selected *roubo* (robbery). On 'court', I selected all the 32 Barra Funda criminal courts. On 'free search', I entered the word *desclassificação*—whose closer English translation is 'downgrading'. The idea was to select cases where the defence requests, among other things, a charge downgrading, mainly but not only considering the aforementioned possible subtle difference between a robbery and a theft. This entering could also comprise cases where the defence requests the downgrading of any sort of 'aggravated' (*majorado*) robbery to an ordinary—meaning non-aggravated—robbery. I provide a more detail explanation of these terminological issues and

⁴ Available at: <https://esaj.tjsp.jus.br/cjpg/>

classifications of robbery in Chapter Six. Finally, I selected three different one-year time frames, which allowed me to look at sentences handed down in six different years.

The selection of different time frames is an important aspect of this research. I started using this search tool on 18 September 2020. The first one-year time frame I selected—the maximum period allowed in the search tool—was between 16 September 2019 and 15 September 2020. After entering these dates, the results shown were of 712 sentences, all ordered from the most recent to the oldest within that period. The results were shown on pages each of which containing 10 sentences. I downloaded all sentences from the first five pages, totalling 50 sentences handed down between 1 and 15 September 2020. The search tool also allows us to show results in an ascending order, from the oldest to the most recent. I then used the same inputs and selected this ‘ascending order’ option, downloading all sentences from the first five pages, totalling 50 more sentences, now from 16 September to 1 October 2019. I then changed the time frame for the period between 16 September 2014 and 15 September 2015. Results showed 1,332 sentences, and I downloaded 100 more sentences, following the same steps—i.e., all sentences from the first and last five pages. To follow the same gap between 2014-2015 and 2019-2020, I attempted to get sentences from 16 September 2009 to 15 September 2010. However, the search did not find any results. Even bringing this time frame forward in a year (September 2010 – September 11), no results were shown either. I then entered 16 September 2011 and 15 September 2012 as the searched period and got 1,248 results—when I realise the first digitalised sentence files with these features date back to 29 September 2011. I downloaded 100 more sentences following the exact same steps as for the previous periods.

This longitudinal approach comprising six different years between 2011 and 2020 allowed me to cover sentencing in different and extremely important contexts in recent Brazilian history. The first two years (2011 and 2012) were periods of political stability and socioeconomic development. The years of 2014 and 2015 represent a period of political instability, initiated in June 2013 with a series of mass protests across the country, also known as June Journeys (Purdy, 2019; Singer, 2013). In particular, 2015 also corresponds to a period of economic crisis. Finally, 2019 and 2020 represent years of far-right governments in Brazil, mostly illustrated by the presidential election of Jair Bolsonaro, but also reflected in wider regional and national elections (Cruz et al, 2015; Löwy, 2015; Singer, 2021). The period covered in 2020 is also significant due to the pandemic, which resulted in a trend of decarceration across the globe (Penal Reform, 2021). Besides changes in the economy and the political climate, these different time frames also allow us to cover three important legislative changes. One, enacted in 2012 by President Dilma Rousseff, represents a more tolerant law. The two other changes represent more repressive laws and were enacted in 2018 by President Michel Temer and in 2019 by President Jair Bolsonaro.

Of the 300 sentence files downloaded, 276 were analysed. The remaining 24 were excluded due to different reasons: 14 files were not in a PDF but RTF format, so I was not able to open them. During my analysis, I noticed that three files were duplicated, and six files were wrongly classified in the system—five were not charges of robbery and one was not a sentence. In the end, after deleting those inappropriate and unreadable files, I analysed 276 sentences on charges of robbery handed down by judges of all Criminal Courts of the Barra Funda Criminal Courthouse in the years 2011, 2012, 2014, 2015, 2019, and 2020. These 276 case files comprised criminal judgments concerning 361 defendants and 346 sentencing records.

To better and systematically gather relevant information from all those sentences, I developed a court-file analysis research form consisting of 32 items. These items were organised in three main groups: general information, case description, and information on trial and sentencing. To each sentence analysed I filled out a research form. Before gathering information and analysing my data, and to help me develop the research form, I listed a number of things I wanted to know from my dataset. During data collection and analysis, I kept revisiting this list—and the sentencing files when needed. After collecting data, I coded all the responses to that research form, transferred them to an Excel spreadsheet, and used SPSS for my quantitative analysis. While collecting data, besides this main research form, I kept gathering notes and information in two other forms. One was another research form exclusively reserved to qualitative observations on issues that would not otherwise be captured by the main research form. The other sort of document was used to write down notes on general patterns and random but potentially relevant information coming from each of those six years. I used NVivo to better organise and make sense of my qualitative notes. The analysis of all these quantitative and qualitative aspects of sentencing robbery is developed in Chapters Six and Seven.

If court-file analysis can be descriptively rich and valuable, especially by showing *what* judges are doing and *how* they are doing it, it cannot answer *why* they do what they do. Court-file analysis are therefore limited in explanatory power. It may help us with hints on possible causal powers and mechanisms, but it does not allow us access to the domain of the real. There are elements and dynamics influencing judges' decisions that simply cannot be captured by court-file analysis. This therefore represents a significant methodological limitation, whose implications are the need of engaging with complementary methods if one wants to go beyond a rich descriptive account, or beyond the speculative level.

Qualitative interviews

After completing my court-file analysis, I conducted a number of interviews, precisely aiming at addressing some intrinsic limitations of court-file analysis and going beyond the empirical level and its immediacy. Interviews can be used in different ways and have different purposes (Maxfield and Babbie, 2015: 263-275; Noaks and Wincup, 2004: 74-80). As this stage of my research was concerned with getting closer to understanding why judges act as they do, I conducted qualitative, in depth interviews, including both semi-structured and unstructured interviews. These formats of interview allow the interviewer to explore issues such as the interviewee's perspectives, feelings, views, and experiences.

From the premises established earlier, I am aware of the limitations intrinsic to interviews. As Archer (2013: 199) states, real social structures cannot be fully uncovered by interviewing people, not even with in-depth interviews. Furthermore, interviewees' responses are, in certain way, influenced by the interviewer research framework and the relationships between interviewee and interviewer. Sayer (2000: 35) highlights that the interviewee's answers 'are artefacts of the research question rather than the practice or situation under study', what indicates some degree of independence between what is said and what really is. Whilst this does not mean that what the interviewee does in context is necessarily different from what they speak during the interview, Sayer continues, this is undeniably a possibility. The researcher should not therefore assume that what they are told perfectly corresponds to the reality. An interviewee may not only purposely omit things and not be completely honest in their answers, but they may also have limitations in understanding their own reality. For example, a racist white man may intentionally omit racist

thoughts in an interview to avoid possible social and legal implications, just as a naive white man may genuinely contend that issues of gender and race do not constitute his experience as a human being, simply because he is unaware of that. Awareness of the intrinsic and potential limitations of interviews as a method, as well as a thorough analysis from the researcher, can be helpful with these issues.

A thoughtful and adequate sampling also plays an important role in dealing with possible limitations of interviews. My interview sampling is divided into three groups. One consists of Barra Funda judges—from where my court-file analysis comes from. By being randomly selected as per their availability and interest, the idea was that this first group could be more representative of Brazilian judges. Differently, the other two groups are established mainly by a purposive sampling (Boeri and Lamonica, 2015: 128-129). The second group is made of judges who are members of the Judges for Democracy Association (hereinafter AJD judges), a minority group of judges who are known by their counter-majoritarian legal positions as *garantists*—guided by Luigi Ferrajoli’s (1989) legal theory of *garantismo penale*, committed to maximising the protection of individual rights before penal interventions. *Garantist* judges are those whose decision-making prioritise due process, proportionality, and the safeguarding of constitutional guarantees—they are, accordingly, against mass incarceration. Shortly, AJD is an association of judges, founded in 1991, in the context of re-democratisation, aiming to defend the rule of law, human rights, the democratisation of the judiciary, and judicial independence. The third group refers to other criminal justice professionals that are also known for their commitment to human rights, due process, and civil liberties. This third group of interviewees is composed of active and retired prosecutors, public defenders, defence attorneys, and police chiefs. These professionals could not only

share their own experiences and daily relationships with judges, but also discuss criminal justice and incarceration-related issues from a different and complementary perspective.

The pandemic significantly affected my recruiting possibilities—some for the better, some for the worse. The increasing popularity of online, videotelephony software programmes such as Zoom and Microsoft Teams meant an opportunity: I could expand my group of interviewees to the whole country, rather than be confined to São Paulo. From my personal, professional, and academic experience, I already knew, before starting my research, some AJD judges. I then sought help from my closest contact from that association, asking them if they could put me in contact with some of their colleagues. This person asked me to write a brief message introducing myself and explaining my research and intentions, so they could share it as a WhatsApp message to the WhatsApp group of AJD judges located in criminal divisions. Shortly after that message was shared with their group, another person who I knew sent a supporting message in the group chat, saying that they knew me, giving me credibility as a researcher, and highlighting the value of my research. The outcome was positive, and about ten people instantaneously made themselves available for an interview, telling my gatekeeper to share their personal contact with me. In a snowball process, some of these interviewees put me in contact with other AJD judges, further expanding my list of interviewees. In addition to these judges recruited from that WhatsApp group, I decided to reach out to a few other judges more famously known by the legal community for criticising mass incarceration. I then emailed them directly and managed to expand my list of interviewees of AJD judges. In the end, I interviewed 13 AJD judges, most of whom were active trial judges, though some were retired or appellate judges. These interviewees come from six different Brazilian states, including from four of the five macro-regions in Brazil—South,

Southeast, North, and Northeast. Regarding more populous states such as São Paulo and Rio de Janeiro, I interviewed judges from both the state capital and other cities and towns.

The possibility of interviewing people remotely also expanded my possibilities in relation to other criminal justice professionals. As remote interviewing settings could allow me to interview anyone from anywhere in Brazil, I decided to reach out to criminal justice professionals who are nationally known within the legal community, particularly for their defence of human rights, due process, and individual freedoms. To recruit these interviewees, I emailed them directly. While I did not personally know them all, I knew some of them from academic circles. I interviewed 10 people who were public prosecutors, defence attorneys, public defenders, or police chiefs, with some fluidity of labels, as some of them have had careers in different professions within the criminal justice, including as judges. These interviewees work mostly in five different states.⁵ This third group of interviewees is actually an entire consequence of the pandemic: while software programmes such as Microsoft Teams made me able to interview them, I only included this group of interviewees in my sampling as a partial replacement of court observation—a method I had originally planned to engage with but was unable to owing to restrictions imposed by the pandemic.

While the pandemic expanded some interview possibilities in one direction, it restricted possibilities in another—including the feasibility of other originally planned methods, as just stated above. As a downside, the pandemic imposed massive constraints on the recruitment of Barra Funda judges. I originally thought of these interviews as a follow-up from court observation, which I had planned to conduct for around three months in the Barra

⁵ This does not apply for defence attorneys who do not have a geographical limitation and can work in different states, differently from public servants such as prosecutors and public defenders.

Funda Criminal Courthouse. I was relying on my in-person presence in hearings and trials to contact judges' clerks, asking for brief interviews. Brazilian judges are not usually inaccessible and reserved to these contacts as they are in many Global North settings. Several scholars have similarly approached and interviewed them in Brazil (Casara, 2017; Almeida, 2010; Zaffalon, 2017; Jesus, 2018; Valença, 2012). Besides that, I had some gatekeepers and a professional background which does not make me an outsider—I used to be a defence attorney accredited with the São Paulo Bar Association until 2023, having worked in different Barra Funda criminal courts. I was not, therefore, anticipating any major issues with this recruitment method. However, right before going on fieldwork, the pandemic struck and court proceedings were no longer conducted in person. For different reasons, I decided not to conduct online court observation and, by being unable to be there in person, the channels of contact with TJSP judges were significantly reduced. Until recently, TJSP institutional website did not include judges' (or their clerks') institutional emails. I then purely relied on a gatekeeper who works in the Barra Funda Criminal Courthouse. Despite waiting for about nine months, this channel did not work either, and I sought different channels. Someone close to me was close to someone else who was married to a Barra Funda judge. This gatekeeper helped me, also sharing an introductory-invitation message written by me to a WhatsApp group of Barra Funda judges he was part of. After a few months, he got back to me with the contact of six judges. I contacted them and managed to interview some. Others did not respond me. In a snowball process, some of those who I interviewed put me in contact with other judges who I ended up interviewing too. As the number of judges within this interview group was not close to what I had planned, I sent him a list of judges whose sentences I had analysed. He told me he knew some of those judges and would check with them about their interest and availability. Regardless, no further contact was passed onto me. The whole

pandemic context might have interfered the likelihood of those judges not necessarily aligned with the interests of this research to allocate time to speak with me. In the end, I interviewed only five judges within this group. Among my interviewees from other groups, however, there were other three judges who had at some point worked in a Barra Funda criminal court. A total of eight Barra Funda judges was acceptable, though I had originally hoped for about as twice as that.

At that point, I had conducted 28 in-depth interviews totalling 39.58 hours. Besides that, I had also had informal chats with other judges and criminal justice professionals who are my colleagues, including some of my gatekeepers. I felt that something was still missing, particularly as the number of Barra Funda judges was low. I had not spoken much to judges whose views on penal policies and the penal system are more representative of Brazilian judges—i.e., more conservative judges, as exposed by previous survey-based research and reports (CNJ, 2014; Vianna et al., 2018; Sadek, 2015). Then, a relatively prominent group of judges who more openly and proudly advocate for increasing and tougher punishment came to my mind. This group is called FONAJUC (*Fórum Nacional de Juízes Criminais*, or National Forum of Criminal Judges). I decided to email their secretariat introducing myself, more loosely explaining my research, and asking about their interest and availability for interviews. As I had not heard back from them even after sending another email, I tried to contact them on their different active social media platforms, such as Facebook and Instagram. This did not work either. Among the two alternatives I thought of, one was to analyse interviews given by their members—and other judges famous for being vocal on their support for tougher punishment and penal policies—to journalists or other interviewers, particularly in platforms such as podcasts and news programmes. Doing that allowed me to gather and analyse some

more comprehensive data, partially addressing methodological issues I faced when adapting my original research design.

Before interviewing these three different groups, I drafted three similar but different interview schedules, which I kept progressively updating as interviews were being conducted. Most of my interviews were semi-structured, and some were open. As I roughly knew topics and issues I wanted to explore, I drafted general plans of inquiry that did not represent a rigid sequence of specific questions to be strictly followed. Besides follow up questions, I did allow space for spontaneity and exploration of new topics that emerged during the interviews, making it possible to incorporate the interviewee perspectives as another guide to the direction taken in the conduction of the interviews. In some cases, I knew my interviewee had specific features or experiences that were more exceptional or extreme, and therefore more valuable to be explored. On those occasions, our interviews tended to be open, as I focused more on exploring those specific features or extreme experiences. For my group of interviewees who were AJD judges, I had 21 drafted questions divided in four main themes: introductory and more personal but neutral questions; questions on the role of judges; discretion and dynamics influencing decision-making processes; and mass incarceration. For my group of interviewees of Barra Funda judges, I used a similar guide based on four main themes. The first three were very similar, but the fourth was more open on models of justice and public security issues, not directly focusing on mass incarceration. For the third group (other criminal justice professionals), I had 16 questions distributed in four main themes: the first two were again very similar; the third was more loosely related to judges features and the interviewee's relationships with judges; the fourth was centred on sentencing and mass incarceration. These flexible and adapted interview schedules were helpful in addressing the

topics I was more interested in, exploring them from different perspectives and allowing margins for interviewees to influence the direction of interviews.

Rapport played an important role during the conduction of interviews. Developing a rapport with judges and other criminal justice professionals, just as with any sort of elite interviewing (Odendahl and Shaw, 2012; Petintseva et al., 2019), may be more challenging. These professionals are usually characterised as more alert and on-guard interviewees, whose responses tend to be more cautions, selective, and slippery. In my research, four main elements helped me developing rapport with interviewees. The first relates to access and recruitment. As mentioned above, I had the support of an intermediary—either my gatekeepers or my interviewees themselves in snowball recruitment—who put me in contact with interviewees in most cases. This gave me some sort of legitimacy as a researcher, which was sometimes explicitly highlighted by my intermediaries, as in the WhatsApp group of AJD judges. On the rare occasions that I directly reached out to interviewees without any intermediary, I either somehow knew them from academic circles or had colleagues in common with them, so I was not a complete stranger. The second element helping with rapport relates to some sort of alignment with my research. This was mostly the case with AJD judges and other criminal justice professionals. Both groups of interviewees represent a tiny minority of criminal justice professionals who oppose the dominant punitive mindset of judges and operation of the criminal justice in Brazil. They oppose the rationale of mass incarceration and are usually happy to speak openly and unguardedly about these topics. For this reason, they had a clearer understanding of the ultimate goals of my research, as I made it clear for them since my invitation to take part in these interviews. This not only made them more inclined to speak openly with me, but also allowed them to bring issues that, in their views, were relevant for my research. The third element regards my interview schedule. As a

rule, the first set of questions designed by me followed a more self-biography approach. In the first interview section, interviewees were talking more about their own professional and personal trajectory, so they could not only warm up and progressively open up but also feel personally valued in the context of my research. The fourth element relates to institutional reputation. Odendahl and Shaw (2012) claim that the academic standing of a university might enhance access to interviewees. In my case, I felt my institutional affiliation with the Oxford Law Faculty helped with credibility and was a way to start building up trust and rapport, especially with interviewees that were not aligned with some premises of my research—such as the very concept of ‘mass incarceration’. In a context where judges are not usually reticent and opposed to interviews, all these four elements helped me developing a rapport with interviewees and, in turn, with the fluidity of the interviews.

Throughout this thesis, particularly in Chapters Eight and Nine, it becomes clear that great rapport and trust were indeed developed between the interviewees and me. Initially, all my interviewees agreed to have the interviews videorecorded. Before starting the interviews, I informed my interviewees I would either anonymise or pseudonymise them. Some of them said they did not mind having their real names exposed. In specific sections of the interviews, however, some interviewees explicitly asked for their identity to be preserved. This is a great sign of interviewees being comfortable enough with giving transparent answers, even with revealing rich, confidential information. Some of my interviewees also shared with me confidential, private documents, such as disciplinary proceedings they had faced. Another sign of trust and rapport regards the amount of time spent during interviews. Despite telling interviewees I did not expect interviews to last longer than an hour and that we could finish the interview at any time upon their request or as per their availability, 24 of the 28 recorded interviews I conducted lasted over an hour—12 lasted over 90 minutes, with five lasting

around or over two hours. Some interviewees that had to finish the interview earlier owing to other commitments made themselves available for a second interview. Some have kept in touch after the interview, for example sharing news or other sorts of documents related to our conversation. Ultimately, apart from one judge who held a more important role in CNJ, my interviewees were quite open and avoided slippery responses.

Concerning data protection techniques, my interviewees were pseudonymised most times. There are two exceptions. One regards situations in which too much detail is needed and given, and the identity of my interviewee could be revealed, compromising their pseudonym. In those cases, I anonymised my interviewees, referring to them merely as ‘an interviewee’. When context demands, I refer to them by a qualifier and/or a role identifier, such as ‘an AJD judge’ or ‘a prosecutor’. The other situation is when the identification of my interviewee is unavoidable in a certain context, given that a situation discussed by me in which the interviewee is involved is publicly and widely known. With their consent, I refer to them by their real identity—which is extremely exceptional throughout the thesis. Despite almost all my interviewees allowing me to reveal their real identity, I have pseudonymised them most cases, referring to them by their role identifier and a random forename—e.g., ‘Judge Gabriel’ or ‘Retired Appellate Judge Oswaldo’. The reader will notice that I very occasionally refer to a judge by their full name, such as ‘Judge Patrícia Alvares Cruz’. When a full name is given, this is a real identity and not a pseudonym of an interviewee. These situations refer to cases where the referred person either gave a public interview or are involved in a public known fact I am discussing.

A final relevant methodological aspect of my in-depth, qualitative interviews relates to the transcription and analysis processes. My interviews were all conducted in Portuguese—

my and all my interviewees' mother tongue. When I was conducting my interviews, there was not any reliable and efficient software capable of transcribing audios in Portuguese, although there were transcription tools available for English audio. While this made the transcribing process a lot more extensive and demanding, it significantly helped my analytical process. This necessity made me go through the contents of my audio recordings back and forth more than it would have done had not I needed to personally and manually transcribe this material. I took advantage of this situation and, already at that transcription stage, started organising what would later become my nodes. While transcribing my material, I was drafting a list of key themes and elements that were later transferred to NVivo, where I organised and analysed my nodes.

Ultimately, my qualitative interviews were appropriate to help me achieve my research goals, having successfully played its planned role. It is true that the pandemic significantly affected my research possibilities on this regard, at the same time expanding possibilities to interviewing AJD judges and other criminal justice professionals across the whole country but also limiting my access to Barra Funda judges—who, contrarily to AJD judges, could be more representative of ordinary judges. While analysing interviews—and other types of public statements—by more conservative judges given to journalists helped provide me with a more comprehensive analysis, I felt there was more to be explored. Pandemic restrictions and the respective increasing number of remote events provided me with another unplanned but golden opportunity, to which I turn my attention now.

Online participant and non-participant observations

Besides conducting archival research, analysing sentences, and interviewing elites, I engaged in online participant and non-participant observation. In that context, while struggling to recruit more conservative or non-progressive judges to interview, I realised that there was an active and vocal group of judges speaking on topics of interest to my research on different social media platforms. This is the FONAJUC to which I referred earlier. While investigating their profile on platforms such as Facebook and Twitter, I found out that they had hosted their first virtual three-day conference during the pandemic in 2021, and made it available on their YouTube channel. I then decided to watch it, hoping that this could help me suffice some methodological limitations hitherto existing in my research. And indeed it did.

At first, I thought I could merely engage in an online content analysis, looking at their publications on different social media platforms. This could have been helpful, even though it would have had more significant limitations. For example, despite clearly advocating for some legal positions or perspectives on prisons and the criminal justice, their posts on social media are usually brief and more direct. These brief, direct, messages do not build up a rationale for their defended positions. There is a substantial lack of depth. The virtual conference had more to offer. Their annual conferences usually have one or two keynote talks per day, each of which are followed by comments provided by discussants. Throughout the conference day there are also parallel sessions of specific working groups. Beyond the clarity on some positions defended by them, which can also be identified by their social media posts, analysing those presentations could allow me to better and more deeply understand their premises and rationale for their defended arguments and legal positions. So, I decided to focus on their virtual conference.

The First Virtual Conference of FONAJUC took place over three days. The recordings made available on YouTube are almost five hours long. However, besides the video contents—including keynote talks and discussants' comments—there were also all comments made in the live chat box to be analysed, which makes the temporal dimension more complex. Besides slightly changing temporal dynamics, the fact that the conference was livestreamed via YouTube has some significant methodological implications. If I were attending an in-person conference, I could still listen to the main ideas discussed in the conference—from the main presentations and the eventual questions asked during the panels, to informal chats over coffee breaks. I would certainly know who the people delivering keynote speeches were. If introducing themselves first, I could also identify who the people asking questions following the keynote speeches were. Despite being able to listen to informal chats, I most likely would not be able to know who those people chatting were, especially considering that the audience of these annual meetings is not restricted to judges—even though they are the majority. If more than just observing, I were participating, I could myself take part in those informal chats. While this could allow me to know who is speaking what, all information would emerge in the dynamics of an interview, having their intrinsic and other potential limitations as briefly acknowledged in the previous section. The YouTube livestreamed conference allowed me to see things differently. While YouTube livestreams do not have coffee breaks, they do have a live chat tool, where more than asking questions after presentations, people make comments simultaneously to the presentations and keep parallel conversations. Besides being spontaneously made and not provoked by the interviewer, all these comments are linked to actual profiles, which allows one to look into those profiles and identify who speaks what. Because this conference was open to the public—judges, other criminal justice professionals, students, and anyone else—identification was an important element of this non-participant

online observation. I was able to gather frank and spontaneous views of, and information on, several other judges, who were presumably comfortably speaking to each other, to their close peers, as if they were in a private setting, not necessarily considering it was all happening in an online, public space, where observed subjects do not really know they are being observed at all. Ultimately, the in-depth character of keynote speeches, the spontaneity of informal chats and comments, and the possibility of identifying everyone involved in those conversations made this non-participant observation an extremely rich method for data collection.

This online observation did not start with the online conference, nor did it end at it. Before analysing the online conference, I gathered data from FONAJUC social media activity. After the 2021 conference, I kept looking for other sorts of data made available by themselves. For example, during all their conferences, FONAJUC members discuss some general statements on criminal justice issues, including, for example, legislation, sentencing, and case law. By the end of the conference, FONAJUC publishes a list of approved statements. As an illustration, their Statement n. 26 argues that ‘The conversion of a flagrante arrest into pretrial detention by the judge ex officio [meaning not required by the prosecution] does not violate the accusatory system’. Although these statements are not sources of law, they have already been used in judicial reasoning to justify imprisonment (Conjur, 2018) and several other punitive positions.⁶ FONAJUC also claims their statements have been used to justify CNJ resolutions.⁷ Their statements have also been shared in the institutional website of Courts of

⁶ Available at: <https://www.jusbrasil.com.br/busca?q=enunciados+do+fonajuc>.

⁷ Available in their Instagram account: <https://www.instagram.com/fonajuc/p/CVlaXg5PFHe/>

Justices from different states, such as São Paulo, Rio de Janeiro, and the Federal District.⁸ So besides analysing their virtual conference and some of their social media posting, these FONAJUC statements are other sorts of complementary and elucidative material I have analysed for my research.

The pandemic also allowed me to engage in other remote settings that became rich methods of data collection. In addition to the aforementioned non-participant observation, I engaged in a participant observation in the context of another remote course I attended. This course was titled *Para entender o Judiciário hoje* (To understand the Judiciary today). This course was taught by TJSP Appellate Judge Marcelo Semer, who in addition to having more than 30 years of experience as a TJSP judge, has deeply researched the Brazilian Judiciary. His PhD thesis is one of the most relevant studies of sentencing, drug trafficking, and mass incarceration. The course was taught in four online sessions of 2.5 hours each. The first session focused on aspects relating to judges' empowerment since the transition to democracy; the second dealt with the relations between judges and the people, and on their popular legitimacy; the third was on more internal, administrative, and practical elements of the judiciary; and the fourth portrayed who the judge is in Brazil, discussing issues on their general profile. The course therefore does not only provide a general overview of the Brazilian judiciary, but analyses some recent trends experienced by judges, such as their empowerment, and promotes discussions on contemporary issues, such as privileges and struggle for legitimacy. Attending this remote course was another methodological opportunity, not originally planned, but seized in the middle of my doctoral research.

⁸ Available at: <https://api.tjsp.jus.br/Handlers/Handler/FileFetch.ashx?codigo=99075;https://portaltj.tjrj.jus.br/documents/10136/30422/fonajuc-of-circular.pdf>; and <https://www.tjdft.jus.br/institucional/imprensa/noticias/2018/marco/fonajuc-termica-neste-sabado>

Despite this being a course I attended, I have called this an online participant observation for a reason. At times, this course got even close to a focus group from my perspective. Among the course participants there several other judges in different career stages, including judges more experienced than Appellate Judge Marcelo Semer, the course leader. Besides judges, there were also several researchers among course participants, including experienced researchers whom I have cited in this thesis. After the main exposition, the sessions were open to a discussion section, which was more a collective discussion than a Q&A session. We, course participants, were not only asking questions to the course leader, but were having an open conversation, where anyone could expose their views, feelings, and perspectives on the main topics of the course. Despite often taking part in the group conversation, I was just another course participant, so I was not responsible for facilitating and guiding the conversation. And yet quite often discussions organically moved in directions that meet the interests of my research—which is not surprising, given the course’s main topic. Ultimately, attending this course helped me to better understand the Brazilian judiciary from different perspectives and in many ways, including the course leader’s own structured analysis, the gathering of secondary data, the identification of relevant literature presented and discussed during the course, and informal group discussions with other judges and researchers of the judiciary held in the end of each session.

Conclusion

In this chapter, I have discussed matters pertaining to research design and methods. After presenting the research questions that the thesis addresses, I established some key premises that inform and guide my research. Those premises have a significant influence on the whole

research project, from the definition of research questions and the selection of appropriate methods to the acknowledgment of their potentials and limitations, and the possibility of certain research claims. Once I established those premises on science and scientific research, I moved on to discuss and justify each of the different methods I have employed during my research. I believe the extensive and intensive research design consisting of a combination of methods was appropriate to answer my research questions. Drawing on a combination of socio-historical analysis via archival research and secondary data analysis, extensive and intensive court-file analysis, in-depth semi-structured and open interviews, and participant and non-participant online observation allowed me to reach my goals: not only to provide a thorough, detail description of my research object in its empirical immediacy, but to grasp the interplay between structure and agency, and to grasp relevant relationships, powers, and mechanisms at play in a historically-sedimented setting. In the following chapters, I develop an explanatory framework to make sense of the production and reproduction of mass incarceration in Brazil since 1990s.

PART TWO
THE HISTORICAL MARGINALITY OF
IMPRISONMENT IN BRAZIL

Chapter Four

Domestic and informal punishment in the periphery

The historical marginality of state justice in Brazil

Scholars have not yet entirely understood the rise of mass incarceration and its reproduction in Brazil, especially under its particularities—emerging in a context of re-democratisation and being further expanded in a period of economic growth and inclusion. As emphasised in the previous chapter, to really understand the present, one cannot ignore the past. By focusing too much on the rise of neoliberalism in the 1990s, most of the scholarship on mass incarceration in Brazil has neglected the historical development of the national penal system, with a few exceptions (e.g., Batista, 2004; Flauzina, 2006; Alemany, 2021; Dal Santo, 2018). Rather than asking why incarceration rates are currently that high in Brazil, we must first understand why these rates were historically low until around 1990 (Dal Santo, 2023).

Despite being an extremely unequal country, with high levels of poverty, inequality, and exploitation, Brazil had imprisonment rates comparable to Scandinavian countries until around 1990 (Sozzo, 2016c). In 1981, the imprisonment rate in Brazil was 41 (41 prisoners per 100,000 inhabitants) (IBGE, 1981). This rate only passed 60 in 1988, when it reached 61, remaining stable until 1990 (IBGE, 1988, 1993). In 1980 and 1990, imprisonment rates in

Norway were 44 and 56, respectively; in Sweden, 55 and 58; in Denmark, 63 and 67.¹ Understanding socio-historical conditions is a necessary process if one wants to ‘grasp matters at the root’ (Marx, 1844/1972: 137), as it allows us to identify both continuous processes, as well as ruptures and mutations that have played significant roles in shaping a given social reality. This should not, however, be mistaken by historical determinism. In this chapter, I start to explain the historical marginality of imprisonment and the criminal justice in Brazil. Analysing elements from political economy and institutional perspectives allows us to understand how other forms of punitive practices and social control were more useful than the criminal justice, making Brazilian punitiveness camouflaged by domestic and informal punishment.

The chapter is divided into three main sections: in the first, I analyse colonial and postcolonial punitive practices in slaveholding Brazil (up to 1888); in the second, I discuss the persistence of domestic and private punitive practices in a context of late urbanisation (up to the mid-20th century); in the third, I analyse how informal punitive practices prevailed in contexts of poor urbanisation, which highlights some reminiscences of the rural poor not having their needs addressed by the state. In so doing, we understand how political economy and the peripheral conditions of the Brazilian state—first as a mere colony, then as a dependent state—have affected patterns of punishment and control, in such a way that state justice have only played a marginal role for most of the Brazilian history.

Colonial and postcolonial punitive practices in slaveholding Brazil

¹ As per the World Prison Brief. Available at https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=14

Throughout most of its history, Brazilian society has been marked by the predominance of domestic punishment and private conflict management. To understand it, one must go back to colonial times. As a result of the commercial revolution—or commercial maritime expansion—that enabled the origin of capitalism (Prado Jr., 1942/1981; Santos, 1994: 21-24), the lands of what is today known as Brazil were found by the Portuguese in 1500. For about the following 30 years, the relation between Portugal and the newly found land was limited to the exploitation of Brazilwood (Prado Jr., 1933/1999: 11-13). Colonialism is consolidated from the 1530s as a mechanism of defence over the new land that could (and would indeed) yield financial advantages for the colonising Empire, whose economy was mostly based on the exploitation of other territories (Prado Jr., 1933/1999). From this period up until 1815, Brazil remained as an extension of Portugal under colonial regime.

According to Quijano (2009: 73), colonialism

strictly refers to a structure of domination/exploitation where the control of political authority, production resources and labour of a given population dominates another with a different identity and whose central headquarters are located in another territorial jurisdiction.

This period of Brazilian history is marked by indigenous genocide, dispossession, and slavery. The supposed 'civilising process' in Brazilian lands began with the insertion of Portuguese people into indigenous civilisations, mostly through Jesuits and their theological knowledge and power (Prado Jr., 1942/1981: 25; Zaffaroni, 1988: 65). Indigenous peoples were brutally decimated by white Europeans, who considered them representations of the devil. Others died from epidemics taken from Europe to Brazil (Ribeiro, 1995: 28-37,93-94). When left alive, others were oppressed through brutal processes of forced labour (Dussel, 1977: 16; Gorender, 1978/2016: 511-528; Ribeiro, 1995: 77, 92-105). The indigenous genocide enforced by colonisers is what made possible the process of 'primitive accumulation' (Marx, 1867/1928),

and a wide exploitation of the then-new and rich land and its native peoples. The so-called 'civilising process' was nothing but a project of economic expansion achieved through extremely violent means.

Besides indigenous genocide, slavery is another key feature of colonial times. Portuguese colonial domination over Brazil had its economy based on rural activities, such as sugar and coffee plantations. From 1549, African people were trafficked to Brazil, where millions were enslaved up to 1888. This means that slavery was maintained even longer than the colonial regime, that had its formal end in 1815. Colonial society was composed by two major groups: on the one hand, *senhores de engenho* (hereinafter 'planters') and their families (European settlers); on the other, slaves and 'quasi-free' workers (Prado, 1942/1981; Costa, 1997/2010: 72). In between them, there were military and religious personnels, people such as artisans and traders, and some *degredados*—those sent from Portugal to Brazil through penal exile (Ribeiro, 1995: 83-88). The structure and social relations that configured this stratified society hugely affected patterns of punishment and social control needed for the reproduction of that hierarchical social order.

For most of the period in which slavery was legal in Brazil, punitive practices and social control were fundamentally domestic matters. Punishment used to be meted out privately, within the *engenhos* (plantations), usually by *feitores* (overseers) at the behest of planters (Gorender, 1990/2016; Lara, 1988; Costa, 1997/2010: 287, 328-346; Pimentel Filho et al, 2017: 156-162; Cacicedo, 2022; Araújo, 2017; Batista, 2006). This is not a peculiarity of slaveholding Brazil and follows the same pattern of domestic punishment enforced in other slaveholding societies (Davis, 1998; 2003; Sellin, 1976; Du Bois, 1901/2015; Muller, 2018; Paton, 2004; de Vito and Muller, 2022; Lopes, 2022; Turner, 1999). An enslaved person is under a permanent

condition of prisoner to their master (Sellin, 1976; Melossi, 2023; Gorender, 1978/2016). Slaves have their freedom (almost) completely taken off by their master. How can they therefore lose something (freedom) they do not even possess? How can they be disciplined by someone or something other than their master? How and why would their masters accept to have their 'property' taken from them?

The rationale for these questions is illustrated in different levels of the Brazilian reality of that time. Take, for example, discourses of planters or even political and judicial representatives. When the state usurps the master of his domestic power to punish slaves and uses them in forced labour in public works, 'who suffers the punishment is the master', said a deputy in São Paulo Legislative Assembly in 1855 (Costa, 1997/2010: 343). Punishment of forced labour to slaves is actually 'an incentive [to slaves]... They kill their masters or overseers to be free from them, then present themselves to be sent to houses of correction', said a judge in Campinas in 1860 (Costa, 1997/2010: 344). A similar claim was made by senator Paulo de Souza:

Will the slave who lives bowed under the weight of his labors by any chance have a horror of being incarcerated in a prison where he can abandon himself to laziness and drunkenness, the favorite passions of a slave? (*apud* Beatti, 2015: 2-3)

When slaves were detained by public authorities, their masters spared no efforts to bring them back to the plantations (Schwartz, 1973; Martins, 2005).

As Cacicedo (2022) and Giamberardino (2024) have highlighted, analyses of legislative and normative changes across time cannot accurately portrait *de facto* punitive practices. Colonial Brazil had some legal framework provided by Portugal. Yet colonial Brazil never had any sort of *Code Noir*, as there was in France and its colonies, providing guidelines on the life

of slaves and their relations with their masters (Ferreira, 2017: 182). In practice, the most usual slave crimes punished by masters were thefts, fleeing bondage, drunkenness, and laziness (Costa, 1997/2010: 333). However, the cruellest masters could consider anything, even the most banal conducts, subject to punishment and torture (Mott, 2010). Despite the legal establishment of different forms of public punishment—such as penal exile, death penalty, forced labour, corporal punishment, and fines—slaves were usually corporally punished by the overseer, as commanded by the master, in their domestic setting. The most common domestic punitive practices were:

the *bacalhau*, the *palmatória* [wooden paddle], the trunk, and more rarely the *golilha* [iron choker fixed to a post or pillory, to which criminals or slaves were attached], the handcuffs, the *anjinhas* [sorts of thumbscrew], the iron facemask [Flanders mask or iron bit] and detention. The types of whips and scourges ranged from simple *varas de marmelo* [wooden rods made of flexible and resistant quince branches] to twisted leather sticks with several extremities. The *bacalhau* was a small whip, with a leather or wooden handle and twisted leather extremities. It was the most widespread punishment in plantations. Whipping and *palmatória* also constituted a common disciplinary penalty, established and authorised by the legislation itself (Costa, 1997/2010: 333).

The portraits of Debret (Figures 1 and 2), who lived in Brazil between 1816 and 1831, illustrate well all these features of domestic punishment in slave-holding Brazil: the corporality of punishment meted out by overseers within plantations.



Figure 1. J.B. Debret, 'Overseers punishing slaves on a rural estate'

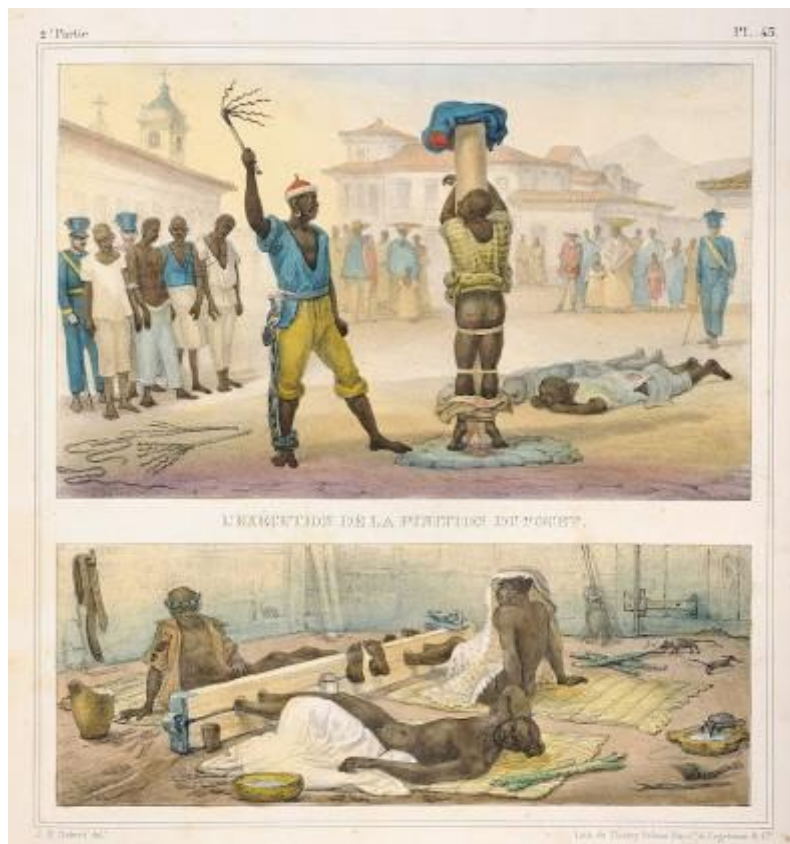


Figure 2. J. B. Debret, 'The execution of the punishment of [*bacalhau*]' and 'Blacks on the trunk'

For free people, another informal ‘treatment’ used to prevail: again with a more corporal dimension, beatings, but now in the streets or at police stations (Holloway, 2017). For white settlers more specifically, the main punishment was penal exile, either to other provinces within Brazil or to other Portuguese colonies in Africa or Asia (Cacicedo, 2022). Military and political offenders would often be sent to *presigangas*—sorts of prison ships administered by the Navy, where forced labour, exile, and corporal punishment would be enforced (Giamberardino, 2024; Neto, 2017).

The predominance of domestic punitive practices over state-enforced punishment is corroborated by the analysis of judicial and prison files. In different regions across Brazil, slaves often composed only a minor part of prisoners. The findings in judicial files are consistent: slaves usually represent around 10% of the defendants throughout the 19th century (Ferreira, 2017; Queiroz, 1958/1977; Machado, 1987; Campos, 2003). In regions with a minor representation of slaves in the wider population, such as Ceará, the percentage of slave defendants could be as low as 1.25% (Pimentel Filho et al., 2017: 162). Analysis of prison files go in the same direction. Huggins examined logs of the Recife House of Detention at ten-year intervals over a span of sixty-two years. Her sample consisted of 15% of all free people and all slaves. ‘The small number of slaves detained’, she explains, ‘made it possible to secure information of all of them’ (Huggins, 1985: 81). Therefore, as per official documents, the huge majority of people formally punished consisted of free people, and not slaves.

The prevalence of domestic punitive practices was made easier by the lack of any minimal bureaucratic structure (Zaffaroni et al., 2015: 419). The relations between the then-Kingdom of Portugal and planters in Colonial Brazil were limited to some administrative and political levels, including tax payments. As Prado (1942/1981: 30) argues:

Kingdom officials closed their eyes to all sorts of abuses that they did not have the power to repress or punish. They intervened with the settlers at best as their allies in the [...] oppression of the lower population. They gave [the settlers] *carte blanche* to act as they best understood.

This reinforces that social control and punishment were tasks left for planters and overseers. The lack of both legal guidelines and a bureaucratic structure (and will) to repress any punitive 'excess' allowed masters to punish their slaves as they wished. Apart from the years close to the slavery abolition (Costa, 1997/2010: 337-338; Algranti, 1988: 77), where abolitionist movements were growing, very rarely were masters held accountable for any 'excessive' punishment meted out onto their slaves (Chalhoub et al., 2022; Gorender, 1990/2016: 44).

This corporality of punishment has certainly been a feature of not only slaveholding settings, but wider colonial contexts. This was a widespread practice beyond the Portuguese empire (Bertelsen, 2011; Lopes, 2022), also featured in French, British, Dutch, Belgium, and Spanish empires, for example (Killingray, 1994; Bernault, 2007; 2003; Canfijn and Fatah-Black, 2022; Zinoman, 2001; Deslaurier, 2021; Aguirre, 2007; Mbenga, 1997; Turner, 1999; Pierce and Rao, 2006). Corporal punishment used to be enforced both in informal, domestic contexts, but also as an official, judicial punishment, especially in British colonies (Peté and Devenish, 2005; Killingray, 1994; Paton, 2004; Ocobock, 2012; Hynd, 2011; Brown, 2007; Anderson, 2011). Whereas it was slowly disappearing in the metropolises from the 18th century (Foucault, 1975; Ignatieff, 1978; Rothman, 1971; Rusche and Kirchheimer, 1939/2003; Melossi and Pavarini, 1977), corporal punishment remained as a key punitive practice in many colonies up until the 20th century.

Corporal punishment is not an exclusive feature of colonial settings. It was also enforced in pre-colonial societies in Africa and Asia mainly through beatings and servitude (Gibson, 2011; Brown, 2007; Mbenga, 1997). It was also a practice observed in societies that

were not colonised by Europeans (Dikotter, 2002; Botsman, 2005). A significant difference is that in pre-colonial societies, corporal forms of punishment were usually reserved for more serious offences (Onyeozili and Ebbe, 2012), where in colonies they were widespread, enforced even for trivial behaviour. Very little is known about punitive practices in indigenous civilisations in Brazil before the European invasion. Some indeed incorporated more violent punitive practices, including servitude and cannibalism on more extreme cases such as inter-tribal war enemies captured (Ribeiro, 1995: 33-34, 57-58). Many other tribes were more pacific (Ribeiro, 1995; 1970/2018). However, one cannot dissociate the corporality of punishment in Brazil from the colonial enterprise, whose widespread practices included the indigenous genocide and the enslavement of Africans throughout Brazilian lands and across centuries.

Slavery was only abolished by the end of the 19th century, but a few other significant events took place throughout that century, many of which affected the use of and the need for a penal system. One is the Portuguese Royal Court move to Brazil in 1808, following the threats of Napoleon Bonaparte invasion of Portugal. The colony became the seat of the Portuguese monarchy. Between 1815 and 1822, Brazil no longer possessed the status of a colony, being 'promoted' to a Kingdom alongside the metropolis. In 1822, the prince regent himself, Don Pedro, declared Brazil's independence from Portugal and became the emperor of the Empire of Brazil. In addition to political changes, the 19th century also witnessed significant transformations in different but intertwined domains, such as the economic, the social, and the demographic. For different reasons, whereas the first half of the century witnessed an expansion of slavery, the second half saw its weakening and the increasing liberation of enslaved people. In 1817-18, enslaved people represented around 50% of the Brazilian total population (Moura, 1987/2020: 15); in 1872, around 15%; in the year before

slavery abolition, they composed 5% of the population (Prado Jr., 1933/1999: 99). In the decades following Brazilian's independence, poor and oppressed sections of the population, including slaves and freed people, revolted across the country.² In the demographic sphere, despite remaining predominantly rural until the 1970s, Brazil underwent an initial process of urbanisation, with the establishment of a few commercial centres, especially around mining and port zones.

All these events are not only deeply connected but have produced further changes in practices of punishment and control. The transfer of the Portuguese Crown to Rio de Janeiro promoted some initial processes of urbanisation, demanding greater labour force for public works, and simultaneously promoting the development of urban slavery (Algranti, 1988). If masters were usually able to control, punish, and discipline their slaves within plantations in the rural setting, this task was more complicated in the city. The urban context made it possible for a new category of slaves to emerge: the *negros de ganho*, or slaves for hire. They would spend the day on the streets renting their services, mainly but not only as transport of things and people, having to pay their master a previously established fee (Gorender, 1978/2016: 495-497; Algranti, 1988: 47; Costa, 1997/2010: 274). This means that most urban slaves would spend most of their time away from a direct control of their master, coming back home only to sleep, and sometimes to eat (Algranti, 1988; Costa, 1997/2010: 274; Reis and Klein, 2010: 191). This would unavoidably make slaves be mistaken by freed people—and vice versa. For this reason, the urban setting became one of the main destinations for runaway slaves. The more intense flow of people and the greater amount of autonomy possessed by urban slaves could make it more difficult for them to be identified and recaptured. The other

² Examples are the Cabanagem (North Brazil, 1835-1840); the Malê revolt (Bahia, 1835); and the Balaiada (Maranhão, 1838-1841).

possible destination for runaway slaves was the forest, where they could find shelter in *quilombos*.³ Masters would put out advertisements on newspapers informing about runaway slaves and offer rewards in case of capture. In rural settings, *capitães-do-mato* (slave catchers)⁴ would more often do this task. In the streets, that role was mainly played by the police, whose activity would be mainly defined by a racialised order. Whether slaves, free, or freed, Black and non-white people were generally considered suspects (Koerner, 2006; Batista, 2016; Chalhoub, 1988; Azevedo, 1987; Dal Santo, 2017) and then subjected to a more intensified control. When stopped without any identification, in groups, on the streets after curfew, or carrying any possible weapon, they would be detained—and physically assaulted—in dungeons (Costa, 1997/2010: 276; Cacicedo, 2022; Araújo, 2017; Jean, 2017: 688). More details on detention practices follow in the next chapter. For now, what is important is to understand that, as Araújo (2017) claims, urban slaves lived under a ‘double bondage’, having two masters—one private and one public. In addition to the whip and the chain, urban slaves were subjected to another instrument of subordination and control: the gaol (Cacicedo, 2022).

After its formal independence in 1822, Brazil underwent a process of legal codification that started in 1824 with Brazil’s first constitution. In 1830, Brazil’s first Criminal Code was enacted, followed by its first Code of Criminal Procedure two years later. Despite adopting a ‘liberal legislation’, very little changed in terms of relations of dominance. Slavery remained untouched, and the Criminal Code of 1830 preserved masters’ autonomy to punish their slaves, including the right of slave owners to corporally punish their slaves for disciplinary purposes (Dieter, 2012: 621). The liberal idealism incorporated into Brazilian legislation was

³ ‘The gathering of Black people in a non-inhabited region’ (Moura, 1987/2010: 132).

⁴ They were professional individuals in the hunt for runaway slaves. If in the US slave patrols were mostly composed of white people, slave catchers in Brazil were often mulattos (Moura, 1987/2010).

limited to cover the relations between planters and the state, but not their relations with the oppressed (Gorender, 2002). Just as in several other places, including in metropolises (Gorender, 2002; Losurdo, 2005; Tomich, 2004; Williams, 1944/1994; Rodney, 1972/2018; Blackburn, 1997; Cesaire, 1955/2000; Fanon, 1961/2001), slavery and liberalism did not represent any sort of antithesis in Brazil. As Miranda (2020) sustains, while liberalism has been associated with *liberté, égalité* and *fraternité*, it has also meant *colonialism, racism* and *slavery*.

Two major exceptions to masters' autonomy of domestic punishment prescribed by the Criminal Code of 1830 were materialised in practice: forced labour and death penalty. Slaves being occasionally subjected to forced labour is a consequence of some criminal offences demanding civil reparation. The 1830 Criminal Code established that anyone who was found guilty but was unable to economically repair the damage caused would do forced labour for the time necessary to pay off their debt. This provision was directed to slaves (Dieter, 2012: 620-621). Before this Code, civil reparation was a slave owner responsibility. In turn, to avoid the debt assumption, the slave owner would sometimes free their slave. In the end, the slave owner would free their slave, the victim would not have any compensation for the damage suffered, and the slave would become free but still indebted and dispossessed, with no means to meet the debt. The 1830 Criminal Code 'fixed' that situation as per local elites' interests in what a first glance seemed to be an exception to masters' autonomy. Death penalties, in turn, relate to slave rebellions. Slaves who killed, or attempted to kill, their masters could be punished with death penalty, which was also the sentence for insurrection leaders. On many occasions, however, these punishments were commuted with forced labour (Andrade, 2017; Martins, 2005). Despite going against the interest of other planters, this commutation to forced labour sentences were more useful for state authorities, who could

deal with an increasing demand for labour (Chalhoub, 2022; Jean, 2022). While forced labour for indebted slaves did not represent an exception to masters' concrete interests, the commutation of death penalty by forced labour consisted of an actual exception, representing a more unusual conflict between political and economic elites.

The reasons for exceptions to domestic punishment of slaves are very clear. One is the control of Black people and the maintenance of slavery, preventing any sort of Black revolution and preserving the racialised hierarchical order (Algranti, 1988; Araújo, 2017; Holloway, 2017; Costa, 1997/2010; Cacicedo, 2023; Bastista, 2016; Azevedo, 1987). This goal was dealt with by death penalties. The other relates to a labour-recruitment mechanism, especially where there were higher demands for public works and low supply of labour or economic constraints in public finances (Algranti, 1988: 74-76; Araújo, 2017: 220-225, 246; Maia, 2017: 130; Huggins, 1985). This goal was dealt with by forced labour. There is one concrete situation that combined both rationales—the preservation of slavery and a labour-recruitment mechanism. When masters were too negligent and unable to control their slaves properly, the state would reclaim the power to punish. This could happen, for example, in repetitive cases of runaway slaves. In these cases, slaves would not merely be held in a gaol until their master collected them, but would be used in public works (Algranti, 1988: 76; Araújo, 2017: 246).

There are two other concrete situations where slaves were exceptionally subjected to state-enforced punishment, rather than a domestic one. In one case, masters would send their slaves to be punished in gaols (Araujo, 2017: 219; Ferreira, 2005; Holloway, 2017: 255-257; Salla, 1999: 68; Cacicedo, 2022). As Holloway (2017: 255) puts it, in this collaboration between slave owners and the building-up state, slave owners would pay one fee for the whipping, and another for the slave's daily subsistence. State authorities would not even ask whether or

which crime was committed. Ferreira (2005) explains that not all slave owners had enough money to hire an overseer or found it worthy. However, it was precisely at that moment of meting out domestic punishment that slaves could find an opportunity to attack and even kill their masters. Given the costs and risks, some slave masters would rather send their slaves to be punished by the state. In practice, while this can be considered state punishment, it cannot be considered exception to master's autonomy to punish their slaves. It rather corresponds to private masters autonomously hiring a public service. An even rarer exceptional situation in which slaves could be found in gaols was not even necessarily a form of punishment. Especially nearer slavery abolition, with the growing pressure of abolitionist movements, a few slaves would come forward and denounce their own masters for their abuse and excessive use of violence. Some slaves could be detained following their grievances, in what was sometimes a way for them to be treated and have their injuries healed (Jean, 2017: 683). Ultimately, this situation presumes almost as a necessary condition that the detained slave had been domestically punished—whose excessive violence is precisely the cause of their grievance. Therefore, although slaves could be found in jails in both cases, these situations first and foremost corroborate the domestic nature of punishment more than they challenge it.

The period in which 'modern' prisons were built in Brazil and how they operated also reinforce the predominance of domestic punishment. Until the mid-19th century, Brazil carceral institutions were mostly colonial gaols (*enxovias*), apart from a few exceptional cases of distinctive institutions, such as the *presigangas* or the Fernando de Noronha prison island (Costa, 2017; Beattie, 2015). Those colonial gaols were actual dungeons (Giamberardino, 2024), some being literally named *Calabouço*—the Portuguese translation of 'Dungeon'. Rather than workhouses or poorhouses as those in the UK, the Netherlands, Belgium and Germany, colonial dungeons resembled the cellars of the Coliseum in Ancient Rome (Melossi,

2023). As suggested earlier, colonial gaols were mostly spaces of containment, housing runaway slaves until they were claimed back by their masters, or detaining those sentenced to forced labour, penal exile, or death (Ferreira, 2017; Giamberardino, 2024; Araújo, 2017). The only exception was the already mentioned cases where masters sent their own slaves to be whipped. The first intended 'modern' prison in Brazil was the Rio de Janeiro House of Correction, whose construction started in 1834 and was concluded in 1850 (Aguirre, 2007). As Aguirre highlights, the time it took for the construction to be finished indicates financial and political constraints when it comes to building up modern prisons. A few other Houses of Correction were built in Brazil in that period, such as in São Paulo, Salvador, Porto Alegre and Recife (Neto, 2017). Not so paradoxically, the very first 'modern' prison in Brazil and some other contemporary ones were built by forced labour (Holloway, 2017: 259; Pimentel Filho et al., 2017: 167).

As the timeline suggests, modern prisons were not built under the colonial regime in Brazil—nor elsewhere in Latin America (Aguirre, 2005; 2007; Salvatore and Aguirre, 1996). On the one hand, they were built as an institutional mechanism representing the desire of local elites to embrace 'modernity' (Aguirre; 2007; Neto, 2017; Pimentel Filho et al., 2017; see also Gibson, 2011; Dikotter, 2007), where national representatives were importing penal ideas and techniques from core countries (Moraes, 1923; Del Olmo, 1981). On the other hand, these prisons were built in a context where the material reality was demanding new forms and strategies of social control, discipline, and subordination. These prisons were not, however, for slaves. Considered backwards and incorrigible by the economic and political elites, slaves could not be morally reformed, treated in their souls and minds, but merely punished in their body, being physically disciplined. This racialisation of punishment has also been observed in several other colonial and postcolonial societies, where native peoples, not necessarily

enslaved, have been considered backwards. For that reason, they were not merely liable but actually deserving of more corporal, violent forms of punishment, such as flogging with quince rod, cat-o'-nine-tails, *chamboco*, *chicotte*, *palmatória*, and caning (Bertelsen, 2011; Killingray, 1994; Paton, 2004; Bernault, 2007; 2003; Canfijn and Fatah-Black, 2022; Zinoman, 2001; Ocobock, 2012; Hynd, 2011; Peté and Devenish, 2005; Lopes, 2022; Deslaurier, 2021; Brown, 2007; Anderson, 2004; Mbenga, 2007; Pierce and Rao, 2006; Anderson, 2011). Ultimately, prisons and state punishment played only a minor role in slaveholding Brazil.

The consolidation of 'seignorial power' (held by *senhores de engenho*) and the maintenance of slavery as the main mode of production for centuries reinforce one of the main assertions from the political economy of punishment perspective. Patterns of punishment tend to adapt to the material needs for the dominant social order and relationships to be reproduced, as the penal system plays a fundamental role in controlling, disciplining, and subordinating. In the 19th century, prisons were becoming the main form of punishment in core countries (Melossi and Pavarini, 1977; Rusche and Kichheimer, 1939/2003; Rothman, 1971; Ignatieff, 1978; Foucault, 1975). In that region, the Industrial Revolution had already reshaped their modes of production and, consequently, their social relations. This made their social order demand specific forms of discipline, subjugation, and control. Workhouses and, afterwards, prisons were useful for that purpose. In Brazil, where slavery remained, a different sort of domination and discipline was required. For this reasons, domestic punitive practices were maintained. As time passed, political, legal, and economic changes resulted in a broader context towards the weakening of slavery labour power, a larger liberation of enslaved people, the initial formation of some urban spaces, and the beginning of a centralisation of punitive practices into a public power. Thus, the enforcement of punitive practices varied according to three main elements: their region (whether rural settings or

more populated urban formations), the status possessed by people (whether slaves or free subjects) and their colour (whether white or non-white). Nonetheless, domestic and not public forms of punishment were predominant through most of the Brazilian history, where slavery lasted until 1888.

Late urbanisation and the persistence of domestic punishment and control

Colonialism and slavery are extremely important for us to understand not only punitive practices and the roots of the penal system in Brazil, but also Brazilian sociability broadly speaking. However, alone they cannot explain why the penal system has worked the way it has until present days. First, for Brazil became formally independent from the Portuguese empire in 1822, and slavery was formally abolished in 1888. Second, for several other countries have also undergone similar historical processes, from Angola and Mozambique to Cuba and the USA. Understanding how Brazil specifically moved from those conditions to the present days is crucial. This section explores another relevant reason for Brazil to keep relatively low levels of incarceration rates throughout most of the 20th century: the late process of urbanisation, which is in turn directly related to the country's condition of dependency, replacing its former condition of colony (Fernandes, 1975; Santos, 2000; 2020; Bambirra, 1972/2013; Marini, 1977/2000; 2017). Brazil became predominantly urban only in the 1970s (IBGE, 2006). This process of late urbanisation clearly affected trends of punishment. I now explain how domestic, private punitive practices outlived slavery abolition, remaining as the predominant pattern of punishment in Brazil.

To understand the evolution of punishment in rural areas, one needs to grasp the changes observed in the social order throughout time. Over the 19th century, exportation of

coffee represented the main economic activity in Brazil. In addition to being a costly and time-consuming cultivation, this activity demanded large rural properties and many workers in a period of decreasing slavery labour force. This situation made room for the rise of free but dispossessed individuals, called *agregados*. To this group of people, small (sometimes unproductive) pieces of land used to be ceded by oligarchs and powerful local landowners (hereinafter shortened to 'landowners') (Franco, 1969/1997: 99–100; Monteiro, 1980: 24; Queiroz, 1958/1977: 23). In practice, this 'concession' did not represent any loss to landowners. On the contrary, a new sort of relationship of dependence and cordiality between landowners and *agregados* started to be forged.

Landowners would evidently benefit from these relations. For *agregados* were dependent on landowners with nothing to give them in return, they were often used as landowners' 'instruments for any and all purposes, including those of offence and death' (Franco, 1969/1997: 153). For landowners, more useful than renting small pieces of land (to whom did not have any money to pay) was to gather many men and incorporate them into the social organisation living in their latifundium. These men fulfilled an alternative function to policing and judicial systems, exercising the private defence of landowners' interests, working as private militias (Huggins, 1985; Queiroz, 1958/1977; Monteiro, 1980; Franco, 1969/1997). They were usually established in allotments bordering the large rural properties, where they were able to carry out activities of surveillance and control.

These relations and the social role played by *agregados* outlived the abolition of slavery. With the lack of public policies to integrate formerly enslaved people into the newly class society (Fernandes, 1964/2008; Moura, 1994; Nascimento, 1978/2016), and without any agrarian reform, Brazilian post-slavery rural territories remained mostly based on large

agricultural estates (Facó, 1963; Leal, 1949/2012). When dealing with the land question, rather than promoting an agrarian reform, the Republic of Brazil would actually mobilise its army to repress any insurrectionary uprisings of the rural poor and exterminate them, as it did in the War of Canudos (Facó, 1963: 23-24; Cunha, 1902/2010). As per the Brazilian Agricultural Census of 1940, Brazilian lands were concentrated in the hands of very few (*apud* Leal, 1949/2012: 50-56). Whilst super large landholdings (those of 1,000 hectares or more) corresponded to 1.46% of the number of rural properties, they represented nearly 50% of the whole rural area. But because not every landowner had only one property, the disproportionality between landowners and land distribution is even more significant: nearly 75% of the rural area was owned by less than 8% of the landowners. Besides, a considerable part of those smaller rural properties either was not productive or had a low soil productivity—the decline of the larger rural property's productivity is precisely what gave place to the division of land. Therefore, land concentration was 'a dominant fact in rural life' (Leal, 1949/2012: 47). In that context of concentration of power and wider dependence, where landowners possessed not only land but also *agregados* as private militias, domestic punitive practices prevailed.

The dominance of landowners was not restricted to their financial power. One year after slavery was abolished, Brazil ceased to be a monarchy and became a republic. With the expansion of suffrage from that period, rural workers became not only politically useful but also necessary. In the countryside, everything ran through the large landowner. Even when the large landowner was not fundamentally rich, the mass of landless rural workers lived 'in the most wretched state of poverty, ignorance and abandonment' (Leal, 1949/2012: 46). In that context, everyone else depended on him, 'and it is from him, actually, that [they] receive the only favours that their dark existence witnesses' (Leal, 1949/2012: 47). This rural

economic and social organisation would make space for *votos de cabresto*—when someone votes not following their own political choice but does it by the order of landowners. The economic dependence of that mass of landless and poor people on the powerful local landowner would make him as influential to the point that local politicians would depend on him too. Leal analyses this complex connection, reciprocity, and commitment between private and public powers, when powerful local landowners and local politicians are aligned with regional and federal politicians. Such relationship emerges from a combination of a political regime of extensive representative base and the rural socioeconomic structure. Leal calls this system *coronelismo*. This system is much more complex and involves many more ‘collaborations’ and ‘reciprocities’ than I am able to explore here. Below I focus on those aspects that are important for our purposes.

A large landowner would help politicians with his wide electoral influence: first, guaranteeing a favourable election at the local (county) level; then, along with local politicians, mobilising ‘their’ electorate to vote for candidates in regional (state) and federal (national) elections. In return, large landowners and local politicians were let free to consolidate their power locally (Leal, 1949/2012: 63-68). This included the control of the police and the judicial system (Monteiro, 1980: 81-94; Leal, 1949/2012: 63-). As argued earlier, most of conflict management and social control would run in a more domestic setting, out of the state apparatus. However, when matters occasionally got to the criminal justice, large landowners and local politicians were usually able to manipulate the outcome as per their convenience, be it guaranteeing impunity for themselves and their allies, or making the law ‘work’ against their enemies (Facó, 1963; Leal, 1949/2012; Monteiro, 1980). Until around the second half of the twentieth century, judges did not possess the legal guarantees they currently do, such as irremovability and tenure. Most of them were freely appointed and had a temporary position

(Leal, 1949/2012: 193-194). On the rare occasions a police chief filed a charge, or a judge handed down a decision, against these local powerful men or a member of their private militia, that police chief or judge would often be removed to other districts (Facó, 1963: 39; Leal, 1949/2012; Monteiro, 1980: 94). In that period, most criminal cases were judged by a jury. However, the list of jurors was also often under the control of those local powerful men (Leal, 1949/2012: 198). Formally or informally, through the direct influence over the judicial apparatus or the direct use of force by private militias, justice was in the hands of a few local powerful men.

When it comes to conflicts and relationships between the rural poor, punitive practices were still predominantly restricted to the private domain. Interpersonal violence was not only the mechanism of conflict resolution deployed by powerful people. This was also the main instrument at the disposal of the rural poor to solve their conflicts with their peers, including trivial issues. Violence, Franco (1969/1997: 27-51) argues, was more than a common feature of rural sociability, representing something valued that highlighted personal courage. Given the lack of social and moral recognition of the rural poor, the state penal apparatus would not be mobilised to deal with their issues, less even to act on their behalf. Their own hands—or knives—were their instrument of justice.

A differentiation on the use of violence must be made. On many occasions, what is first and formally framed as crime was actually deployed as some sort of self-help, private justice. Sometimes, especially when by the orders of the powerful and through their own militias, violence was used as means of social control and maintenance of (the dominant) order, as domestic punishment. Personal dominance and relations of dependence made private punitive practices more effective mechanisms of control and subjugation. On some

occasions, when used by the rural poor against the rural poor, violence was the only means at their disposal and so was used in response to a previous deviant behaviour, as a mode of conflict management and in the pursuit of justice (see also Black, 1983). On other occasions, violence was indeed an actual form of 'predatory' crime. For example, gangs of men known as *cangaceiros* became famous for their use of sheer violence against people from different social classes, a movement that took place especially in Brazilian northeastern countryside, between the late 19th and the mid-20th centuries. Some understand that they represented forms of resistance against the powerful; others understand that their violence was primarily aimed at individualistic interests, including their own survival in a context of extreme misery, but sometimes attacking and robbing other rural poor too (Queiroz, 1958/1977; Facó, 1963).

Overall, violence has been used as a mechanism of self-help, social control, and order maintenance in rural settings. State penal apparatus was hardly ever mobilised, and when in operation, powerful men were often in its control, instrumentalising it. When in operation, the state penal apparatus was used mainly to repress uprisings and revolts of the poor. On those rare occasions, extermination, not prison, was its standardised manifestation. In a context of concentration of land ownership, socioeconomic inequality, misery, and dependence, what prevailed was private 'justice', domestic punishment, and personal dominance. This scenario is observed still in current days, particularly in the context of conflict over land occupation and struggles for agrarian reform (Chersoni, 2023; Martins, 2015: 48; Teixeira, 2023). As per the NGO Global Witness (2018), Brazil is the country with the higher number of environmentalists killed in the world in the last decade.

One last important dynamic to consider here is that while the rural setting favoured the maintenance of domestic and private punitive practices, it was the country's condition of

dependency that made Brazil remain predominantly rural up to the 1970s. A dependent condition is not the same as a colonial condition. Unlike colonialism, dependency is:

a relation of subordination between formally independent nations, where the production relations of the subordinate nations are altered or reshaped to ensure the continued expansion of their dependency (Marini, 1977/2000: 109).

The condition of dependency emerges with the consolidation of industrialism and the international division of labour throughout the 19th century, precisely after the formal independence of Latin American colonies from European metropolises. The literature on the Marxist critique of dependency theory is rich and complex (Marini, 1977/2000; Santos, 2000; Bamberger, 1972/2013; Osório, 2004; see Luce, 2018). For our purposes, and shortly, it is important to understand that Brazil remained predominantly rural as its economy was shaped to meet the interests of core countries and the capitalist circulation. By relying on the production and exportation of raw materials, Brazil and other Latin American countries have served as food suppliers to the international capitalist market. This allowed core countries to focus on more advanced stages of production, notably industrialisation, while relying on foreign trade to meet their subsistence needs. The process of industrialisation—and therefore urbanisation—throughout the 20th century in Brazil is a result of the capitalist development and its renewed international division of labour, where core countries focused on more advanced stages of industrial production and technology, leaving lower stages of industrial production to dependent countries. Until before that new division was required, Brazil maintained its rural economy, which in turn resulted in patterns of punishment that reflected the existing socioeconomic order and its need for reproduction.

Ultimately, this late process of urbanisation, within the specificities here explored, is another key element to help us understand the historical marginality of imprisonment and the

criminal justice. Brazilian low incarceration rates throughout most of the 20th century are therefore a product of the country's condition of dependency.

Poor urbanisation and the informality of punishment

The increasing rural exodus played an important role in influencing patterns and trends of punishment in Brazil. With the migration to more urban zones, prison and the state penal apparatus gained a greater relevance as a mechanism of punishment and social control (see also Melossi, 2013). This is portrayed by Figure 3. The greater increase in incarceration from the 1950s corresponds to a significant change in the Brazilian political economy, entailing the intensification of industrialisation and urbanisation (Marini, 1977/2000: 84-87). For context, agricultural and industrial sectors represented about 45% and 11% of the Brazilian GDP in 1900. In 1960, they represented 17% and 30%, respectively (IBGE, 2006: 347). In 1980, the primary sector represented 11% and the secondary nearly 40% (Pochmann, 2012: 16-17). Many important local and international events and relationships took place throughout this slow and gradual process of urbanisation, from the global Great Depression to the local Vargas dictatorship, for example (Marini, 2000: 75; Antunes, 2016; Fernandes, 1975; Santos, 2000; Freitas and Miranda, 2020). There is one major aspect of this process which directly linked to patterns of punishment: the urban marginalisation experienced by the poor and the respective maintenance of informal punishment in those contexts. While the police and state justice started gaining more prominence in central urban areas (Zaffaroni et al, 2015: 455; Antunes, 2016; Salvatore and Aguirre, 2017; Dal Santo, 2023), this trend did not reach more peripheral urban zones. Just as the poor was left on their own to deal with their issues and

conflicts in rural settings, they remained abandoned in marginalised, poorly developed urban zones.

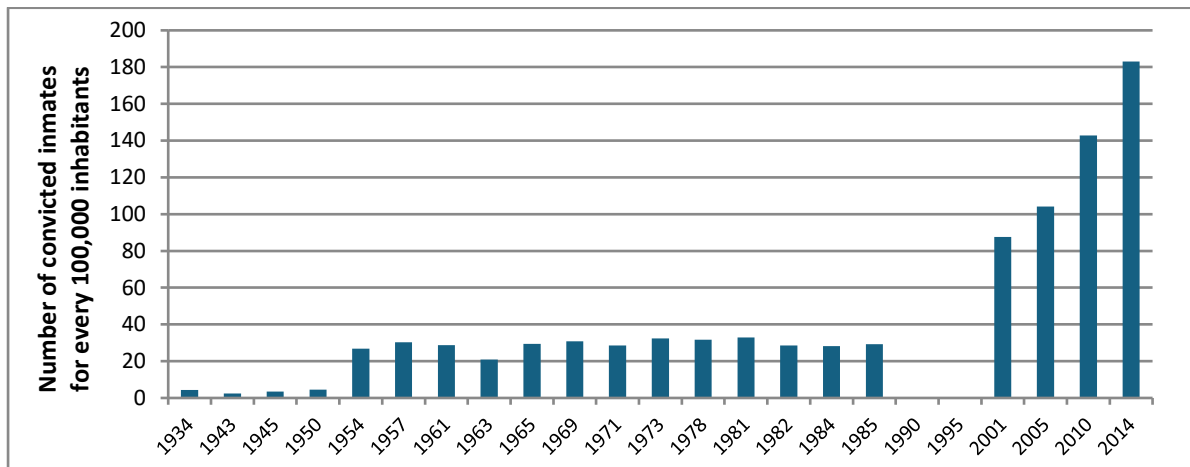


Figure 3. Convict-only incarceration rate (1934-2014)

Source: IBGE, 1937; 1946; 1947; 1953; 1956; 1957; 1963; 1965; 1967; 1971; 1976; 1986; 1988; 1989; 1992; MJ, 2015; 2016.

Back in the late 19th and early 20th centuries, the rural poor started migrating to the cities. In the beginning of the urbanisation and industrialisation processes, the poor used to find shelter in the inner city, near the factory and other places with higher demand for labour. In São Paulo, Rio de Janeiro, and many other cities, *cortiços* (slum tenements) were the most significant popular habitation (Kowarick, 2013; Abreu, 1987; Oliveira, 1996: 75). However, the further development of cities involved a plan of ‘cleaning’ the central areas. *Cortiços* were razed, and the poor were repelled from there, moving to more peripheral areas, to the outskirts (Oliveira, 2013: 47-55; Kowarick, 2013: 50; see also Davis, 2006). If no public policy came up to integrate the Black after slavery abolition, the poor remained excluded from urban planning once again, not being adequately accommodated into the newly socio-geographical configuration. In this urban displacement lies the origins of the *favelas*—though not all settlements in the suburbs are necessarily favelas.

In those metropolitan peripheries, especially but not only in favelas, public services such as electricity, health, sanitation and sewage, tarmacking, and transport are hardly ever provided. Hence, the poor urbanisation—a low-quality urbanisation experienced by poorer sectors of the society. Those spaces are key features of peripheral, dependent states, who are socially unequal, and not only politically uninterested but, under a dependent condition, are structurally unable to address the needs of their working classes (Bambirra, 1972/2013; Cueva, 1983; Evers, 1977/1985; Cotler, 2005; Marini, 1991; Osorio, 2019). Very briefly, among its main roles, the peripheral state must serve the interests of the international capital. This does not only mean adjusting its production as per the needs of core countries and integrated in an established international division of labour. This also means being subservient to a flow and circulation of wealth from inside (local economy) out (global economy). For example, as I explain in the next chapter, the industrialisation process was achieved through foreign investment and external debt. The peripheral state plays a role in mediating the relations of national elites with the interests of international capital, being less concerned with and supportive of national working classes. Ultimately, peripheral states have limited structural capacity to accumulate capital, which reflects in different forms of public service being extremely weak, especially for the more marginalised sectors of society. Just as those basic public services are not provided, neither are justice and security. In that context, where most basic needs such as housing and electricity are addressed through informal and illegal channels (Telles and Hirata, 2007; Telles, 2010), the informality of punishment has persisted as the main form of justice, sometimes alongside extraofficial punitive practices—which I discuss in the next chapter. With the same caveat previously made on predatory crimes unrelated to conflict management, violence and homicide are often instruments of justice and

control of deviant behaviour. Below I touch upon three sorts of informal punishment: interpersonal homicide; lynchings; and by organised crime.

As in rural areas, violent means of interpersonal conflict management as informal, *de facto* justice have had some relevance in marginalised, informal urban settlements. In around the 1960s, in places undergoing a rapid process of urbanisation, such as São Paulo, the social meaning of homicide started to change (Manso, 2016). While the direct interpersonal violence, especially the poor-on-poor one, remained widely accepted and employed, its intensity and frequency soared. In the 1960s, São Paulo city registered rates of homicide at around 6—meaning 6 homicides per 100,000 inhabitants (Manso, 2016). In 1999, it almost reached 70 (Waiselfisz, 2010: 25). This increase was not entirely due to interpersonal conflict management. Several other actors and groups have played a significant role in this upward trend. Yet, by the 1990s, in the peak of violence, interpersonal homicides were those accounting to the larger fraction of the total number of homicide (Manso, 2016: 98). While most homicides took place inside of homes and were a product of close-relationship, emotional conflicts until the 1960s (Fausto, 1984), from there on most homicides were committed in public spaces, being motivated by petty offences and conflicts (Manso, 2016, 98-100). This, however, does not mean petty conflicts did not lead to violent conflict management before. Indeed it did, as indicated earlier. But that earlier violent conflict management would not necessarily take its most extreme form as a homicide. In this context of rapid and poor urbanisation, interpersonal homicide ceased to be predominantly linked to the private sphere and became more present in the public spaces, even though still as means of a private and informal justice.

This 'renewed' direct interpersonal, poor-on-poor violence in marginal and poorly urbanised areas is not only the mere lack of trust and legitimacy of the justice system. It goes beyond that. The penal system is not only perceived as a system that does not deliver justice by restoring conflicts of the poor, but it is also perceived as failing to protect poor lives. As time has passed and homicide has not only not been prevented by the state but actually tolerated, it has become means of survival, a product of feelings of vulnerability and risk (Manso, 2016). In addition to meaning 'killing to deliver justice', it meant 'killing not to be killed'. In both cases, this violence is more of an end in itself, rather than having instrumental purposes (Manso, 2016: 28, 100).

Lynchings are another relevant form of informal punishment present in peripheral and poorer urban spaces. Between one million and one and half million people took part in committed or attempted lynching in Brazil between the 1930s and 1990s (Martins, 2015: 11). This number excludes practices of vigilantism, which are discussed in the next chapter. It only considers practices committed by a multitude that comes together randomly, suddenly and spontaneously to make justice with their own hands, to a person that may or may not be guilty of the crime they are informally accused of (Martins, 2015: 25). Differently from the post-abolition USA or Bolivia, lynchings are predominantly urban in Brazil. They mostly take place in the peripheries of metropolitan zones, such as Greater São Paulo, Rio de Janeiro, and Salvador (Martins, 2015: 26-28, 86-87; Benevides and Ferreira, 1991: 35-37; Sinhoretto, 2002: 40). These are mainly neighbourhoods where people from countryside and rural settings moved to (Martins, 2015: 28, 48). As Martins (2015: 86) alerts, 'the city increasingly receives, but does not welcome; rather, tends to marginalise'. Scholars that have researched lynchings in Brazil emphasise that this physical violence is only one among many other forms of violence experienced in a setting of huge economic marginalisation, which comprises 'the daily

violence of unemployed, malnutrition, precarious housing, and inadequate health and transportation services' (Benevides and Ferreira, 1991: 35). In these settings of daily violence and lack of essential services provided by the state, penal institutions are one among other public institutions perceived by residents as inoperative, unusable, or fictional. There is a widespread disbelief in 'police effectiveness and court justice' (Benevides and Ferreira, 1991: 35-40; Martins, 2015: 27), which is often illustrated by the tiny percentage of crimes reported to the police by victims in Brazil (Sinhoretto, 2002: 117; Benevides and Ferreira, 1991: 41; Caldeira, 2000). In this sense, these peripheral urban zones are almost an extension of those rural settings, not only as a destination in the pursuit of better opportunities, but also where their dwellers are left to fend for themselves. Therefore, in several marginalised urban spaces, residents take the law into their own hands.

Similar to those interpersonal killings, lynchings are not primarily instrumental in the Brazilian context. They are not enforced to repress or control crime, nor are they means of territorial or personal control, neither do they represent ethnic or social cleansing. They usually take shape as thoughtless acts of revenge, or even expiation (Martins, 2015: 26). They mostly follow cases of presumed 'blood' crimes or other offences against the person, and, in a smaller scale, property crimes and violations of principles of social conviviality and civility (Martins, 2015: 52-55). As Martins (2015: 53) claims, even what is formally framed as 'property crime' becomes, in practice, closer to a perception of being crimes against the person, their survival, and that of their family, especially because the victim is often a poor worker—e.g., burglary when the victim is out at work, robbery in payday, or robbery against small, local shopkeepers. Concerning violations of principles of social conviviality and civility, careless or dangerous driving followed by hit-and-run is a good illustration (Martins, 2015: 54-55). Despite being similar to interpersonal killings regarding their vengeful character, lynchings

are different in two ways: while the former is often related to petty conflicts, the latter is mostly committed in presumed cases of more serious offences. Besides, while the former is essentially private—despite taking place in public zones—the latter assumes a form of public conflict management or vengeance, as people come together expressing that the violation of certain values and norms are intolerable (Martins, 2015: 27, 103-104), even if not in an organised, thoughtful way.

Besides informal punitive practices centred on retributivist purposes, poorly developed and marginalised urban spaces have comprised another sort of killings and violence as informal punishment: those enforced by organised criminal organisations. This sort of informal punishment does not work merely as revenge but is better understood within a wider context of governance and authority, being a consequence of the territorial control exerted by criminal groups in peripheral urban neighbourhoods. I now turn my attention to the informal justice of the *Primeiro Comando da Capital* (PCC) in São Paulo.

PCC is an criminal organisation that emerged as a prison collective in the early 1990s (Jozino, 2004; Biondi, 2016/2010). With time, this organisation became a powerful player in the illegal market (Manso and Dias, 2018; Feltran, 2021; 2020; 2018). Eventually, with their increasing power and influence, they have not only regulated important aspects of social life, such as clandestine transport (Hirata, 2010) but assumed a larger role in wider governance and ‘regulation of life and death’ (Willis, 2015) in São Paulo urban peripheries (Feltran, 2010; 2018). Several organised crime groups hold considerable power in different regions in Brazil and some of them play a larger role of wider governance in their communities, mostly in urban peripheries. These groups can exert governance in different ways. Governing through terror and violence has been common, especially in contexts where there is struggle for hegemony

between rival groups (Dias, 2011; Feltran, 2018; 2021: 201). Even once hegemony is obtained, terror and violence can still be means of governance and control. However, PCC has recently shown a more complex way of governance.

Up until the 1970s, 'the crime'—the world of criminals—was not highly organised and structured in Brazil. By then, most criminal groups were more like minor gangs fighting each other for survival, power, and consolidation (Manso, 2016; Ramalho, 1979/2008). Drugs and guns were still increasingly being spread across some regions. More organised criminal groups were beginning to be formed in Rio de Janeiro, in the 1980s, and in São Paulo, in the 1990s (Amorim, 1993; Lima, 2001; Jozino, 2004). Before and even during the expansion of these more organised groups, interpersonal killings were the rule of conflict management. In São Paulo, the consolidation of PCC has changed patterns of governance, punishment, and control in the territories they control. After a significant decrease in homicide numbers of around 80% in a 15-year period, São Paulo has now the lowest homicide rate in the country. In some peripheral neighbourhoods and districts in the outskirts of São Paulo, homicide rates were higher than 100 per 100,000 inhabitants in the 1990s (Feltran, 2010: 195). Jardim Ângela, for example, a district located in the outskirts of São Paulo, was considered by UNESCO the most violent place in the world, with a homicide rate of 116,23 per 100,000 inhabitants in 1996 (Dimenstein, 2006). This huge decrease is mostly attributed to the influence of PCC (Feltran, 2010; Hirata, 2010; Willis, 2015; Manso and Dias, 2017; Telles, 2010). Homicide as informal punishment and interpersonal conflict management—without their approval—has been forbidden by them. This trend is rather complex and involve many other elements that I cannot address here.

It is worth mentioning here—and illustrating how informal punitive practices persist in urban peripheries—that the PCC established their own ‘crime court’ or ‘PCC tribunal’. These crime courts are informal mechanisms of conflict management (Biondi, 2010/2016; Feltran, 2010; 2018; Marques, 2009; Hirata, 2010; Teles, 2010). Cases subject to their trial go from minor personal conflicts or violations of norms of coexistence established by them to serious crimes such as homicide and sexual violence. It of course includes solving conflicts related to their own criminal activity—for example, in a case of whistleblowing or when a member of the criminal organisation appropriates money from their illegal activities. Their jurors are composed of their own PCC members—depending on the circumstances, it may include even imprisoned members, who participate through videocalls. In their trial—or the *debates*—‘there is room for extensive argumentation on both the prosecution's side and, above all, the defence's side’ (Feltran, 2018: 179), including the presence of witnesses.

Only after the verdict a homicide as informal punishment can be enforced. Rather than informally sentencing people to death, the crime court more likely authorises a killing to someone seeking justice or vengeance. Yet killings are now a last resort, with milder forms of punishment being the rule. Aligned with their goal to ‘repair damages with the minimal use of violence’ (Feltran, 2018: 180), their sentence can be mere warnings or forms of reparation—for example returning a stolen good and apologising to the victim. It can also include non-violent but more serious forms of punishment, such as expulsion from the community, and violent punishment less severe than homicide, such as beatings—as shown in Figure 4.



Figure 4. Punishment of beating following a crime court sentence
Source: Metrópolis (Henrique, 2023)

Most importantly, their authority and legitimacy as mechanisms of justice and punishment is widely acknowledged by non-criminal residents of these urban peripheries. The residents themselves report these crimes and conflicts to PCC. Sometimes only after reporting firstly to the police and not having their situation addressed. Sometimes directly to PCC, either for their legitimacy or efficiency in dealing with crimes and conflicts reported to them (Feltran, 2018: 179-201; Willis, 2015: 49-71). Ultimately, PCC is an illustration of informal justice, regulating

life and death through their own crime court in the urban periphery, where state justice hardly ever reaches.

While PCC is considered by many non-criminal residents of urban peripheries as a legitimate instrument of justice and punishment—or at least the only one available—it is not an exaggeration to assert they have operated with the tacit consent of the state. There are reports, for example, of cases where PCC tribunal jurors received information by the police (Feltran, 2018: 184). There is also a belief—by scholars and even police officers—that there has been a peace ‘agreement between high-level state politicians and leaders of the PCC’ (Willis, 2015: 45) following spikes of conflict between PCC and the police. Even if not openly and materially supported, there is some sort of ‘killing consensus’ (Willis, 2015) in which the regulation over life and death by the PCC is recognised and tolerated by the police. This tolerance is, in last instance, reinforced by state inaction and disinterest, mostly represented by the lack of investigation, be that on officially recognised annual tens of thousands of homicides (Dal Santo, 2022) or ‘mundane disappearances’ (Willis, 2021) of people from urban peripheries—the latter being often dumped in mass graves (Willis, 2021), as shown in Figure 5. To every 100 homicides in Brazil, the Brazilian state cannot even identify the perpetrator in at least 92 cases (CNMP, 2012). In some cases, not only the crime perpetrator is not identified, but even the victim remains unknown: by 2022, there were over 25,000 remains of unidentified victims (Rossi et al., 2022). Besides, almost 80,000 were officially considered disappeared in 2019 in Brazil (FBSP, 2020; see also Willis, 2022). As a rule, the life—or even the disappearance and death—of these urban poor is not capable of mobilising the Brazilian state. If, in the last instance, they are ‘left to die’ (Dal Santo, 2022), it is certain that there is at least a tacit consent for informal forms of punishment and government.



Figure 5. Mass grave found by the police near Jardim Ângela, on the outskirts of São Paulo, in 2016

Source: Marcio Fernandes, Estadão (Ribeiro, 2016).

Overall, almost as an extension of rural settings, informal punitive practices prevail in poorly urbanised zones. In practice, these peripheral areas that accommodate the urban poor are abandoned by the Brazilian state, which, as an intrinsic feature of a peripheral, dependent state, is both incapable and uninterested in addressing the needs of its lower classes, including of managing their conflicts. In these areas, people are left to their own devices, a dynamic that used to be the rule in rural Brazil.

Conclusion

In this chapter I have explained why Brazilian incarceration rates were relatively low up to 1990, being similar to those of Scandinavian countries. In a context of slavery, where society

was basically composed of two major groups—slave owners and enslaved people—domestic corporal punishment used to prevail, as it did in other slaveholding societies (Sellin, 1976). After slavery abolition, little changed in terms of dynamics of power. Previously enslaved workers became free but dispossessed. Brazil remained predominantly rural up to the 1970s, and the rural setting was marked by huge concentration of lands, socioeconomic inequality, and dependence. In that context, powerful local men had their own ‘free but dispossessed’ people as *agregados*, who were in practice instruments of punishment, control, and justice. In turn, among themselves, the poor only had their own hands—therefore violence—as mechanisms of conflict management at their disposal. In both slaveholding and post-abolition rural Brazil, state punishment did not have a larger role to play. For the dominant class, domestic punishment was a much more effective instrument of discipline and control. For the poor, private forms of punishment and conflict management was the only available mechanism of justice.

Directly linked with its condition of dependent state in the global periphery, the process of urbanisation started late and left significant sections of the society marginalised in its urban peripheries. The dependent state was not able to provide basic needs for its marginalised urban poor. In that state of neglect, not only did individuals take justice into their hands, reproducing the informality of punishment. The dependent Brazilian state has—even if tacitly—consent to this prevailing informal punishment in its peripheries. It has neglected the existence of the peripheral urban poor, leaving them to deal with their own issues and conflicts.

By explaining why and how incarceration rates were significantly low in Brazil, this chapter has also shed light on an overlooked aspect of the literature on punishment and

society. In these analysis—mostly based on core countries—state typologies are usually organised as either welfare or neoliberal, or either authoritarian or liberal. In this chapter, I have highlighted how features and conditions of a peripheral, dependent state shape penalty. Both as a colony and then a dependent state, Brazil occupied a role in supplying raw materials to the international capitalist market. Organised as a predominantly rural and extremely unequal country, the need for a state criminal justice was secondary for most of its history. Planters, then large landowners were powerful enough to govern their own rural social organisations. The late process of urban development highlighted another feature of peripheral, dependent states. These states are first and foremost concerned with attending the demands of the international capitalist order while responding to local elite interests, which is often conflictive with addressing the needs of their lower classes. In ignoring their most basic needs, rural migrants are not fully incorporated into the urban centres, and remain marginalised in urban peripheries, where most of the services they have are provided informally, from sewage, tarmacking, and transport, to justice and punishment.

The informality of punishment, responsible for keeping incarceration rates low in Brazil, has been a key feature of peripheral states (Pratten and Sen, 2007a; Buur and Jensen, 2004; Kirsch and Gratz, 2010; Steinberg, 2004; Cooper-Knock and Owen, 2014; Fourchard, 2008; Hansen and Stepputat, 2009; Godoy, 2006; Comaroff and Comaroff, 2006a). Throughout this chapter, I have used several close categories: domestic punishment, private punishment, and informal punishment. Domestic punishment refers to the system of practices of punishment and control defined and enforced by an almost sovereign private actor—in our context, first the planters, then large landowners. These practices are a representation of their unregulated power and have instrumental purposes: the maintenance of their dominant order. It is their rule, in which punishment and control are enforced by their private ‘security

staff'—be them *feitores*, *capitães-do-mato*, or *agregados*. Private punishment is in turn represented by interpersonal conflict management. It often but not always takes shape as a poor-on-poor homicide, and is generally an end in itself, having a more retributivist feature. Private punishment has been a practice observed both in rural and peripheral urban zones. Finally, informal punishment is a more generic category. It comprises non-instrumental interpersonal conflict management, lynchings—that despite being spontaneous and vindictive also signal a communal intolerance to certain behaviours—and more organised punitive practices which are instruments of governance, obedience, and order, but enforced by non-state actors. Informal punishment is not confined to private settings, and often take place in public spaces, particularly in peripheral urban areas.

Despite placing an important role in the particular rural social structure to keep low incarceration rates, I have mentioned that Brazil became predominantly urban in the 1970s. Yet incarceration rates did not increase more significantly and consistently until the 1990s. The predominance of informal punishment in peripheral urban settings only provides a partial response to this puzzle. This state abandonment is only one face of the peripheral state. One with a very specific location: in their own (urban) peripheral zones. However, the peripheral state has another face, which is more dominant in another setting: the urban centres. In the next chapter, I explain how state punishment has taken shape in the first few decades of urbanisation, and why it did not immediately impact a more significant increase in incarceration rates.

Chapter Five

From hidden to official state punishment

Authoritarianism, institutional capacity, and the rise of a protagonist judiciary

In the previous chapter, I started explaining why Brazilian incarceration rates were significantly low—in an international perspective—until 1990. The predominance of informal punishment in a late urbanised country played a large role in this process. It does not, however, provide a full answer, particularly since the intensified process of urbanisation and industrialisation from the 1960s was not followed by an intensified growth in incarceration rates. This was shown on Figure 3 on convict-only incarceration rates, which rose significantly from the 1940s to the 1950s, but then remained stable until the 1980s. Understanding this apparent stability requires attention to another common feature of peripheral, dependent countries: authoritarianism manifested through hidden state punishment—state punitive practices that do not appear in official statistics, as this chapter demonstrates (see also Aniyar de Castro, 1983, 1987). The process of intensified urbanisation did result in the expansion of the state penal apparatus. It did not result in the increase of incarceration rates as the state penal apparatus often operated in hidden forms, combining, for example, a different pattern of incarceration—unregulated police detention, not imprisonment—and a different state response—extraofficial killings, not imprisonment. In this chapter, I analyse the transition from hidden to official state punishment. In the first section, I analyse the increase in the

institutional capacity to punish from the 1950s. In the second, I show how unregulated police detention, as a product of police vigilantism, prevailed until the re-democratisation. In the third, I highlight another feature of authoritarianism and hidden state punishment: extraofficial killings. In the fourth, I analyse the outsourcing of extraofficial punishment. Finally, I explain how the transition from the dictatorship to democracy in the late 1980s meant a transition from hidden to official state punishment and resulted in an expanded criminal justice with a protagonist judiciary.

Industrialisation, urbanisation, and institutional capacity to punish in the periphery

Despite informal punishment playing a significant role in peripheral urban areas, urban development has made the criminal justice become more relevant as a state mechanism of social control and order (re)production. Figure 3 partially shows that, portraying a significant increase in convicted rates in the 1950s. But that figure might be not too convincing to support this argument, as it shows stability in rates of convicted inmates between the 1960s and the 1980s. A subtle but crucial detail on the sort of data represented in that Figure had gone unnoticed or undermined in the literature until my Master's thesis (Dal Santo, 2018): the data provided by IBGE National Yearbooks rarely refers to the total prison population, being more systematically limited to convicted prisoners. Some Yearbooks also include the number of arrests made annually, and looking at this information allows us to identify the presumed increase in the use of the criminal justice not portrayed in the figure on convicted prisoners only. This is now shown by Figure 6.

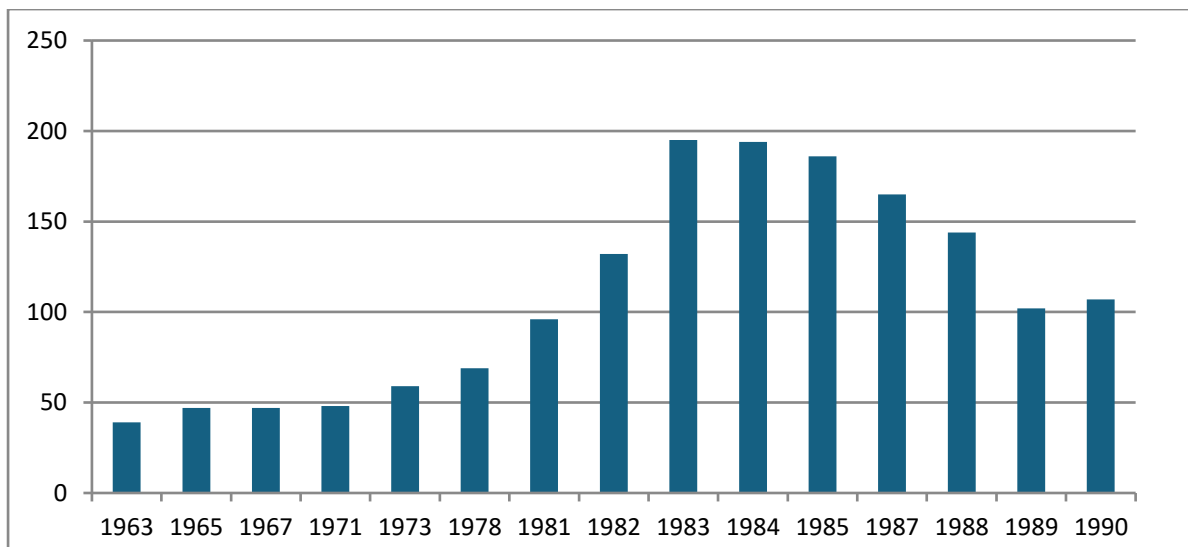


Figure 6. Number of annual arrests for every 100,000 inhabitants

Source: IBGE, 1965; 1967; 1969; 1973; 1976; 1981; 1982; 1984; 1986; 1988; 1989; 1990; 1992; 1993.

For us to understand this apparent paradox between increasing arrests and stable convicted prisoners—and, in so doing, understand the relatively low incarceration rates by 1990 in Brazil—we have to understand the change in state capacity during the civil-military dictatorship, and the transition in nature and pattern of state penal responses after the Brazilian transition to democracy in the 1980s. Let us now examine the changes in the institutional capacity to punish promoted under the dictatorial regime.

The penal system apparatus enlargement during civil-military dictatorship in Brazil is a clear condition of possibility for mass incarceration. As argued above, with the urban migration began a transition from domestic and informal to state punishment. The police apparatus became more relevant in the production and reproduction of social relations. The development of a new social order demanded that transition. These processes of urbanisation and enlargement of the penal system did not take place as unrelated trends. They took place in a period of industrialisation and economic growth in Brazil promoted during the civil-military dictatorship, once again inserted into the international capitalist order. It is therefore important to consider how the processes of industrialisation and economic development

affected and were affected by relations of dependency, and how this context shaped socioeconomic and institutional features of the Brazilian state, reverberating into its trends and patterns of punishment.

The movement towards industrialisation, which began as an Import Substitution Industrialisation in the first half of the 20th century, grew more intensely during the civil-military dictatorship. The industrial sector, that represented 20% of the Brazilian GDP in 1950, almost reached 40% in 1980, with the agricultural sector shrinking to 11% after representing almost 50% in the beginning of the century (Pochmann, 2012: 16; IBGE, 2006: 347). The military regime promoted a tax reform that expanded the revenue base and increased public resources. The government, in turn, invested money in sectors that despite not being profitable or having initial low profitability, are essential for economic growth and development, such as energy, roads, steel, and telecommunications. Especially between the mid-1960s and mid-1970s, the country achieved a significant and intense economic growth, with GDP growing around 10% annually. This growth, however, was also backed up by external debt and wage squeeze. In 1967, Brazil became the fourth-largest recipient of so-called 'aid' from the United States Agency for International Development. In 1968, foreign debt represented just 7% of the country's reserves; by 1973, it had surged to 51% (Netto, 2014: 148-151). This model of economic growth represented a readjustment of the Brazilian economy aligned with the international capitalist order, intensifying the country's dependency and promoting perverse socioeconomic results.

The industrialisation—that led to urbanisation—in Brazil attended the needs of an expanding economy of core countries, notably the USA (Netto, 2014; Bambilra, 1972/2013; Santos, 2020; Marini, 1977/2000). Investing capital in foreign countries (exporting capital) is a

constitutive aspect of imperialism (Lenin, 1917/2010: 61-65). The Brazilian industrialisation based on foreign capital investment and import of machinery favoured imperialist interests in several ways. First, the overaccumulation experienced by core countries drove their corporations to internationalise their production processes. Second, by developing an industrial park beyond their borders, it allowed Brazil—a dependent country—to incorporate machinery made obsolete due to the intense technological development. Third, the industrialisation of dependent countries enabled core countries to concentrate on most advanced stages of industrial production and on the monopoly of the most developed technologies. Inferior stages in the industrial process were transferred to dependent countries, establishing a new international division of labour (Marini, 1977/2000: 68, 145). The denationalisation of the Brazilian economy corroborates how the national conditions suited international interests: in 1974, over 40% of the 200 industrial companies with the highest revenues in the country were foreign-owned, with 35% being state-owned and less than a quarter owned by domestic private capital (Netto, 2014: 149). Despite the rhetoric domain not necessarily corresponding to the concrete reality, a public statement by General Juracy Magalhães, then Minister of Foreign Relations of the military regime, is very representative of the national elites' acceptance of their subordinated role to the US imperialism: 'what is good for the United States is good for Brazil'.

If dependency is the key to understanding industrialisation in Brazil from an international perspective, social inequality is the key to understanding it in the national domain. The reduction in the real value of wages was a crucial aspect of the national plan of economic growth. I mentioned earlier that rural Brazil was characterised by huge land concentration. With no or low prospects for a better life in the fields, industrialisation attracted a rural exodus. As a consequence, a reserve army of labour was formed, keeping

wages low and enabling greater capital accumulation. The low production cost was in fact one element to incentive foreign investments. These factors combined produced economic growth with wealth concentration, as shown by the rise in both per capita income and the Gini Index between 1964 and 1985 (Pochmann, 2012: 14-15). While the richest 5% held 27% of the country's wealth in 1960, by 1976 their share had risen to nearly 40% (Netto, 2014: 156).

In order to be enforced, that perverse socioeconomic reality comprising increasing inequality and super-exploitation of labour demanded stronger coercive mechanisms. It was in that context that the penal system became the key mechanism of social control, repression, and governance. The penal system was not merely expanded but significantly developed in terms of intelligence and information systems. Despite not being the crudest among the South American dictatorships in terms of killings (Pereira, 2008), the Brazilian dictatorship was the one that lasted longer in the region. The use of force and arbitrariness permeated society in all its domains. Suppression of political mandates, persecution of workers' and peasants' leaders, slaughter of indigenous people to expand mining and agriculture, closure of unions, censorship, torture, illegal arrests, forced disappearances, and killing of political dissidents are some features that constituted state terrorism (Godoy, 2014; Teles and Safatle, 2010; Pinheiro, 1997; Netto, 2014; Filho et al., 2016). The development of this repressive apparatus was one of the main roles of the state. That economic model could not have been enforced without an effective penal apparatus to repress political opposition and resistance of workers, and to threat marginalised populations in general, which highlights the key status possessed by the penal system as a mechanism of governance and control. The development of both the economic model and the repressive apparatus by the military regime in times of industrialisation and urbanisation were promoted to address the needs not of the masses, but of international capital and national elites. As an instrument of domination, political stability,

and reproduction of a dependent capitalism, the peripheral and dependent state relies on systematically greater levels of repression (Bambirra, 1972/2013; Netto, 2014; Cueva, 1983; Evers, 1977/1985; Marini, 1991; Fernandes, 1979/2019; Osorio, 2019). The authoritarian feature of peripheral states is therefore almost a precondition to ensure that the capitalist system continues to function smoothly despite growing inequality.

The increase in levels and forms of repression by the Brazilian state during the military dictatorship was significant. This took shape through different ways and in different domains, such as legislative changes, development of new practices and institutions, and through the expansion of the penal system. The evolution in the ratio of public security personnel per every 100,000 inhabitants illustrates this well. As shown in Figure 7, elaborated from IBGE Yearbooks data, this ratio was 23.28 in 1946. In the following years, it increased only subtly—23.98 in 1949 and 25.89 in 1953. The ratio rose more significantly to 47.5 in 1958, but remained relatively stable until before the dictatorship, reaching 51.85 in 1963. In 1968, in the first years of the civil-military dictatorship, this ratio soared to 88.5, increasing over 70% in five years. Only three years later, it more than doubled, reaching 184. The lack of data or of detailed information on public security personnel in Yearbooks published in following years prevents me from analysing a longer period. Nonetheless, Figure 7 portrays well the relevance of the civil-military dictatorship in expanding the penal system and, consequently, the state institutional capacity to control and punish.

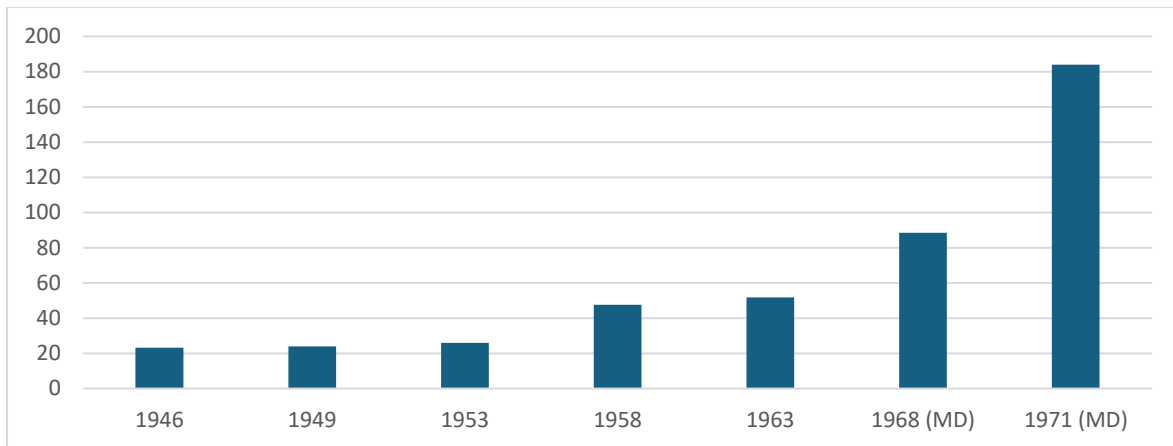


Figure 7. Ratio of public security personnel per 100,000 inhabitants

Sources: IBGE, 1948: 520-521; 1960: 398; 1970: 743; 1975: 966.

As crucial as analysing the expansion of the penal system regarding its institutional reach and repressive functions, it is equally important to understand the political-economic mechanisms that financed and sustained this process. Three major forces participated in this configuration: the state, private capital, and the US government. As mentioned earlier, the military regime promoted a tax reform that allowed the state to centralise resources. More than simply increasing state revenue, the military regime reoriented public expenditure: the proportional public spending on education and health decreased respectively from 7.74% and 2.71% to 4.95% and 0.99% between 1968 and 1974. In the opposite direction, funds allocated to public defence—which includes the police—more than tripled in absolute figures (Netto, 2014: 108, 157; see also Battibugli, 2007: 115-137). Private capital also played a role, even if significantly minor, in directly supporting the state repressive apparatus. Executives from both international and national companies—including Ford, GM, Camargo Corrêa, Bradesco, Ultragas—provided financial and material support (Godoy, 2014: 443; Netto, 2014: 137, 278-279). Finally, the USA government also contributed more significantly to this development. Besides providing training, equipment, and instruction to public security agencies through aid programmes and partnerships, the US government also provided direct financial support to

the Brazilian police (Netto, 2014: 38-39, 160-161; Huggins, 1998; Battibugli, 2007: 138-161). This coalition, representative of the usefulness of a strong repressive apparatus in the periphery, explains a trend observed by Evers (1977/1985: 167-168): the fact that—at least in some contexts—the repressive apparatus of a dependent country may very well be far more ‘modern’ or developed than other institutions in the peripheral setting they operate.

The specific needs of a dependent state promoting industrialisation and urbanisation explains the massive expansion and the qualitative transformation of the state penal apparatus. It does not, however, explain why the rates of convicted inmates remained stable between the 1950s and the 1980s. To explain it, I now discuss a major feature of peripheral states: hidden state punishment. In our context, this comprises three main trends: unregulated police detention, extraofficial killings, and outsourced extraofficial punishment.

Unregulated police detention: an extraofficial pattern of incarceration

One important element responsible for keeping the ‘official picture’ of incarceration rates low in Brazil until 1990 is the historical predominant use of unregulated police detention over imprisonment. The former means short-period custody, mostly a product of unregulated police action, being often unrelated to crimes. The latter is of relatively mid- or long duration, resulting from a sentence passed by judges after a criminal behaviour. In Brazil, unregulated police detention was formally abolished only with the Federal Constitution of 1988. Although its origins date back to the 19th century, this pattern of incarceration is a key element for understanding the boom in mass incarceration during the 1990s.

Unregulated police detention relates to several other issues discussed so far. As mentioned in the previous chapter, the increasing liberation of enslaved Black people represented, in the minds of the Brazilian ruling class throughout the 19th century, an imminent risk to the exploitative social order. Black people were responsible for an increasing ‘white fear’ (Azevedo, 1987). Several scholars argue that the activities of the Empire of Brazil (1822–1889) were focused on controlling enslaved and formerly enslaved people especially in the first urban centres (Flauzina, 2006; Koerner, 2006), to prevent an insurrection from Black people as occurred in Haiti. Zaffaroni and colleagues (2015: 428) argue this period is responsible for the ‘roots of police authoritarianism and Brazilian vigilantism’.

In response to the liberation of enslaved people, several mechanisms aimed at controlling them—and maintaining relations of dominance—were set up. Some behaviours were criminalised in a clear attempt to criminalise former slaves. A good illustration is the criminalisation of capoeira—a combination of martial art, music and dance, played originally by enslaved African people in Brazil. However, despite being formally criminalised in 1890, capoeira was already the main reason for slaves to be arrested in Rio de Janeiro in about the 1850s (Araújo, 2017: 261). In that liberation period, vague mechanisms to increase the discretion of judges and the police were established. Take the power initially given to judges, in 1832, and then expanded to police chiefs in 1841, of detaining for up to 30 days anyone suspected to be planning to commit crime (Zaffaroni et al., 2015: 424). That was the context in which the old seignorial power was giving place to the police empowerment (Duarte, 1988: 210). Urban police were becoming the new overseer.

Although unregulated police detention persisted for over a century (19th and 20th), the alleged reasons for its enforcement varied over time and space. In the context of enslaved

people's liberation and urban migration, Black people and *pardos* used to be detained by the police under the suspicion of being slaves on the run (Koerner, 2006: 219). In 1840, offences against the vague figure of 'public order' were the reason for about 65% of all arrests in Rio de Janeiro (Flauzina, 2006: 58). A similar reality was observed in Pernambuco between the late 19th and early 20th century (Huggins, 1985: 84–85). Between 1892 and 1916, over 80% of arrests made in São Paulo were based on misdemeanours or were detention for police questioning (Fausto, 1984: 33). In São Paulo, misdemeanours were mainly drunkenness and disorder (Fausto, 1984: 37), whereas in Rio de Janeiro, vagrancy was the main category, and capoeira had a significantly higher representation (IBGE, 1927: 377). A key difference between those cities is that the Black population was significantly higher in Rio de Janeiro, whereas (white) immigrants, who had just arrived to compose a then-emerging working class in a state-promoted attempt of whitening the national population (Azevedo, 1987; Nascimento, 1978/2016), were the majority in São Paulo. In the first decades of the 20th century, in the first stages of industrialisation, not only vagrants and homeless, but also communists and anarchists became targets of this instrument of control and repression (Zaffaroni et al., 2015: 455; Antunes, 2016; Salvatore and Aguirre, 2017; Cancelli, 1994).

These detentions were mainly focused on controlling and producing public order by controlling considered risky people. They were not aimed at containing criminality, nor at 'reforming' criminals. Available data from late 19th- and early 20th-century illustrate well the nature and pattern of these detentions. According to Fausto (1984: 31), 3,466 people were in custody in São Paulo in 1893, but only 329 police inquiries were filed. In 1905, 11,036 people were in custody and 794 police inquiries were filed. This large disproportion between arrests and police inquiries was similar in Rio de Janeiro (Bretas, 1997). Data from Recife House of Detention from 1860 to 1922 show that '50% of the referrals to [that prison] left within three

days of arrival; two-thirds were released within two weeks' (Huggins, 1985: 79). Similarly, in Rio de Janeiro, most prisoners experienced incarceration for less than a week in late 19th century (Jean, 2017: 681-682). Hence the centrality of short-term detentions not dependent upon any judicial activity or control, but mostly a product of police activity.

A key feature of incarceration until the transition to democracy is the relevance of the police in shaping its patterns. Throughout history, the Brazilian police would often keep people in custody without even registering the detention—a common practice during the civil-military dictatorship (Manso, 2016: 34; Battibugli, 2007). More than police inquiries not following arrests, at times not even arrests would be formally registered. In the more occasional situations when incarceration was legally ordered by the judiciary and lasted longer than a few days or weeks, the police would often have the practical authority to keep inmates in prison even after they had served their sentence. If the police were questioned and asked to provide information on such practices, they would simply claim that the inmate's release posed a threat to social order (Cancelli, 1994: 209-215). As a result, judicial norms and a legal order were in practice inexistent or disregarded. Incarceration used to be ultimately a product of police discretion.

This pattern of incarceration helps us to understand the use of carceral facilities before mass incarceration. During the civil-military dictatorship, unregulated police detention reached its peak. Arrests based on vagrancy, administrative arrests, and 'for police questioning' were among the most frequent categories of arrests registered (IBGE, 1976, 1986). Teixeira (2012) claims that detention for police questioning amounted to 95% of all arrests made in Brazil in the 1970s. Not carrying an identity document was enough to trigger this sort of detention. These arrests were not ordered nor controlled by judicial activity. What

followed them were mere detentions—arrested people would only remain in custody for a few days or hours. On some occasions, after a short period in detention, the police would release the detainee. On others, particularly in cases of unregistered arbitrary arrests, the police would take the suspect to clandestine detention centres instead and kill the detainee afterwards, before dumping the body along highways, in clandestine graves or thrown in rivers—something I explore in greater depth next. As Godoy (2014: 312) argues, ‘what mattered to the DOI¹ was the gathering of information, and not imprisonment’, so the period of incarceration following arrests made by the police did not usually consist of an imprisonment, but a short-term detention—that could in turn result in release or assassination. Either way, unregulated police detention, a key feature of police authoritarianism, extra-legality, and hidden state punishment, was largely responsible for keeping imprisonment rates low, hiding punitiveness from official records.

Extraofficial killings

Alongside extraofficial incarceration—or unregulated police detention—extraofficial killings function as another mechanism of hidden state punishment. In the previous chapter, I discussed how homicides have been means of informal punishment. I now analyse how homicides have also been an instrument of state punishment, even if in extraofficial ways.

When analysing domestic punishment, I highlighted a few exceptional circumstances when state apparatus was mobilised to act in defence of the dominant social order. Notably in response to insurrections, that mobilisation was mostly translated into killings. That was

¹ Acronym for Information Operations Detachment, a repressive unit developed during the civil-military dictatorship.

the case both with slaves who attacked their masters and rebelled against the slaveholding social order, and with the rural poor who uprose for land distribution. Against insurrectionary slaves, death penalty; against the insurrectionary landless, repression and extermination by the army. In the context of urbanisation, state lethality took a different shape, assuming an extraofficial form. The rapidly and poorly urbanised neighbourhoods forming from the 1950s did not only mean different sorts of daily violence to their residents. It also meant a threat to residents of more traditional neighbourhoods and to those already settled into the cities (Manso, 2020: 116). An increased sense of vulnerability and disorder portrayed—and at times boosted—by newspapers focusing on the emergent street criminality made room for the emergence of paramilitary death squads (Bicudo, 1976; Misse, 1999; Manso, 2016; 2020).

Death squads emerged in Brazil firstly in Rio de Janeiro, in about the 1950s. In the Brazilian context, the expression *esquadrões da morte* (death squads) is usually employed to refer to groups composed of off-duty police. The first death squad is believed to have been formed by the orders of the Rio de Janeiro chief of police in response to economic and social pressure from the Commercial Association and sectors of the population (Manso, 2020: 117), especially to deal with increasing robbery. At that time, the figure of the *malandro*—urban trickster or clever rogue—was gradually replaced by that of *marginal*—more violent criminal—representing a new form of criminality (Misse, 1999). The first death squad emerged in this context. Sometimes, after killing someone, these off-duty policemen would call a journalist and inform that a *presunto* (literally ‘ham’, a derogatory way to refer to a dead body) had been dumped in a certain location (Manso, 2020: 117-121). Celebrated by the media and supported by sectors of the population, the practices of extermination by this specific group started to be mirrored by other groups of police in Rio de Janeiro and, in the following decade, across the country.

In addition to the pressure out of the feeling of vulnerability in a perceived context of increasing street criminality, revenge for a fellow policeman killed by criminals often played an important role in the rise of squad deaths. This motivated the establishment of two of the most famous death squads in Brazil: the *Scuderie le Cocq*, in Rio de Janeiro, in 1964; and the *Esquadrão da Morte* in São Paulo, in 1968 (Huggins, 1997: 213-214; Manso, 2016: 38; 2020: 118-121; Bicudo, 1976). In both cases, the death squads sworn to respond the death of one police officer with the killing of ten criminals—a vengeful practice that has not gone away yet (e.g., Kruse 2023; Duarte, 2023). Despite sharing similarities in their vengeful motivations, death squad practices differ significantly from informal punishment of interpersonal killings and lynchings. First, they emerged from within state penal apparatuses. Second, they were not practices of individuals isolated, nor were they a spontaneous gathering of random people. They were organised. Third, their practices were not an end in itself. More than revenge, death squad killings represented social cleansing (Misse, 1999; Manso, 2016). They were groups of off-duty state penal actors seeking to clean the urban space from the scums, from the ‘bad’ poor that resort to crime for their livelihood—or from those that resemble the socially-constructed figure of criminal. Despite claiming to be acting in defence of the family, the worker, and the community (Manso, 2020: 120-121, Huggins, 1997: 215), squad death members were often paid by businessmen, making them serve both political and commercial interests (Huggins, 1997: 211-224), resonating more to private rather than public interests.

One point in common with the previously discussed instances of informal justice is the disbelief in state punishment. However, while the poor-on-poor killings and general violence emerge in a context where the informal punisher perceives the state justice system as something not made for them—i.e., the penal system not working to make justice for the poor nor to serve their interests and needs—death squad members, who are members of the penal

system themselves, believe that state legal punishment is ineffective, the courts are too slow, the proceedings are too bureaucratic, and therefore legal justice is dysfunctional. In this case, as Manso (2016: 57) puts it, ‘homicide appears as a shortcut to punishment without having to deal with the inefficient and corrupt justice system’. It is illustrative that several victims of death squads were actually taken from holding cells of Tiradentes Prison before being killed and dumped along highways (Bicudo, 1976: 76-78). Death squads are therefore believed—by their members, incumbent politicians, and some sectors of the society—to be a more efficient way to clean society from criminals.

Especially during the first half of the military dictatorship, from the late 1960s to the mid-1970s, the main target of death squads changed. They were not the urban poor whose image was projected as criminals. They were the communists, the opposition to the military dictatorial regime. Those were the times of urban guerrillas, and state killings were once again an instrument of counter-insurgency. It was in this period that extraofficial killings became institutionalised by state actors, particularly by the DOPS/DOI-CODI². State agencies were mainly concerned with identifying and destroying insurgent forces, rather than collecting evidence to legally punish. In that context of prevailing unregulated police detention, information was transformed in weapons, not in legal evidence (Godoy, 2014: 312-314). With unchecked discretion and absolute power, state agents tortured suspects in clandestine detention centres, keeping them alive until information could be extracted.

Even though they operated under institutional impunity which enabled them to commit severe human rights abuses, these state agents still made efforts, however limited, to

² DOPS stands for Department of Political and Social Order; CODI for Centre for Internal Defence Operations. DOPS/DOI-CODI were repressive organs used by the civil-military dictatorship for surveillance, political persecution, and torture of regime opponents.

hide their cruellest practices from public view. While instrumental lethal violence was often tolerated and at times celebrated by sectors of society, overt sheer violence risked eliciting public sympathy for those tortured and undermining the credibility of the military regime, particularly when their victims included members of middle classes (Pineiro, 1997; Teles and Safatle, 2010; Godoy, 2014). Two important consequences arose from this situation. First, releasing detainees who endured the most extreme forms of torture posed a risk of exposing those practices to the public. In certain circumstances, killings were not merely about eliminating the enemy, but were strategic acts aimed at preserving the dictatorial methods of extracting information. Second, these state agents developed different strategies to hide their own responsibility for these killings. Initially, some of the most notorious theatrical tactics used to manipulate extraofficial killings included staging them as suicides, traffic accidents, and resulting from gunfire (Godoy, 2014). In these cases, deaths were acknowledged, although not as (premeditated) killings. From the mid-1970s, amid growing public suspicion and declining credibility, particularly after the killing of journalist Vladimir Herzog [figure 8], staged deaths were replaced by forced disappearances. Several were thrown into waters near clandestine detention centres (Godoy, 2014: 476). In 1990, a clandestine mass grave containing the remains of over a thousand of people at the Dom Bosco Cemetery in Perus, São Paulo. Some were identified as political prisoners and disappeared from the military regime (Vendramini, 2020: 169-170; Godoy, 2014: 443). The vast majority, however, are considered indigents and victims of police violence from that period. This, in turn, relates to another aspect of extraofficial killings.

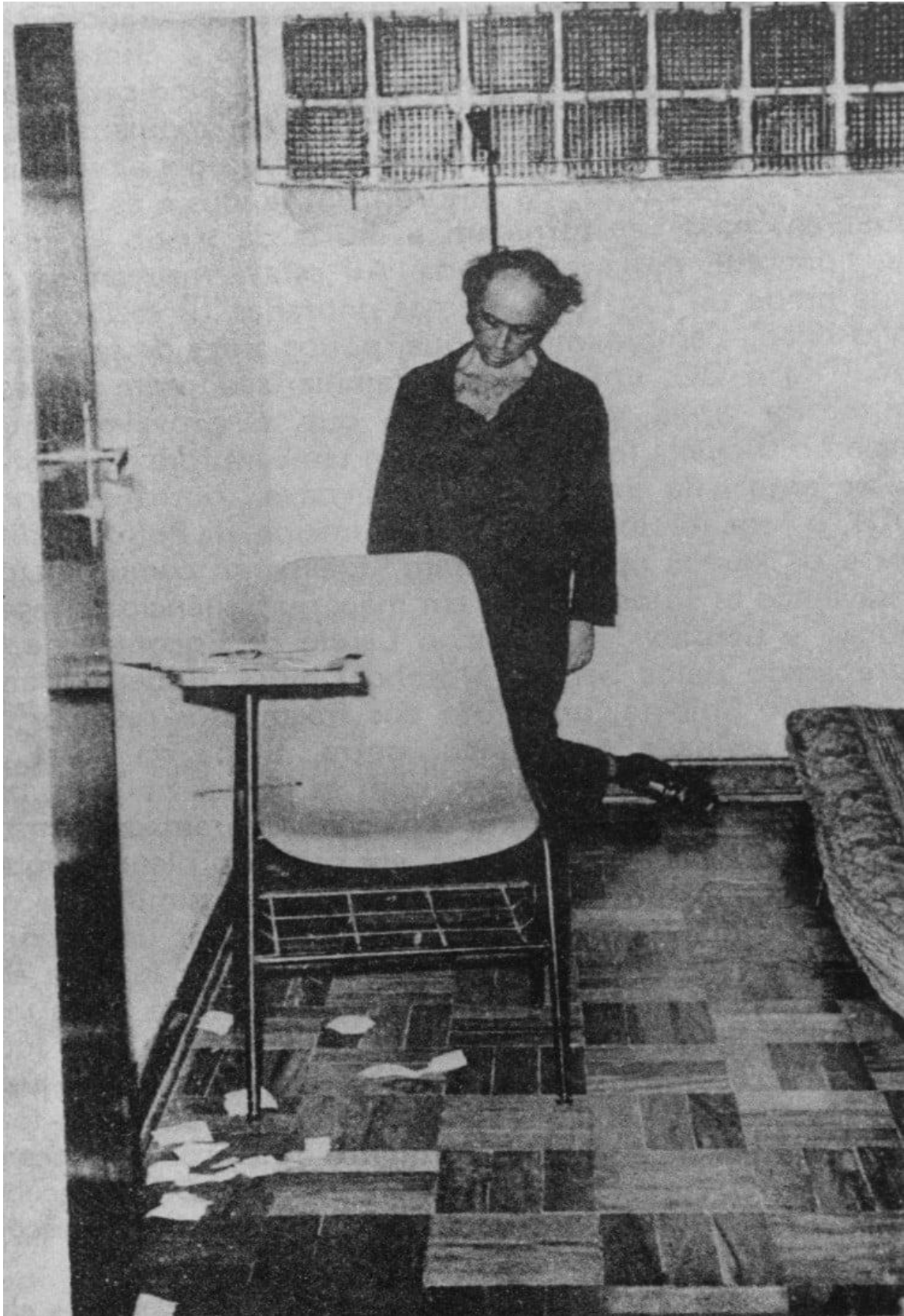


Figure 8. Vladimir Herzog murder staged by the military regime as suicide in a DOI-CODI detention cell in October 1975

Source: Silvaldo Leung Vieira

In the second half of the 1970s, after killing and defeating the armed political resistance, the state penal apparatus—including its death squads—turned its attention back to the ordinary ‘street criminal’. However, a special administrative procedure developed in those years of the military dictatorship changed the way police kill. In 1969, an infralegal provision gave rise to *autos de resistência* (resistance reports), establishing that a policeman who kills someone for allegedly resisting or not cooperating with police action do not need to be arrested, and that no police inquiry needs to be opened. Five years later, another infralegal provision laid out guidelines for the Judiciary Police in those cases of police killings after alleged resistance, regulating the resistance reports as a special administrative procedure. Although the requirement for a police inquiry was reintroduced, there was still no obligation to arrest the officer on the spot. Put shortly, since the introduction of resistance reports, the police kill but the killed person is the one turned into criminal, and the police killing is brought under the guise of legality (Cano, 1997; Misse, 2011; Verani, 1996; Willis, 2015; Zaccone, 2015; Barcellos, 1992/1997; Dal Santo, 2020, 2022). Since then, police often pretend to have acted in self-defence, and that the victim was actually a criminal resisting police approach—which corresponds to the aforementioned act of staging police killings as resulting from gunfire.

Police killings changed in different ways since the introduction of *autos de resistência*. One major change is that this mechanism allowed police to kill on duty. Police no longer need to kill off-duty, nor do they need to hide dead bodies. However, they still need to manipulate the crime scene, so to conceal they have killed after a suspect did not comply with their orders and posed serious threat. Since the mid-1970s, there had indeed been a gradual increase in official police lethality rates, with some periods of more intensive escalation, such as the 1990s and the late 2010s (Adorno, 2002; Pinheiro, 1997; Dal Santo, 2022). This gradual increase has only been temporarily neutralised recently after police officers started wearing

bodycams (UNICEF and FBSP, 2023; Mendonça, 2023)—which, coincidentally or not, reduces their possibilities of manipulating crime scenes.

A second major change is that the on-duty police started to kill in the urban peripheries. With the change in the enemy of the state penal apparatus from political resistance groups back to street criminals, extraofficial killings also changed their locations from clandestine detention centres and city streets to urban peripheries. This, however, does not contradict my claim from the previous chapter on the predominance of informal punishment in urban peripheries. Just as in the context of domestic punishment in slaveholding and rural Brazil, state penal apparatus may well be mobilised in urban peripheries where informal punishment prevails. Nonetheless, different from what happens in urban centres where police authoritarianism was more limited to control through unregulated detention, in urban peripheries police authoritarianism was—and still is—mostly translated into extermination through extraofficial killings.

To claim that police no longer need to kill off duty or to hide dead bodies is not to claim they no longer do it. Some reasons for not doing so have already been mentioned in this thesis, even if indirectly. For example, the low homicide elucidation rate leaves the vast majority of homicide perpetrators unknown. Besides, tens of thousands of people are considered disappeared every year (FBSP, 2020). Researchers and journalists (Willis, 2021; 2022; Manso, 2020: 23; Guimarães, 2022; Rossi et al., 2022) highlight that among the contemporary hundreds of bodies discarded in waters—rivers, lakes, and along the coast—and buried in clandestine and mass graves there are also victims of police lethality, and victims of paramilitary groups, such as *milicianos*. This, in turn, relates to a more nebulous dimension of extraofficial killings as means of hidden state punishment which I discuss now.

Outsourced extraofficial punishment

Besides police units and death squads entirely composed of state security agents, extraofficial killings have also been committed by paramilitary groups such as *milicianos*, and other social actors such as *justiceiros*. In the Brazilian context, the figures of *justiceiros* and *milicianos* overlap with both death squads and informal justice. Given their closer connections with state agents and resources, it is more accurate to frame them as a sort of extraofficial rather than merely informal punishment. They represent a complex combination of both features of peripheral, dependent states discussed so far: authoritarianism and state disregard with urban peripheries. This combination results in an outsourced extraofficial punishment. This idea of outsourced punishment has also somehow been suggested in relation to the informal justice system of PCC (Feltran, 2018). However, while PCC operates under a more passive tolerance and tacit permission by the state, which may even include informal non-aggression pacts at times, *justiceiros* and especially *milicianos* are encouraged and more actively supported by the state. Given their different levels of state connection and specific sociohistorical and political dynamics, I now separately analyse the outsourced extraofficial punishment carried out by *justiceiros* and *milicianos*.

Justiceiros

In the previous section I showed how the military regime institutionalised extraofficial killings as means of punishment, and that death squad killings were often celebrated and encouraged by the media. The combination of institutional promotion by the state and recognition by the

media is believed to have set the conditions for homicides as crime control and social cleansing in urban settings to be spawned even beyond the state penal apparatus (Misse, 2019; Huggins, 1997; Manso, 2016; 2020). This is the context in which *justiceiros* emerged.

Justiceiros, were another group of social actors committed to take justice into their own hands (Manso, 2016; 2020; Huggins, 1997; 1991; Adorno and Cardia, 1999). This social group did not always have a hard structure, being more malleable. They were often represented by ordinary citizens, such as bricklayers, construction workers, and even shopkeepers, but sometimes by off-duty or retired police officers too. Sometimes *justiceiros* were 'lone wolves', though for most of the time they acted in small groups. Many of them moved from the countryside to the city, seeking better opportunities in life. They were often dwellers of working-class neighbourhoods, in the urban peripheries, the outskirts of metropolitan regions. Their neighbourhoods were exactly the location in where they were acting—or killing. Sometimes they were financed by shopkeepers and other residents. Sometimes they were not. Manso (2016: 80) reproduces the speech of a teacher from one periphery of the Greater São Paulo which summarises well the role played by *justiceiros*:

Who were the vigilantes? It's something similar to alternative transportation. The bus companies in the morning use 10 buses to take people [from the outskirts] into the city, but they only provide six coming back. So who shows up? The van drivers [which work as informal, illegal collective transports]. Who are people going to complain to? These transportation co-ops are born out of the transportation authorities' lack of concern for the population of the periphery. The vigilante is born out of the police authorities' lack of concern for the population of the periphery.

Justiceiros' activities date back to the late 1970s (Mingardi, 1992) and were more common throughout the 1980s, especially in metropolitan regions. The late 1970s and the 1980s are considered a period with a more significant increase in levels of crime and violence in the urban setting, including homicide and different sorts of crime against property, the arrival of

more powerful guns, and the expansion of drug trafficking, especially cocaine (Misse, 1995; Zaluar, 2007; Lima et al., 2000). The formula for the emergence of *justiceiros* was therefore the combination of increasing criminality routinely experienced in their neighbourhood, the lack of response by state agencies, and sometimes the personal experience of victimisation, in addition to the previously mentioned legitimisation of homicides as social and crime control committed by the police and defended by the media. Originally, their activities fit more into the category of informal rather than extraofficial punishment, with *justiceiros* being a category closer to more classic definitions of vigilantism (e.g., Johnston, 1996; see Tuesta, 2024). *Justiceiros* killed and hunted criminals to tackle crime, but these killings also had a sense of morality (see also Buur and Jensen, 2004). They represented the morality of work, the values of the working-classes, often carried by rural migrants, against an increasing ideology of crime, spreading across the youth tired of struggling with misery and unemployment (Manso, 2016: 70-71; Mingardi, 1992; Adorno and Cardia, 1999; Caldeira, 2000). Even if structured more as informal punishment, the justice of *justiceiros* mirrored the logic of social cleansing by death squads.

The motivations of *justiceiros* and death squads are similar in many ways, despite having subtle differences. Both death squads and *justiceiros* claimed to kill—and punish—in the name of the community, for the workers and their families. However, I have shown that death squads' activities were often aligned with political and economic interests. *Justiceiros*, differently, were acting in their own neighbourhood, with their daily experience and influenced by local residents. Originally, therefore, *justiceiros* were more often than not indeed speaking for the community and defending the working-class morality. Another resemblance with nuanced differences relates to experiences of victimisation and discontent with official state justice as their motivation. Several death squads were formed as means of

revenge, in response to the killing of fellow policemen. Many *justiceiros* also highlight the fact that their family or they themselves were regular victims of crime too. Likewise, both groups share discontents with the criminal justice. Death squad members believe state justice is flawed due to excessive rights and guarantees, leading to impunity or a delayed, ineffective justice. For *justiceiros*, is not the victimisation itself nor a perception of an ineffective justice system that fuel their activity. On several occasions they have highlighted they had reported crimes to the police, but the police never did anything. The dominant feeling is tiredness and a perception that state justice cannot serve their needs not because it has too many legal protection, but simply because it is not made for them. They were tired of not being heard. Tired of having their claims and needs ignored by the state. So *justiceiros* were originally replacing the state in a service that they were not being provided—and sometime were actually being denied.

This takes us to two connected points: the reproduction of *justiceiros* and their fall as social players. As Huggins (1997) puts it, *justiceiros* are in an intermediate range of Brazilian vigilantism. It is less spontaneous than interpersonal killings and lynchings, but it is less structured and organised than death squads. If they used to start their activities alone, as individuals and not in groups, they ended up building up alliances and forming groups. Part of these links actually involved the police, be it more or less directly. Just as informal punishment, it relies on the police complicity, which involves omission to repress, investigate, and punish these killers. However, their reproduction as social players depended on a more active support by the police. Off-duty police often joined them in patrols and killings eventually (Adorno and Cardia, 1999; Huggins, 1997; Manso, 2016; Fernandes, 1991). Their reproduction also involved other forms of explicit encouragement from the police. A *justiceiro* have confessed the police had told him he had ‘better chances of infiltrating them [the criminals]’, and then actually

supplied him with names of other criminals to be killed (Manso, 2016: 76-77). Not only the indirect permission but the more direct links with the police is a crucial element to allow the reproduction of killings as crime control and social cleansing by more organised ordinary citizens. For this reason, even if emerging as informal punishment, the actions carried out by civilians eventually became an outsourced extraofficial punishment.

The decay of *justiceiros* as significant social actors in the urban periphery came in about the 1990s. This decay relates to the previous institutional support and encouragement being ceased—which corroborates their need as a condition for *justiceiros* to be reproduced. Different factors determined a falling institutional and social support for *justiceiros*. Among them is the switch in their guiding rationale. If they start killing to speak the voice of the voiceless, to represent the community's interests, and to defend working-class values, they eventually started to kill on self-interest, sometimes as a matter of survival (Manso, 2016: 80-87). Just as some unorganised urban poor, they killed not to be killed, as they were accumulating enemies. They built up alliances to have some backup. And in so doing, their own interests diverted from the interests of the communities. Some of their killings were eventually against the interest of the police, which might have triggered warning signs of a common consequence of outsourced groups: when the state 'los[es] control over the monster it has fostered' (Huggins, 1997). In addition, with the worsening of economic conditions in the 1990s in Brazil, opportunities for a dignified life through labour were becoming increasingly scarce. Criminal careers were becoming increasingly more tolerated—and sometimes the only means of survival. In that context, the existence of *justiceiros* began to lose purpose. The big issue in urban peripheries was no longer between the worker and the criminal, but whether one is a *good* or a *bad* criminal, someone who does or does not respect the local communal rules—which includes, for example, not to steal in the neighbourhood (Feltran, 2008a; Marques,

2009; Manso, 2016: 85-86). *Justiceiros* then lost their institutional and social support and, consequently, their role as social actors meting out extraofficial punishment in the 1990s in urban peripheries.

Milicianos

Milicianos, paramilitary groups whose origins date back to the 1960s in Brazil, are another group responsible for carrying out outsourced extraofficial punishment. Once again, the lines are quite blurred between death squads, informal, and outsourced extraofficial punishment. As mentioned earlier, on many occasions, death squad members themselves started getting involved with corruption and criminality, linking and building up stronger relations with more powerful criminals and organised crime against other criminal groups, particularly of drug traffickers. As Manso (2020) explains, here is the origin of Rio de Janeiro's *milicianos*.

Milicianos have been relevant social groups in Brazil, especially in Rio de Janeiro. They are believed to have control of about 10% of the Rio de Janeiro state's territory currently (Hirata and Couto, 2022). Their influence and control have increased across time. Originating in the 1960s, they have established themselves as more relevant social actors in the 2000s, particularly in favelas and poor neighbourhoods of the metropolitan area of Rio de Janeiro (Hirata and Couto, 2022; Manso, 2020). These paramilitary groups are a devolution of death squads, notably from their alliance with *bicheiros* (illicit gambling bosses), local politicians, and local shopkeepers.

Just as *justiceiros* and squad deaths, *milicianos* arguably started their activities as means of crime control and social cleansing. As shown in the previous chapter, violence and

homicide were the tools to tackle crime in rapidly and poorly urbanised neighbourhoods where the state was inoperative. The killings of *milicianos* are instruments of obedience and order, to establish a local authority—as emphasised by some of their nicknames: Natalino *Kills Laughing*, Leandrinho *Bone-Breaker*, Julinho *Gunfire*. Killings, however, are only one among their instruments and, with time, they have become last resort to those challenging or not obeying local rules. Their local authority was also achieved by providing basic needs other than security and justice. This includes, for example, collective transport, gas, water, internet and cable television (Manso, 2020: 10-24). To be provided with these services, residents have been charged with monthly fees. *Milicianos* have also provided things ‘out of courtesy’, financing parties and barbecues, giving slippers to barefoot kids, distributing *cestas básicas* (roughly a month’s supplying of essential goods for a family), providing bicycles, refrigerators, and televisions as awards for bingos in the community, paying haircut for the boys that are ‘looking like homeless’ and so on (Manso, 2020: 17-20). This combination of social providers and violent guardians of the community have made their activity work as a business model where extortion against residents is implied. If originating as means of social cleansing, they have achieved territorial control and operated within a wider context of governance and authority. Similar to PCC, their business have filled the gaps left by the state.

Different from PCC, however, *milicianos* are deeply embedded within the coercive apparatus of the state. They are mostly composed of off-duty and former police officers, military personnel and other state agents such as firefighters and prison guards (Zaluar and Conceição, 2007). Several *milicianos* have actually become politicians out of their influence as *milicianos* in their neighbourhood. Manso (2020: 81) claims *milicianos* often play the role of

informal ‘sub mayors’³ in their favelas or poor communities. In practice, there is a decentralisation of the city’s administration in where *milicianos* informally operate. For this reason, he argues that they resemble those figures of *coronelismo* from early 20th century rural Brazil, where local influential people—in that time, powerful landowners and local politicians—would guarantee the election of certain regional politicians who in turn would let those influential people govern freely locally, which included making use of the state apparatus. In the more recent context of *milicias*, *milicianos* also rely on the supply of guns and training by the police and the army (Manso, 2020: 18). The comparison between rural *coronelismo* and urban *milicianos* is therefore compelling. But more than that, given that they have mostly been individuals formerly or currently involved with the state acting outside legal channels while also counting on the state active support and protection, *milicianos* are other agents of outsourced extraofficial punishment—and governance.

As groups of wider governance and territorial control, *milicianos*’ outsourced extraofficial authority to punish is exercised in four main domains. One is ordinary interpersonal conflict, that may or may not be crime. They are more actively involved in the three other domains. One is out of the conflicts from the illegal business of their allies, especially the *bicheiros*. As Soares (2023) affirms, *milicianos*, who were often state agents trained to fight crime, began to kill on behalf of the (organised) crime itself. In this situation, they operate more as private security staff, responding to the orders and interests of their clients. Another domain is the one vulgarly referred to as street crimes. In this situation, they play a role of public security. On both occasions, more extreme forms of violence might be employed, such as torture, beatings, and killings, or expulsion from the community (Zaluar

³ In major Brazilian cities the ‘municipality’ is administratively divided in smaller areas. The city’s mayor appoints sub mayors—executive authorities in their sub-municipality area, still subordinated to the elected mayor.

and Conceição, 2007: 98-99). The fourth domain is where someone behave against the rules imposed by *milicianos*. Manso (2020: 89-90) provides us with a good illustration. In a given community, residents had to pay an extra-officially established fee to park their car in a specific public space. These fees must be paid directly to *milicianos*. Whoever does not comply with that rule is punished—which also illustrate their extortion. Punishment in that case is damaging the vehicle itself. Ultimately, *milicianos* indeed punish people who commit crime, but they also punish those that disrespect their own rules (these being crime or not), and anyone else as per the orders and interests of their ‘clients’—which in practice means not only turning a blind eye to the crimes and illegal activities of their allies, but rather protecting them as private security staff.

In different levels and even if in blurred lines, actors such as *justiceiros* and *milicianos* have carried outsourced extraofficial punishment. They did not merely operate with a tacit state consent and guaranteed impunity, but their reproduction depended on state support—from information and training to material resources and off-duty personnel. Outsourced extraofficial punishment is another common feature of peripheral states (Evers, 1977/1985: 166), that combines both authoritarianism and abandonment of peripheral zones. It has been used a means of social cleansing while allowing state deniability, which has also allowed official incarceration rates to remain low. Outsourced extraofficial punishment has worked as another aspect of hidden state punishment.

Truncated democratisation, rule of law, and protagonist judiciary

After a ‘slow, gradual, and careful political opening’ (Netto, 2014) and a huge socioeconomic crisis, the civil-military dictatorship was defeated in 1985. A post-dictatorial Constitution was

enacted in 1988. One year later, a president was elected through direct, popular vote for the first time since 1960. This transitional period had significant effects in patterns and trends of punishment. Many argue that this period is more accurately portrayed as one of a ‘transaction’—marked by negotiated arrangements by political elites—rather than a true democratic ‘transition’ (Netto, 2014; Fernandes, 1986; Maciel, 2012; Iasi, 2019). On the one hand, the institutional left bet on the rule of law to overcome the tyrannical power and promote social justice; on the other, key actors of the military regime assumed significant positions in this negotiated transition, securing intact some authoritarian structures and institutions, besides securing their own impunity. The radical left, just as the people, did not play a major role in shaping the transition and its conditions, despite the former paying with their own blood and lives for resisting against the civil-military dictatorship, and the latter dynamizing the defeat of the dictatorial regime. In what more directly matters to this thesis, this negotiated transition resulted in the rise of a protagonist judiciary that preserved authoritarian traits, in a context of a further expansion of the criminal justice system. In this section, I discuss how the bet on the legality resulted in the transition from hidden state to official state punishment and in a general expansion of the criminal justice; and how state structures and penal institutions—including the police and the judiciary—remained essentially intact by the transitional forces. I then analyse how this formula paved the way for mass incarceration.

Humanise and expand

The process of re-democratisation did not dismantle the punitive infrastructure developed during the civil-military dictatorship. Rather than dismantling the ‘penal state’, it further

expanded it and endeavoured to make it more humane, following a human rights legal framework (Marques, 2017; Salla, 2003; 2007; Goes, 2004). As Marques (2017) shows, concerns with making the state penal apparatus more humanitarian went hand-in-hand with its expansion, both quantitatively and qualitatively (see also Dieter, 2024). In São Paulo state, for example, in his first year in office, Governor Montoro—a democrat committed to human rights—increased the state expenditure with public security by around eight times in comparison to his antecedent, Maluf, of the dictatorship’s ruling party (Marques, 2017: 151). These expenses included not only the hiring of more police officers, but also the re-equipping of the police, with new vehicles, weapons, and radios. The national prison system has been continuously expanded since then—at the transitional period, as a response to a state of prison overcrowding and prisoners systematically allocated in detention centres and police lockups (Salla, 2007; Marques, 2017). In 1995, the National Penitentiary Fund had a budget of R\$10 million. This amount increased significantly over the following years, reaching R\$135 million in 1998 and R\$258 million by 2001 (Salla, 2003).

In that period, democrat and liberal institutional forces believed that the repressive apparatus only needed a democratic and more humane control to operate under the rule of law and promote a better public security. By following a human rights orientation and relying on the legality as the ultimate control against authoritarianism, the post-dictatorship Constitution abolished the arbitrary arrests for police questioning and administrative detentions, establishing judicial control over any and all forms of arrest, detention, and imprisonment. The old pattern of police unregulated detentions are gone. It was with the new Constitution that ‘the judiciary emerged from the shadows’ (Semer, online course) and stepped into the spotlight. Just as in other post-dictatorial Latin American countries (Lemaitre, 2019; Hilbink and Gallagher, 2019), the judiciary was empowered, strengthened, and

expanded. Limited available data makes it difficult to accurately track changes in the number of judges over time in Brazil. As per IBGE (1962: 359) Yearbooks, there were 2,545 judges and substitute judges in 1960. Soon after the transition, the judiciary was composed of 4,930 judges in 1990 (Sadek and Arantes, 1994: 40). This number increased to 13,539 in 2004 (CNJ, 2009: 14, 110, 202). Based on IBGE census data, the judiciary was expanded in the same proportion as the general population from 1960 to 1990—both doubled in 30 years. However, between 1990 and 2004, the judiciary increased in a much larger proportion than the general population—174% compared to 26% respectively. And the judiciary keeps expanding, currently reaching 18,829⁴. Numbers of judge clerks, as well as prosecutors and their servants, have also increased significantly (Fonseca, 2018). As a consequence, and illustrating both the judiciary expansion and empowerment, Brazilian courts received 3,617,064 new judicial cases in 1990. By 2012, this number had risen to 9,764,616—representing a 270% increase in case filings, compared to a 20% growth in population for the same period (Semer, online course).

Despite contributing to the expansion of the state penal apparatus, political efforts to humanise the system were genuine. Academics and legal professionals who had been vocal opponents of the military regime and were critical of institutional violence and state arbitrariness occupied prominent positions in the state and federal governments during and after the transitional period, including as Secretaries and Ministers of Justice (Marques, 2017). In the 1990s, then-president Fernando Henrique Cardoso developed a National Programme of Human Rights for the first time in the country, and created a National Secretariat of Human Rights (Marques, 2017). Under Montoro São Paulo administration, the number of civil police officers punished administratively rose significantly, largely due to changes in the Internal

⁴ As per CNJ's live panel *Justice in Numbers*. Available at: <https://justica-em-numeros.cnj.jus.br/painel-mpm-pessoal/> Accessed on 15 April 2025.

Affairs Division (Mingardi, 1992: 75). In the late 1990s, the Senate opened Parliamentary Inquiry Commission to investigate irregularities such as corruption and nepotism in the judiciary (Pastana, 2009: 97-101).

However, these attempts of humanisation and democratisation—which included increased accountability, combatting corruption and abuse of force—faced internal resistance by police officers, prison guards, and judges, and were not supported by some sectors of society, politicians, and the mass media (Mingardi, 1992; Caldeira, 2000; Goes, 2004; Salla, 2007). This became apparent by longstanding practices such as massacres in prisons, in urban centres against the homeless, in urban peripheries against the poor, and in rural areas against the landless, all of which persisted since the first years under the new Constitution. Famous cases include the Carandiru, the Candelaria, the Vigário Geral, and the Eldorado dos Carajás massacres. While the bet on institutional legality was able to put an end to unregulated police detention through the Federal Constitution, the reliance on legality and the subsequent strengthening of the judiciary did not succeed in eradicating other authoritarian features and trends. To understand this failure, we must look at certain dynamics of the 'fractured transition' (Netto, 2014).

Truncated transition, authoritarian reminiscences

There is broad consensus that the Brazilian *transition* to democracy was the most conservative among the Latin American transitions, marked by fewer ruptures with the authoritarian regime and the most limited transitional justice. Despite forced by decades of resistance and social mobilisation, the actual transition is often referred to as an elite pact that excluded the people and the radical left. Netto (2014: 257) sustains that 'the civil-military

dictatorship was defeated, not overthrown'. The *slow, gradual, and cautious transition* planned by the military regime was mostly successful. The Amnesty known as *broad, general, and unrestricted*, conceived by the very military regime through Law n. 6,683 in 1979, did not cover only political opponents, but also the very military personnel responsible for torture, killings, and forced disappearances. The military regime managed to neutralise popular mobilisations, such as the *Diretas Já* movement started in 1983, which demanded direct votes for presidential elections. In neutralising this movement and postponing direct presidential elections to 1989, the military regime also neutralised rising left leaderships such as Lula and Brizola (Santos and Pitillo, 2020: 208). Instead, the military regime made political arrangements with a more moderate opposition, establishing a so-called Democratic Alliance for the transition. This alliance resulted in Tancredo Neves, MDB candidate—a party founded in 1965 by the military regime as part of an enforced two-party system, as the official but controlled opposition—as the first post-dictatorship president, to take office in 1985. This alliance established as Neves' vice-president José Sarney, who had been the president of the military regime's ruling party since 1979. Neves fell ill days before taking office, dying shortly after, having never assumed the presidency. Ironically, Sarney, who had been the dictatorship's ruling party president for the previous five years, became the first president of the period framed as 'post-dictatorial'.

Sarney's presidency is representative of the conservative feature of the Brazilian transition to democracy. Besides him, though, several other politicians from the dictatorship's ruling party held positions of power in the transitional process, including in the elaboration of the post-dictatorial Constitution. In 1986, general elections were held to form the Constituent Assembly, responsible for designing Brazil's democratic Constitution. On that occasion, 559 constituents were elected. This election was dominated by *Centrão*, the 'Democratic Centre',

formed by conservative parties supported by the executive branch, then led by Sarney (Maciel, 2012). While left-wing opposition parties secured 50 seats, the pro-government *Centrão* bloc elected 509 deputies, 217 of whom came from ARENA, the military regime's ruling party. A significant portion of this conservative political elite—at times directly descended from the dictatorship's ruling party—has occupied key roles in political arrangements in every election since then. This is especially evident in the elected political composition of 1994 and 1998, when once again a formerly-ARENA politician occupied the vice-presidency. It is no exaggeration to say, therefore, that not only did the elites aligned with the civil-military dictatorship retain political power, but, as Arturi (2001: 26) puts it, 'the reformists within the authoritarian regime became the privileged political heirs of the transition process'.

This retention of political power by conservative elites had significant effects in the contours and limits of Brazil's democratic transition. While the inclusion of some democratic and liberal forces in the new political arrangement made it possible the expansion of civil, labour, and social rights and safeguards in the legal dimension, the persistence and legitimisation of reactionary and conservative actors within the democratic political landscape made space for the preservation of authoritarian structures, institutions, and practices. The general Amnesty, self-granted by the military regime, was later upheld by the Brazilian Supreme Federal Court,⁵ despite recognised as unlawful by the Inter-American Court of Human Rights (Gomes Lund et al. [*Guerrilha do Araguaia*] v. Brazil, j.2010). In consequence, and contrary to the Argentinian and Chilean cases, no Brazilian military officer has ever been punished by the judiciary. Transitional justice was mostly limited to financial reparations

⁵ Supreme Court chairman Peluso sustained: 'if it's true that every people, according to its own culture, solves its own historical problems in its own manner, then Brazil has chosen the way of harmony'.

(Piovesan, 2010), initially given to only 44 farmers. Despite earlier attempts and owing to pushbacks from the military, a National Truth Commission was established only in November 2011. To this day, the Armed Forces have never acknowledged institutional responsibility for their crimes—and rather celebrate the 1st April 1964 as the ‘Revolution of 1964’, when the military saved Brazil from the communist threat. So normalised had the erasure of memory and the lack of accountability for their crimes become that then-Congressman Jair Bolsonaro dedicated his vote in favour of Dilma Rousseff’s impeachment, in the Chamber of Deputies, ‘to the memory of Colonel Carlos Alberto Brilhante Ustra, the terror of Dilma Rousseff’. Colonel Ustra is widely recognised as one of the dictatorship’s most notorious torturers, having headed the DOI-CODI between 1970 and 1974. Dilma Rousseff was imprisoned and tortured by military officials between 1970 and 1972.

Authoritarian reminiscences are not restricted to the lack of memory and accountability. Not only the economic structure has been substantially maintained by the democratic Constitution, but in both the legal and institutional domains, security forces and the judiciary have almost been untouched by reforms, particularly concerning an effective democratisation of these institutions. Zaverucha (2010) identified a significant dynamic in the drafting of the democratic Constitution, which was a process divided into eight main committees. The committee responsible for the chapters on the Armed Forces and public security was chaired by a retired colonel—not just any colonel, but one who had served as a minister in the governments of three different dictators and had been a AI-5⁶ signatory. Not surprisingly, several authoritarian traits of the state repressive apparatus have been preserved, from military prerogatives in the preservation of order to the military structure and

⁶ The decree that most escalated the use of force and the despotic powers of the dictatorship.

nature of the police forces responsible for street-level patrolling and public order, as originally imposed by the dictatorial regime.

In relation to the judiciary, changes at the legal and institutional levels were at best modest. On the one hand, judicial guarantees were reinstated, independence from the executive branch was restored, and the recruitment model through civil service examinations was adopted as the general rule by the Constitution. However, the judiciary itself did not undergo a process of concrete democratisation. Once again different from Argentina and Chile, there were no purges of the judiciary. Judges appointed by the military government remained in their positions—the last two Justices appointed by the dictatorship to leave the Supreme Court did so upon retirement in 2003. The judicial reform came only in 2004, but it was mostly concerned with rationalisation, being primarily focused on enhancing its quantitative efficiency (Semer, online course; Sinhoretto and Almeida, 2013). Key authoritarian traits within the judiciary persisted, even some more subtle ones, such as the continued treatment of lower-court judges as non-full members of the court, keeping them without any voting rights. As a result, they have remained excluded from major institutional decision-making processes, which are reserved for appellate judges—typically those with longer tenure in the system, facilitating the preservation of the judiciary’s conservative and at times reactionary character, while also hindering possibilities for internal institutional democratisation. Despite relying more on extraofficial repression and military courts (Pereira, 2008; Rosa, 1985; Mattos, 2006), civilian judges had also shown high levels of integration and consensus with the civil-military dictatorship, as measured by their opinions and views ‘found in newspapers, memoirs, academic studies, legal decisions, and specialized journals dealing with the military, the law, and military justice’ (Pereira, 2008: 30). Besides, the Brazilian judiciary had been acting as a conservative—and even anti-citizen (Avritzer, 2019)—force well

before the military dictatorship. Despite being promoted to the guardian of democracy through renewed confidence in legality and the rule of law (Sadek, 2004; Recondo, 2018), the absence of meaningful reforms in the judiciary may help us understand the gap between constitutional, liberal promises and the concrete authoritarian reality (Sozzo, 2017; Pinheiro, 1997; Lima, 2004)—or why, at least in the criminal division, judges have often ruled in a conservative and repressive manner (Adorno, 2000), at times ‘sentencing as instruments of a needed social cleansing’ (Nalini, 2004).

In these terms, while the liberal institutional left bet on the rule of law, the transition to a liberal democracy very much suited the interests of dominant classes—both nationally and internationally. The dictatorial regime had already played its role in reshaping socioeconomic structure and dynamics (Netto, 2014; Santos ad Pitillo, 2020). As Evers (1985/1977: 163) observes, repression deals directly with consequences and contradictions of social conflicts, being an effective means of shaping social behaviour and making symptoms of crises disappear when other means—such as money, ideology, or the law—fail. However, repression only suppresses contradictions and does not ‘address the root causes of conflicts’. Within the terms under which the rule of law was institutionalised in Brazil—notably through constitutional mechanisms for self-preservation by the dominant class—liberal democracy replaced an ‘unmasked class dictatorship’ and established itself as a more ‘concealed, yet more efficient’ (Fernandes, 1979/2019), form of domination. In earlier versions of this work, I had introduced an idea of judges as ‘robed vigilantes’ later in the thesis. While I acknowledge that I had not sufficiently worked on that category, the first reaction from someone who gave me feedback is very telling: ‘but how can they be vigilantes if they’re working within their legal powers?’. This is precisely the function of the seal of ‘legal authority’: to confer legitimacy through the presumption that, within the legal domain, there are no excesses—thereby

distinguishing it, ostensibly, from authoritarian rule and domination. Thus, just as state punishment shifted from hidden to official modes—from invisibility in official statistics to institutional acknowledgment—class domination underwent the reverse: moving from a despotic use of largely overt violence to a more disguised form of control, now cloaked in legality and legitimised as democratic governance.

Authoritarian and protagonist judiciary

The humanisation ethos and bet on the rule of law resulted in a further expansion of the state penal apparatus. Intended to fight prison overcrowding and promote human dignity to prisoners, the construction of prisons has not yet been able to tackle prison overcrowding in the long term (Dal Santo, 2022) but has worked to house more and more prisoners. A better-equipped and more numerous police force was expected to provide public security of better quality. This expectation was grounded in a liberal belief that the reestablishment of legality would be enough to control then-systematic police excesses. Police and prison guards would no longer be arbitrary, but regulated, with the law serving as a safeguard against abuses. The expansion, empowerment, and strengthening of the judiciary was then thought a necessary step to bring justice, while also tackling then-systematic delayed judicial provision. The now expanded criminal justice system has a capacity to process more and more cases. In this scenario, a significant increase in incarceration rates partially corresponds to hidden state punishment being replaced by official state punishment, similarly to the foundations of 'Prison America' (Murakawa, 2014).

The bet on the legality and a consequent judicialization of social and political life is not a phenomenon exclusive to Brazil (see Comaroff and Comaroff, 2006b). As Garapon (2001: 24) observes:

the judiciary's growing control over collective life is one of the most significant political developments of the late 20th century. Nothing can escape the judge's control. In recent decades, litigation has exploded, and judicial bodies have expanded and multiplied, steadily diversifying and asserting their power day by day.

While the expansion and empowerment of the judiciary is not unique to Brazil, these processes are shaped by their own local dynamic particularities, assuming their specific forms. In quantitative terms, the proportional expansion and growing prominence of the Brazilian judiciary since re-democratisation have been striking. In a comparison with countries in Europe and across the Americas, Da Ros (2015) sustains that 'the budget allocated to the Brazilian judiciary is most likely the highest per capita among all federal countries in the Western Hemisphere'. Judiciary budget corresponds to less than 0.25% of the GDP in countries such as Argentina, Colombia, Chile, EUA, England, Spain, and Italy. In Brazil, it represents 1.3%. In qualitative terms, this reliance on formal legality overlooked the authoritarian and at times reactionary traits of the Brazilian judiciary, which, at certain moments in the Brazilian history, played a role not only in preserving the dominant order and the status quo, but also in blocking and restraining political and social advances (Paes, 2019; Koerner, 2010; Almeida, 2010; Zaffalon, 2017).

If the massive increase in incarceration rates is partially a consequence of the enlargement of the state and its institutional capacity to control and punishment, the dynamics, conditions, and intensity through which they have increased more recently, even

despite legislative and executive attempts to decarcerate, directly relate to this phenomenon: the protagonism of an authoritarian judiciary.

Ultimately, from the perspective of liberal institutional forces, the bet on the legality and the reliance on an authoritarian judiciary to prevent authoritarianism by state repressive forces brings to mind the famous story of Baron Munchausen, who attempts to pull himself out of a swamp by his own hair. From the perspective of conservative and reactionary forces, this shift from domination through overt force to a more veiled form of control legitimised by the liberal rule of law resonates with the famous line from Lampedusa's novel *Il Gattopardo*: 'if we want things to stay as they are, everything must change'.

Conclusion

This chapter has provided a complementary response to why and how imprisonment rates remained low until 1990 in Brazil, and particularly why these rates did not increase more significantly with the intensification of urbanisation in the second half of the 20th century, as suggested in the previous chapter. While state justice was marginal under slaveholding and predominantly rural Brazil, it did gain prominence as means of control and (re)production of order. Until before the transition to democracy, state punishment did not systematically assume the form of imprisonment, but mostly different forms of hidden state punishment. Extraofficial punitive forms—mainly unregulated police detention, extraofficial killings, and outsourced extraofficial punishment—each in their own way played different roles effectively, according to the demands of the international capitalist order and local ruling classes' interests and depending on their locations—whether urban centres or peripheries. These roles include social control, social cleansing, repression of insurgent movements, and

governance. Relevantly, and even if featuring their own peculiarities, each form of extraofficial or hidden state punishment discussed here has been observed in other peripheral states, including forms of unregulated police detention (Cooper-Knock and Owen, 2015; Gail, 2023), police killings (Chevigny, 1990; Jauregui, 2015; Tankebe, 2013; Uddin, 2018), paramilitary death squads (Figueroa Ibarra, 1991; Manitzas, 1991; Palacio Castanêda, 1991), and vigilante groups more or less directly connected with state repressive agencies (Lund, 2006; Buur, 2005; Sen and Patten, 2007b; Fourchard, 2008; Cooper-Knock and Owen, 2015; Buur and Jensen, 2004).

Given the dynamics and greater levels of exploitation and socioeconomic inequality, peripheral and dependent states structurally rely on greater levels of repression. Useful to articulate the needs and interests of international capital and local ruling classes, the state penal apparatus was massively expanded and better equipped in the context of industrialisation led by the civil-military dictatorship. This expansion was supported by an illustrative composition between the national state, the imperialist power—notably the USA government—and national and international capital. This enlarged and more capable repressive apparatus operated mainly extra-officially, predominantly through police forces independent of the judiciary. The previous chapter revealed a major constitutive feature of peripheral, dependent states: state abandonment and disregard with the needs of local masses, which allows different patterns of informal punishment. This chapter, in turn, revealed another constitutive face of peripheral, dependent states: authoritarianism, usually manifested in different extraofficial forms. Ultimately, both chapters reveal significant limitations of imprisonment rates as the proxy for punitiveness, despite their consolidation in most of the international scholarship on punishment and society. Imprisonment rates do not

only not portray state and public punitiveness in an accurate way, but they can actually be significantly misleading of penal harshness, notably in peripheral contexts.

Besides that, this chapter has also shown how the way for mass incarceration had been paved. While the civil-military massively expanded the state institutional capacity to punish and control, the negotiated transition to democracy, composed by different forces, actors, and dynamics, defeated but did not completely overthrow authoritarian and reactionary forces, nor did it dismantle that repressive infrastructure, betting on the legality to control the abuse of force and promote social justice. While efforts to democratise and humanise the state penal apparatus resulted in its further expansion, they were not enough to meaningfully reform and truly democratise these institutions. The truncated transition empowered and promoted to protagonist of the liberal order an authoritarian judiciary, which now operates in a further expanded apparatus. The next chapters show empirically the role played by judges in driving mass incarceration and how judicial punitiveness has been reproduced despite the reinstatement of judicial safeguards—most notably external independence—and transitional efforts to democratise judicial recruitment.

PART THREE

**JUDICIAL PUNITIVENESS IN ACTION:
TRIALS AND SENTENCING**

Chapter Six

‘I’d rather be judged by flipping a coin than by a judge’

Punitive normality, judicial endorsement, and inflated convictions

The judgement is ready [before the final submissions are even heard]. The defendant enters the process already condemned. If they can *prove their innocence* through their legal defence, they have *some chance* of not being found guilty. But the tendency, as a general rule, is for them to be convicted, and the conviction is prepared [written] beforehand. The text [for a conviction] is standard, so you only change the name, one or two paragraphs that were written by your judicial assistant or law intern, and then you sign [the conviction file]. It is very easy to convict. When in doubt, they convict. The judge feels obliged to be sure and provide a legal reasoning only if they acquit. That’s exactly the opposite of *in dubio pro reo*. That is, there is an entire direction, a script, that leads to a conviction. Something exceptional must happen for them not to convict ... There is a Barrister-Professor who often says that he would rather be judged—if one day he is charged with an offence—by [flipping] a coin. He says he’ll at least have a 50% chance [of not being convicted] (*Public Defender Rodrigo*).

This quotation from a Public Defender I interviewed represents well the general judicial activity. My trial analysis tells the very same story. In examining a series of robbery convictions, one quickly gets the sense of reading the same case again and again—identical in their case description, evidence, reasoning (or lack thereof), and final judgement. Public Defender (PD) Lucas questions how the reality, which is so diverse, becomes monolithic in legal cases. Several of my interviewees equally highlight the existence of this expected, ordinary path, which not coincidentally ends up in convictions. Judge Ricardo confessed: ‘we’ve fallen into routine ... I do

not know why, but we're reducing (legal decisions) to mere standard practice'. The problem, however, is that this standard practice is fundamentally punitive. Barrister Bruno argue that

if you take the 'arc of normality' of a process, this arc is punitive. ... The 'arc of normality' of a criminal case of a young black defendant from the peripheries—who is the 'client' of the penal system—is punitive.

In this chapter, I explain how this punitive 'arc of normality'—the ordinary and almost immutable practices and decisions in criminal proceedings—develops throughout trials of robbery charges. I refer to this normalisation of default judicial decision-making as 'punitive normality'. The chapter focuses on judicial decision-making in the trial process, particularly on how flawed, dubious, and illegal evidence is used to sustain a robbery conviction—which is usually reduced to a mere legal endorsement of police narratives. In so doing, I show how despite being empowered and trusted to regulate and control previously police unchecked discretion and sheer violence of state repressive agencies, judges have generally endorsed and granted legal legitimacy to those excesses they were—naively or maliciously—trusted to control. Throughout the chapter, quantitative data are presented to produce descriptive generalisations. Explanatory penetration is achieved through qualitative data and analysis.

The chapter is structured as follows. In the first three sections, I thoroughly examine default judicial assessment—or endorsement—of the body of evidence and typical reasoning used to support convictions across three main trial stages: *autoria do delito*, when judges assess whether the defendant is in fact the crime's perpetrator; *circunstâncias elementares do delito* (essential elements of the offence), where judges determine the specific legal classification of the offence (e.g. whether robbery or theft), based on its constituent elements; and *consumação do delito* (stage of the commission of a crime), whether the offence was completed or merely attempted. In the fourth section, I analyse how defendants must actively

prove their innocence to break the punitive normality—which still falls short of ensuring an acquittal. In the fifth, I highlight the tight relationship between judges, prosecutors, and police officers, and how it manifests in judicial decision-making, particularly in the form of convictions.

The chapter ultimately shows how judges stack the odds against defendants and inflate convictions at multiple stages of their decision-making. As a result of a cumulative punitive assessment of the body of evidence, judges often produce what I call ‘inflated convictions’: instances in which theft is treated as robbery, or attempted robbery is considered a completed offence. Inflated convictions, in turn, lead to inflated punishment—a matter I address in the following chapter.

Judicial endorsement and default conviction reasoning

As mentioned in Chapter Three, my analysis of judicial decision-making is based on 277 judgement files, comprising trials of 361 defendants charged with robbery. Acquittals were extremely rare: only 15 out of 361 defendants were found not guilty. This makes it a 96% conviction rate.¹ For context, conviction rates for drug trafficking in Brazil—the crime usually considered the main driver of mass incarceration in the country—are around 80% (Semer, 2019: 237). This almost 100% conviction rate confirms the idea that a status of convict is pre-established ahead of the trial. Having grasped the main dynamics shaping trials of robbery, I now explain how the arc of punitive normality unfolds in almost all trial stages.

¹ This rate includes defendants found guilty of other offences such as theft and handling stolen good, although they represent a tiny proportion.

Crime perpetrator

In a typical judgement in Brazil, after summarising the factual circumstances and legal arguments presented in the prosecution's charge and the defence's claims, the judge proceeds with their analysis on the merits. After establishing that a crime has been committed, the judge rules on whether the defendant is in fact the perpetrator of the crime. At first glance, it seems that judging the defendant as the crime perpetrator is a much more straightforward, less disputable trial stage than it actually is. A combination of arrest in flagrante delicto and the defendant's identification by the victim seems almost irrefutable. Nearly all defendants (97%) in my dataset were arrested in flagrante delicto, and 69% were apparently identified in court by the victim as the crime perpetrators. However, less than 20% of the defendants pleaded guilty to all prosecution charges, despite guilty pleas being a mitigating factor in the sentencing stage. What could be problematic under these circumstances?

Major violations of two related constitutional guarantees are systematically identified at this stage: the right to remain silent and the presumption of innocence. While a minor percentage of defendants confessed full criminal liability, only 43% denied all charges pressed against them.² Among these, some remained silent before police authorities, when taken to the police station after being arrested. One might not expect defendant's silence to be considered element of guilt formally expressed in official judgement files, even if they might configure one of those hidden elements shaping judicial decision-making. Since remaining silent is a constitutional right, explicitly mentioning it as evidence of guiltiness provides a clear reason for defence appeal, allowing the conviction to be overturned. However, this does not

² 38% pleaded 'partial guilty'—to have committed a lesser offence, not as per prosecution's charges.

prevent judges from doing so. The following excerpt from j.0050081-75.2015.8.26.0050 does not constitute an exception in São Paulo Criminal Courts:

In the [police] district, [the defendant] was silent, supported by a constitutional rule, a fact that, despite being an inviolable right, does not match the attitude of someone who is innocent. If this were the situation of the defendant, he would take advantage of the first opportunity, in the “heat of the moment”, to at least say that he had no involvement in the crime.

During my interviews, however, I was made aware that most defendants remain silent before police authorities simply because of the lack of legal defence provided by them in police stations. This is why, Judge Luiz argues, arrested people opt for remaining silent and only speak before a judge, when they are provided with a defender. This goes in line with what PD Fernando told me in relation to arrested people being systematically represented by public defenders in police stations in only one out of the 26 states in Brazil—namely, Rio Grande do Sul.

One might well believe that the fact that the defendant was arrested in flagrante delicto in itself overrides the presumption of innocence. At first glance, this can indeed appear to be a strong indication that the defendant has committed a crime—though not necessarily the crime they have been charged with. However, a closer look at the conditions of what is considered a flagrante delicto situation raises doubts about whether the arrest truly qualifies as such. What is framed as ‘flagrante delicto’ is not always a homogenous circumstance. On some occasions, the victim resists and ordinary people or the police apprehend the criminal. On others, the offender is immediately chased. If the arrest is made under any of these circumstances, there is less space for challenging the version in which the person arrested is indeed the crime perpetrator. There are, however, cases that leave more margins for doubts. In several cases, the defendant manages to escape after taking something from the victim;

police officers who are in the surroundings are informed about the crime and given descriptions of the offender—usually their physical appearance and clothes; hours or minutes later, after patrolling the region, police officers arrest someone that somehow matches the description given by the victim; the defendant may or may not be caught in possession of the stolen goods property. This common scenario is corroborated by the fact that, in 33% of cases, stolen goods are not found in the defendant's possession, despite their arrest being framed as *flagrante delicto*. These situations weaken the supposedly irrefutable character of the *flagrante delicto* arrest as evidence that the defendant is the perpetrator of the offence, but they are not systematically challenged by judges.

Even if the defendant does not plead guilty or is not immediately chased and arrest in possession of stolen goods, their identification as the crime perpetrator by the victim could also be considered enough evidence to prove the defendant is indeed the person who committed the offence. Once more, besides the inherently issues of false memories leading to wrongful convictions (Rose and Beck, 2014; Wells and Olson, 2003; Stein, 2015), the concrete dynamics of the identification procedure casts doubt on what could be seen in principle as reliable means of proof—despite usually not being disclosed by mere court files. An important contextualisation must be made. The Brazilian criminal justice system entails two types of identification: one in the police phase, considered extraofficial and of limited evidentiary value; and one in-court procedure, with adversarial proceedings and judicial oversight. Only the in-court identification procedure is considered full evidence that might support conviction—Brazilian higher courts have ruled that identifications conducted in police phase are merely indicative, sufficient to support earlier proceedings such as charges and pretrial detention, but not enough as means of proof to support a conviction. Even in the judicial phase, several problematic dynamics have become part of the normal operation of

the system. This is the case, for example, of showup procedures, where the defendant stand alone in a room and the victim merely confirms whether the person being shown is the crime perpetrator. In one case I analysed, the judge stated that

there was no request from either party for a formal identification of the defendant in a special room and with other look-alike people present, which is why the procedure was carried through a sighting through the crack in the door, to confirm that the person shown was the one actually arrested at the time of the events (j.1515761-31.2019.8.26.0228).

Other sorts of in-court identification procedure are at least highly dubious. For example, victims are normally able to identify offenders who committed the crime masked or wearing motorcycle helmets (Prata, 2023: 125-130). In one trial, the judge reported that

the victim Elisângela recognised the defendant as the crime perpetrator in the police investigative phase. In court, she said that she recognised him in the police investigative phase because he was arrested in possession of her vehicle; she said she had a little doubt because he was wearing a mask [when the crime was committed], but she believes it was him. She said he had an expressive look, but that he was not wearing the same clothes as the person who robbed her. She said she was a bit unsure because of the mask (j.1510380-08.2020.8.26.0228).

This excerpt sheds light onto another common issue: in-court identifications that are entirely shaped by the identification procedure conducted in the police phase—which are even more problematic. Victims are induced to identify suspects as the crime perpetrator in different ways. The police might show a picture of the suspect to the victim before the identification procedure or present the suspect in a room with people that do not even minimally resemble them—for example a black suspect grouped with white people (Prate, 2023: 128). There are cases where the victim identifies the suspect through photo array—but photographs shown are usually of people with criminal records.

Limitations of identification procedures and the frequency of which they violate the law have been acknowledged by higher courts and the CNJ (STJ, 2022a; 2022b). Nevertheless, hardly ever do trial judges question the value—and even less the legality—of any of the dynamics mentioned thus far. In less than 2% of the cases in which defendants were identified the judge acknowledged any inconsistency or irregularity in the identification procedure, discarding its value as element of proof. The problem is that judges hardly ever provide information on how the identification was conducted, which may hide the real frequency of illegal and fragile identifications considered by judges as evidence to convict defendants. Judges usually merely state that ‘the defendant was identified by the victim as the crime perpetrator, leaving no doubt as to who committed the crime’. Yet, the practices and dynamics illustrated with concrete cases here are enough to expose how judges do not challenge or discard fragile or unlawful identifications.

Initially, a combination of arrests in flagrante delicto and defendants identified by victims makes almost irrefutable the claim that the defendant is indeed the person who committed the crime. However, a closer examination of trial details and the particular dynamics of the criminal justice system reveals a series of significant issues. These range from judicial violation of fundamental rights—such as the presumption of innocence and the right to remain silent—to an overlooking of suspicious or unlawful police practices and narratives. These issues are evidenced by the mismatch between the number of arrests framed as flagrante delicto and the number of defendants arrested without possession of stolen goods, as well as by the way identification procedures are conducted during the police phase or even in court. Rather than suggesting that judges are systematically convicting innocent defendants, the analysis of judicial decision-making at this stage highlights authoritarian tendencies—notably, the frequent disregard for core constitutional guarantees—and points

to a judicial practice that is far from effectively controlling or even questioning abuses committed by repressive institutions. Yet the judicial assessment on whether the defendant is the crime perpetrator of *a* crime is far from being as problematic as it is to establish that the defendant is the crime perpetrator of *the* crime.

Essential elements of the offence

Judicial analysis of the constitutive elements of the offence is possibly the most controversial aspect of robbery trials, both in terms of substance and frequency. Robbery, as defined in Article 157 of the Brazilian Penal Code, is ‘the act of taking someone else's movable property, for oneself or for another, through serious threat or violence against a person, or after having, by any means, rendered the person unable to resist’. For robbery to be committed, it is not enough simply to possess stolen goods or unlawfully take someone else’s property without their consent and with criminal intent. For an offence to be classified as robbery, the stealing must have been committed through the use of violence or by serious threat, otherwise the appropriate classification is handling of stolen good or theft. For this reason, after ruling that a crime has occurred and that the defendant is the perpetrator, the judge assesses whether the constitutive elements of robbery have been proved. In this subsection, I first present descriptive data on how often robbery charges involve serious threat versus actual violence, and on what typically constitutes a serious threat or violent conduct in practice. I then analyse judicial reasoning that treats the evidence as sufficient beyond reasonable doubts to reject defence requests for reclassification of the charge to theft or handling of stolen property—requests commonly raised as alternative defences.

Robbery often appears in the popular imagination as a violent crime. In reality, levels and even forms of violence vary quite significantly. My dataset shows that instances of robbery resulting in charges and convictions are based on serious threat and not on physical violence in nearly three out of every four cases. In 15% of the cases the robbery was committed through physical violence, while 12% the cases included both violence and a serious threat. This means that the vast majority of cases do not entail physical violence. What, then, is framed as a 'serious threat' in practice? And how is this proved?

The Brazilian Penal Code does not offer a concrete definition of what constitutes a 'serious' threat. To address this vagueness, judges often provide a definition in their reasoning. A 'serious threat' is generally treated as a subjective element that the victim feels sufficiently intimidating to compel compliance with the offender's demands and prevent resistance to the criminal act. Judgement 0033401-20.2012.8.26.0050 provide us with a representative illustration of this definition: 'the severity of the threat to constitute robbery may be established through actions, gestures, or even simple words, provided they are sufficient to prevent the victim from resisting'. In practice, most of the acts framed as 'serious threats' in charges from my dataset were cases where the defendant allegedly displayed a weapon to the victim (38%). The second most common behaviour framed as serious threat was pretending to have a gun (27%), typically described as the perpetrator covering their hand covered with their T-shirt to simulate a firearm. Oral threat (addressing the victim in an intimidating tone) and possession of a firearm replica each accounted for 9% of the charges.

When it comes to violence, only three categories of actions were allegedly committed by defendants in more than 10% of the cases: pushing the victim (14%); fight following the victim's reaction to the offender's approach (14%); and punching the victim (12%). In 14% of

cases the violent behaviour is not clearly identifiable in the judgement files—8% are unclear, and in 6% it is not mentioned at all.

A key issue in robbery cases is proving the crime's constituent elements. Robberies involving violence are rarely supported by body examinations—in at least 87.5% of cases, no such examination was conducted. Additionally, no footage was used as evidence in any case from my dataset. While proving serious threats is inherently more complex due to the lack of necessarily visible evidence such as body marks, nearly 40% of defendants were accused of threatening victims by displaying them a weapon, not just pretending to have one. In 60% of these cases, however, weapons were not found with the defendant, despite most of them being arrested in flagrante delicto. With few body examinations and weapon retrievals, no footages, and other sorts of serious threat being less likely to be proved by material evidence, proving these elements beyond a reasonable doubt largely relies on statements. In over 80% of cases, witnesses are limited to one or two police officers who arrested the defendant, leaving the victim's, police officers', and defendant's statements as the only evidence.

Judges typically adopt a rigid stance when weighing the statements of the victim, police officers, and the defendant. The rule is that 'there is no reason to doubt the victim's statement', a position expressed in nearly all cases. Judges justify this by citing precedents such as 'the victim's word assumes great relevance in this sort of crime, especially when there is no reason to falsely accuse an innocent person'. This rationale is often followed by the claim that the victim did not know the defendant. The assumption is that the victim, having no prior knowledge of the defendant, would not falsely incriminate someone, while the defendant might lie to avoid conviction. However, this premise assumes a precondition of guiltiness, as only a guilty defendant would need to lie. This constitutes another foundation of the punitive

normality: the defendant is presumed guilty until proven innocent. In one case from my dataset, where the victim did know the defendant, the judge adapted the reasoning to state that:

the victim has no motive to falsely incriminate the defendant, especially because he knew the accused “by sight”, which, in addition to showing the absence of any animosity between them, makes it clear that there is no interest in a recreant incrimination (j.0035457-60.2011.8.26.0050).

Although this ‘adaptation’ is logically inconsistent, it reveals the use of template reasoning by judges, who simply fill in blanks to justify convictions. In this instance, the template is: ‘The victim has no reason to lie because [insert any concrete information]’. The inserted information can be random and irrelevant, serving only to prevent the judgment from being overturned for being abstract and not grounded in the concrete case. I explore the broader use of such templates to convict and inflate sentences in the next chapter. In this specific case, it demonstrates that, regardless of the circumstances, the victim’s account is presumed accurate and beyond question, never being subject to inaccuracies or inconsistencies.

More than not having the benefit of the doubt, my trial analysis shows that defendants’ statements hold virtually no value. While judges consistently emphasise the victim’s credibility, claiming they have no reason to falsely accuse, defendant’s accounts are systematically disregarded, even when there is no victim statement to oppose them. In rare cases where the victim was absent at the court hearing, their statements given during the police investigation were treated as more credible than the defendant’s testimony in court. Only once in my dataset was the defendant’s word credited in the absence of the victim. It is important to note that the issue here is whether the offence involved violence or serious threat. With no material evidence, judicial assessments rely entirely on oral testimony. Yet even without a victim’s presence, defendants’ statements are valueless. Victim testimony

alone suffices for conviction, whereas defendants must produce additional evidence to achieve acquittal—highlighting that *in dubio pro reo* is a myth for defendants charged with robbery in Brazil.

Similarly to their approach to victim statements, judges adopt a standardised stance regarding police officers' testimonies. As a rule, they employ a reasoning template to justify why police statements are always deemed valid and credible. An example of such reasoning template concretely used in judgements is provided below.

The police officers provided detailed narratives, consistent and harmonious with one another, confirming what they had said during the police investigative phase, with nothing in the case proceedings capable of casting doubt on the validity of their words. They are public agents, vested with public faith, entrusted with powers for preventive and repressive policing, and it is not reasonable that, only in court, their statements should be deprived of due value. ... Their testimony does not deserve discredit, considering that the defendant did not report knowing them previously, and there were no reasons for them to fabricate a false justification for the arrest they made. They are public agents vested with a presumption of good faith, unless proven otherwise, with the burden of proof lying with the defence—something which was not discharged in these records. It would be incoherent to grant police officers a presumption of legitimacy in carrying out their functions, such as overt policing and stop-and-search suspects, and then, in court, deny the necessary validity to their testimony (j.1512561-79.2020.8.26.0228).

The consistency between the testimony of the two police officers, always aligned with what they reported during the investigative phase, is unsurprising. During interviews, a Public Defender shared with me one of his strategies for cross-examining police witnesses in court. PD Matheus explained that he always asks questions about facts and dynamics not described in the police incident report attached to the case proceedings. The reason, he said, is that officers often reread their own statements shortly before the hearing, which explains the general consistency of their accounts. But what happens when they fall into contradictions or provide inconsistent testimonies? Judges not only have reasoning templates to

unchallengedly accept fully harmonious police testimony as irrefutable evidence ('they are public agents vested with a presumption of good faith'); they are also prepared to justify inconsistencies when they arise from police testimonies. The prevailing presumption is that police officers, dealing with daily arrests, are human and thus prone to forget details or confuse the events of a specific case. The following excerpt, from the same judge quoted above, illustrates this line of reasoning:

The divergences in statements are specific and do not, in any way, tarnish the statements given; they only indicate that these police officers provided firm and reliable testimony based on their memories. If there had been absolute synchrony, without any divergence, even on relevant aspects, then one might suspect that the officers had agreed on their accounts beforehand. ... I note that small contradictions, not essential to the facts, only confirm the veracity of their statements, as they clearly indicate that there was no prior coordination regarding the narrative to be presented, their reports being based exclusively on the memory they have of the day the events took place.

In the end, police testimonies are never problematised and are always used to support convictions. While judges always suggest that defendants have reasons to lie or omit facts to avoid being found guilty, they rarely consider that discrepancies in police officers' accounts might cast doubt not only on their truthfulness but also on the legality of the arrest—and, ultimately, on their professional conduct. In any case, police statements are treated as inescapable evidence. If the testimonies are coherent, consistent with each other, and align with the initial incident report, they are deemed reliable. If they are inconsistent or contradictory, judges argue that this only proves the statements are honest, human recollections, and therefore even more credible. Thus, more than a simple reasoning template, this reflects a double standard: judges apply two sets of rules to ensure any police testimony fits into the body of evidence against defendants, preserving the punitive normality.

Another important aspect of police statements is their actual content. At first glance, cases where police and victim testify against the defendant seem to show corroboration. While defendants rarely have witnesses to support their version—as I discuss later—the victim’s account is consistently backed by the testimonies of one or two police officers who made the arrest. However, closer analysis reveals that police statements often do not truly corroborate the victim’s narrative. Since officers rarely witness the crime itself, they cannot offer first-hand accounts of how violence or serious threat was used to commit the offence. Instead, they simply reproduce what the victim reported to them on the day of the events. Their only first-hand testimony concerns the circumstances of the arrest—which relates to their own conduct, not to the alleged offence. What appears to be a 'two versus one' situation is, in reality, just a single narrative: the victim’s statement, presumed truthful, versus the defendant’s, presumed false.

Closely tied to what police officers can report first-hand are arrests made in ‘late’ *flagrante delicto*—when the defendant is arrested not immediately but hours or even days after the offence. The longer it takes for the arrest to be made, the greater the likelihood that the offence committed by the arrested person is handling of stolen property, not robbery. This is especially true for easily traceable goods like vehicles or phones, which are often tracked. In contrast, items like watches, jewellery, or shop products are harder to trace and more likely to be found through personal searches based on the suspect’s appearance. Judges consistently hold that the burden of proof shifts to the defendant once caught in possession of stolen goods. While this reasoning has some basis—since handling of stolen property is itself a crime—arrest for possession should not automatically lead to a robbery conviction without further irrefutable evidence linking the person to the robbery itself. In such cases, the key evidence relied upon is usually the victim’s identification—which I have already discussed.

However, in vehicle robberies, suspects often commit the crime while riding a motorcycle and typically wear helmets, significantly impairing reliable identification. Nonetheless, judges regularly accept victim identification as sufficient, overlooking the serious doubt that arises when a suspect's face was covered during the crime.

During my interviews, a prosecutor and a public defender uncovered a key dynamic related to the subtle boundaries of constituent elements of the crime which are often obscured in sentencing files. 'There are situations where the [punitive] excess actually precedes conviction. That's the [punitive] excess in the [prosecutorial] charging power', Prosecutor Paulo told me. This recalls debates around mass incarceration in the US, where prosecutors ordinarily overcharge to pressure defendants into guilty pleas (Pfaff, 2017; Simon, 2007; Lynch, 2016; 2023; Alexander, 2017; Gottschalk, 2015: 266–268). According to Prosecutor Paulo, overcharging is less about malice and more about prosecutors buying into police versions, sometimes to avoid discrediting the police or because they do not have the courage to go against the police version. PD Matheus, however, views overcharging as a deliberate tactic to ensure incarceration. In robbery charges, he explained, defendants typically remain in pretrial detention throughout the whole process, with habeas corpus rarely succeeding in appellate courts. In contrast, theft charges are less likely to result in remand, as an eventual punishment may not even be imprisonment. By framing conduct as robbery, 'you ensure that the guy will stay locked up at least until trial' (PD Matheus).

My dataset supports PD Matheus's claim. In at least 80% of cases where the defendant was arrested in flagrante delicto, they remained on remand until trial. In an interview, Judge Julio corroborated this understanding by sharing his personal views:

For me, the guy who steals, I think that until his trial—as long as it's a quick trial—he should be in jail. Of course he should. Here in Brazil, it's become

quotidian: the guy commits robbery because he knows that the next day he'll be out on the streets. You may say to me, "Man, you're being too harsh". Okay, on that point I'm harsh then. But he must wait [locked up].

Cases in which defendants were convicted of a lesser offence also support PD Matheus's point. In 37% of charges, the defendant was found guilty of a lesser offence. In about half of these cases, this was owing to the prosecution dropping part of the charge, rather than to defensive arguments. We should not forget Judge Julio's words: 'The judge tries to repair some things from the state that don't work'. If other state institutions fail to adequately or sufficiently gather evidence, judges compensate for these failures through their judicial decision-making. From their perspective, this compensation involves always presuming the worst-case scenario for defendants—or, as they presume, for criminals.

Overcharging to ensure defendants are locked up for at least some time appears to be a well-known practice among criminal justice professionals. Prosecutors undeniably play a key role in promoting these punitive excesses prior to conviction, but so do judges. This practice aligns with Judge Ricardo's view of 'giving effectiveness to criminal law', given that it ensures that the offender—whether a robber or a thief—spends time in custody. Judicial punitiveness materialises in the blurred boundaries between theft and robbery. While judges claim defendants' words must be questioned because they have reasons to lie, they turn a blind eye to the real motivations behind police and prosecutorial activity. As several interviewees highlighted, judges often merely endorse prosecutors' narratives, which are in turn the reproduction of the police narrative. In cases where there is doubt over whether the conduct amounts to robbery or theft, the case is treated as robbery. Defendants are presumed guilty until proven innocent and treating the case as robbery makes it possible for the defendant to remain locked up. If, during proceedings, it becomes clear that the offence was theft,

prosecutors may drop part of the charge and seek conviction for theft in their final submissions. Otherwise, in the absence of clear evidence of innocence or of a lesser offence, the prosecution insists on the robbery charge, which is simply endorsed by judges. A conviction for robbery is secured, and the punitive normality is reproduced.

Ultimately, this trial stage where judges assess the constituent features of the offence is one of the key moments where convictions are inflated the most. While the distinction between theft and robbery can be subtle—especially when the robbery involves serious threat rather than violence—their difference in terms of punishment is significant. Although I discuss sentencing in the next chapter, I anticipate that robbery sentences are, on average, four times longer than theft sentences—that might actually result in community sentences. While it is hard to quantify, a considerable number of cases sentenced as robbery should have been classified as theft. Not all cases are thefts, but there is often insufficient evidence to support a robbery conviction beyond reasonable doubt. Most robbery charges rely on serious threat, rather than violence, typically involving the defendant either showing or pretending to have a weapon under their t-shirt. Weapons are rarely recovered, despite the defendant being arrested in flagrante delicto. Material evidence is equally scarce—none of the cases in my dataset included footage, and body examination reports were exceptional.

The evidence in these cases is almost always reduced to oral testimony, specifically the victim's word. Victims are presumed to be bona fide, with no reason to falsely incriminate defendants. When defendants confess, it is usually a partial confession, admitting to theft but denying serious threat or violence. Although police officers typically support the victim's account, they rarely witness the crime itself and therefore cannot offer firsthand testimony on the use of threat or violence. In the rare instances where officers do witness the crime, it

usually indicates an immediate chase, suggesting an attempted rather than a completed robbery—which is precisely what I analyse next. Nevertheless, by presuming guilt, systematically disregarding the *in dubio pro reo* principle, and convicting defendants solely based on victim statements, judges significantly inflate convictions and, in doing so, contribute to the growth of the Brazilian prison population.

In sum, this trial stage in robbery cases is a great illustration of the punitive normality. Once again, rather than controlling excesses of other penal institutions, judges mostly endorse them—from police narratives to prosecution overcharging to ensure suspects spend some time in custody. Convictions are often secured based solely on victim statements, even when evidence is tenuous. The blurred boundary between theft and robbery is consistently resolved in favour of harsher classifications, prioritising imprisonment over due process, thereby revealing authoritarian rather than liberal traits. This judicial decision-making, driven by a presumption of guilt and oriented towards the punitive normality, systematically inflates convictions.

Stage of the commission of the offence

After establishing that a crime occurred, that the defendant is the perpetrator, and that the offence is robbery rather than theft or handling of stolen property, judges move on to assess whether the robbery was actually completed or merely attempted. Convictions for completed robbery are far more common than for attempted robbery. According to my dataset, for every robbery sentenced as attempted, three are sentenced as completed. However, a closer look at judgement files casts doubt on this proportion. Judges systematically overlook situations where the robbery was merely attempted, sentencing them as if they had been successfully

completed. As explained in Chapter Two, attempted crimes may have their punishment reduced by up to two-thirds. For instance, instead of receiving a five-year prison sentence, a defendant could be sentenced to less than two years if the judge recognises the attempt. I analyse in greater detail the concrete consequences, in terms of sentence length and initial prison regime, of convictions for attempted versus completed robbery in the next chapter only. Here, my focus is on examining how judges decide upon this matter, particularly how they develop legal reasoning to justify convictions for completed robbery even when evidence suggests the crime was only attempted.

We have seen that nearly all defendants charged with robbery were arrested in *flagrante delicto*, and that the dynamics of these arrests vary. Sometimes, after being robbed, the victim finds police officers nearby and reports the crime, providing a physical description of the perpetrator. Minutes or hours later, the police identify a suspect matching the description and arrest them. This is a clear case of a completed offence. However, in several cases I analysed, the perpetrator is arrested following an immediate chase by the victim, by ordinary people—bystanders—or, more rarely, by police officers who witnessed or immediately heard the commotion (such as people shouting *pega ladrão!*—catch the thief!). In one instance, the defendant was even shot by the victim after being chased. In these situations, the defendant is apprehended while attempting to flee, without having undisputed possession of the stolen object, even if briefly. Until 1987, the Brazilian judiciary considered robbery completed only when the perpetrator achieved undisputed possession of the property. Based on that interpretation, these cases would have been classified as attempted robbery. Part of the doctrine still supports this view (Fragoso and Glioche, 2017). However, the judiciary changed its stance in 1987, establishing that robbery is completed as soon as the perpetrator, rather than the victim, holds the object, regardless of whether possession is

undisputed. Since then, the judiciary has adopted a more punitive interpretation compared to their understanding under the civil-military dictatorship.

My dataset includes several cases that would have been sentenced as attempted robbery had the judiciary not adopted a more punitive approach since 1987. Judges have often explicitly reported that the defendant was lynched by ordinary people after being immediately chased for taking the victim's property. In some cases, the chasing was provoked by the victim shouting, 'Catch the thief!', prompting bystanders to pursue the defendant. In one instance, the lynching was so severe that the defendant was hospitalised for five days. Other cases involved perpetrators attempting to rob in confined spaces and failing to escape. One instance occurred on a bus, where the defendant was immediately lynched, while in another, the defendant broke into a house but never managed to flee. In this latter case, the victim broke their finger punching the defendant, who later fainted after being strangled. In yet another case, the defendant took bottles of vodka from a supermarket, placed them in his backpack, and attempted to leave without paying. After being caught, he reacted violently to retain possession of the stolen bottles, but was arrested inside the supermarket, never leaving the premises. In all these cases, judges dismissed the defensive claims and classified the offence as a completed robbery, rather than an attempted one.

Although it diverges from my main focus, these situations not only highlight a punitive judicial decision-making where attempted robberies are treated as completed crimes, but also support a key argument developed in previous chapters. Offenders caught and lynched by ordinary people are now subsequently imprisoned, indicating that while informal punishment somehow persists, it is now increasingly followed by official state punishment. This reflects the expansion of the state institutional capacity to punish, marking a shift from informal to

official state punishment, helping us to understand the significant increase in imprisonment rates.

Returning to the main topic of this subsection, despite being generally viewed as more lenient and liberal than trial and appellate judges, Brazilian higher courts have reinforced this more punitive interpretation of the law. The Brazilian Superior Court of Justice (STJ) is the body of the judiciary responsible for ensuring uniformity in the judicial interpretation of federal law. One way it achieves this is through the approval of *Súmulas*—a mechanism introduced by the 2004 judicial reform to enhance the judiciary's efficiency. A *Súmula* is not legislation but rather an established judicial understanding, established by STJ, that lower courts must follow. It serves as a summary of the prevailing judicial interpretation of a law, particularly in cases where different interpretations have been frequently disputed and generated high volume of appeals. In September 2016, STJ approved *Súmula 582*, which standardises the judicial interpretation of when a robbery is considered completed. The *Súmula* reads:

The crime of robbery is completed with the inversion of possession of the property through the use of violence or serious threat, even if for a short time and followed by an immediate chase and recovery of the stolen property, so that undisputable and unguarded possession is not required.

Essentially, this means that a robbery is considered complete when the perpetrator takes possession of the targeted property, regardless of how briefly they hold it.

The general perception among public and private defenders is that STJ *Súmula 582* has almost eradicated the recognition of attempted robbery in judicial decision-making. This view is even shared by a minority of judges, as Appellate Judge João noted during our interview: 'There's no more attempt[ed robbery] in Brazil'. Even if a judge understands that the situation amounts to an attempt, they often refrain from convicting it as such to follow the *Súmula*,

Appellate Judge João explained. A comparison of convictions before and after the *Súmula's* approval supports this perception. In 2015, before *Súmula* 582, attempted offences accounted for 31.6% of all robbery convictions in my dataset; by 2019, this had fallen to 23% and dropped further to 15% in 2020. One important point must be emphasised: most judges already held this more punitive interpretation prior to the *Súmula*. The difference is that they can now ground their decisions more irrefutably in higher court precedents. It is judges who formerly held a more *garantist* position whose decision-making has been most constrained.

Besides casting doubt on whether the crime was attempted or consummated, these dynamics of immediate chases may also raise questions about the classification of the offence and its constituent elements. As mentioned earlier, most robberies are based on serious threat. If serious threat is understood as a subjective element that prevents the victim from resisting the perpetrator's approach, what does it imply when the victim reacts—by chasing or fighting the perpetrator or shouting intensely 'catch the thief!'? This point becomes particularly relevant when evidence of the threat normally rests solely on the victim's testimony, as in cases where the defendant allegedly pretended to carry a weapon by hiding a hand under their T-shirt. In some instances, the circumstances at the crime scene may change rapidly: what initially represented a serious threat could lose its effect within seconds. In such cases, the fact that the victim pursued the perpetrator does not necessarily deny the initial threat—meaning the offence would still be robbery achieved through serious threat, that later ceased to exist. However, while a victim's immediate reaction does not automatically mean they did not feel seriously threatened, it should at least be subjected to judicial scrutiny. Yet this aspect was not considered in any single case from my dataset. It was simply never examined in trials.

Ultimately, whether a robbery is sentenced as committed or attempted has significant effects on the severity of punishment. Sentence length, in turn, influences the initial prison regime assigned—from closed to semi-open or open facilities. Just as framing an offence as robbery rather than theft typically ensures a period of custody, sentencing a robbery as completed rather than attempted typically ensures sentences are served in closed prisons rather than in less restrictive facilities. Circumstances described in my dataset suggest that this stage—alongside the judicial assessment of the crime’s constituent features—is one of the most problematic and consequential points in trials of robbery in Brazil. Despite doctrinal and judicial disputes over the distinction between attempted and completed robbery, higher courts have foreclosed the debate—first by adopting a more punitive interpretation in the late 1980s, and later by consolidating this understanding through a *Súmula* in the 2010s. Ironically, judicial interpretations on this matter were more liberal under the country’s dictatorial regime. These findings highlight how judicial practices have not served as a check on punitive excess but have instead represented the excess themselves. The systematic denial of the attempted form of robbery as a default decision illustrates how the punitive normality is reproduced in everyday legal decisions, laying the groundwork for harsher punishment and endorsing an authoritarian model of criminal justice.

How to escape from an almost unescapable punitive normality

I have shown how convictions are the default outcome in robbery trials. When proceedings follow the punitive normality, conviction becomes virtually inescapable. How, then, can a defendant escape from an almost unescapable outcome? My dataset reveals that the *in dubio pro reo* principle is effectively absent from judicial practice in robbery judgments. Rather than

the prosecution bearing the burden of proving guilt beyond reasonable doubt, it is the defendant—treated as a presumed criminal throughout the proceedings—who must prove their own innocence. In this section, I briefly discuss one key element that increases the chances of avoiding a conviction or securing a conviction for a lesser offence: the presence of defence witnesses. This analysis also exposes structural limitations of the criminal justice system which, unsurprisingly, operate to the detriment of defendants, particularly those who depend on public legal defence.

Facing trial under a precondition of guilt, defendants must effectively prove their own innocence. The primary way to do so is by bringing defence witnesses to court. Not having a defence witness is almost always fatal. While presenting a defence witness is far from guaranteeing an acquittal, it significantly increases the still-remote chances of not being found guilty. Compared to the 3.8% acquittal rate among defendants without defence witnesses, the 12.8% acquittal rate when a defence witness is present marks a notable difference—the likelihood of acquittal more than triples. Even when defendants are convicted, having a defence witness tends to result in convictions for lesser offences. When a defence witness is presented in court, 35.9% of defendants are found guilty as charged, while 51.3% are convicted of a lesser offence. In the absence of defence witnesses, full conviction rates nearly double—from 35.9% to 60.8%—while partial convictions drop from 51.3% to 35.4%.

A subtle but crucial detail would have gone unnoticed had my research been limited to court-file analysis. The presence of a defence witness is not so much about the existence of an alibi, but rather the legal defence's capacity to identify and present one in court. This, in turn, is influenced by the type of legal defence—whether provided by a private lawyer or a public defender. The majority of people charged with robbery have their defence provided by

public defenders—around 80% of the defendants in my dataset.³ However, public defenders rarely manage to present defence witnesses in court. In only 2% of the cases do public defenders manage to do so, compared to 15% for private defenders. A partial explanation for this discrepancy came up organically in interviews. PD Lucas told me that public defenders have limited capacity for investigative work. In addition to the massive differences in workload, time, and resources between public and private defenders, he pointed out that the defendants represented by the Public Defender’s Office often come from the extreme socio-economic bottom, ‘who have no idea about anything’ and ‘don’t even know what to do in that position when they have to prove their innocence’. This particular profile not only shapes judicial biases but also undermines the ability to carry out a coordinated defence investigation, especially given the material and personnel shortages and work overload faced by public defenders.

At this point, I must briefly divert from the main focus of this section to build upon something PD Lucas argued. The profile of individuals assisted by public defenders reveals another element that corroborates the thesis that mass incarceration is partially a result of the shift from informal and hidden state punishment to official state punishment. It illustrates how official state punishment has increasingly reached individuals who would previously have been left to other instances of justice—notably informal or hidden state punishment. This shift mirrors the historical composition of the prison population (Dal Santo, 2018: 84, 116). In the early 1930s, homicides accounted for over 60% of convicted prisoners, while theft and robbery represented just 16%. Over time, these percentages have gradually reversed. By 2014, homicide accounted for only 10% of the prison population, while theft and robbery together

³ Excluded cases where information on the type of defence—public or private—was unclear.

made up nearly 40%. If we also include drug-related offences—previously non-existent in 1930—this percentage almost reaches 70%. While this shift is partly driven by changes in criminality too, it also reveals a broader trend: the extreme poor, who once were not typically dealt with through imprisonment, now is even overrepresented in the prison system.

Returning to the main focus of this section, I had not initially realised that the presence of defence witnesses could, albeit marginally, influence trial outcomes, nor that their presence or absence was shaped by hidden factors. Once I became aware of the struggles public defenders face in bringing witnesses to court, I reached out to PD Fernando, with whom I informally discussed this issue in more depth. PD Fernando highlighted two additional dynamics. First, as the vast majority of defendants charged with robbery are on remand, the contact between public defenders and defendants is extremely limited and complicated. Public defenders must often rely on third parties—typically the defendant’s mother or friends—to facilitate access to and communication with potential witnesses.⁴ Ultimately, public defenders rarely succeed in reaching the end point in a long path towards witnesses. Judge Luiz and Judge Vanessa both informed me that some public defenders learn about existing defence witnesses only during the hearing, when they have more direct contact with the defendant. In these cases, public defenders typically request another hearing at a later date to allow time for witnesses to be summoned and brought to court. However, both judges

⁴ PD Fernando explained that in robbery cases, as most defendants are on remand, contact with a Public Defender is typically limited to three occasions. In São Paulo, given the city’s dimensions, defendants meet a different Public Defender each time. The first contact occurs within a day of the arrest, at the detention hearing, where discussions are restricted to the regularity of the and the appropriateness of pretrial detention. The second takes place at the Detention Centre (CDP), where a team of Public Defenders visits fortnightly to provide legal assistance. During each visit, they meet with approximately 10-15 detainees and record key information for legal defence—including the defendant’s account and witness details—on a form, which is forwarded to the public defender assigned to the case. The third contact occurs minutes before the hearing at the Courthouse. Illustrating the difficulties of gathering evidence, PD Fernando cited a detainee’s statement at the CDP: ‘Yes, there’s a witness. Call my mother at this number. Tell her to speak with Marquinho—he’ll find witness X. Also, go to petrol station Y to check for a camera’.

noted that judges generally deny such requests, arguing that witnesses should be listed at an earlier stage of the proceedings, in accordance with the Criminal Procedure Code.

On rarer occasions, when a defence witness is identified and located, another dynamic may reduce their chances of being presented in court. PD Fernando explained that poor, working-class people are often reluctant to appear as witnesses due to fear of reprisals from police officers or the threat of being sued for false testimony by prosecutors or judges. This concern, highlighted by PD Fernando, was echoed by another interviewee. Judge Vanessa confirmed that such threatening behaviour does occur during hearings she presides over. She argues that

There's a criminalisation of poverty and of the black population. We don't have cameras attached to the police [in her state], so I acquit many cases because eyewitnesses show up [in court] and report that the arrest wasn't as the police said: "Oh, it wasn't like that—[the police officers] put the defendant in the car, drove around, and so on...". Then, in my decision, I argue: "Look, this doubt would be cleared up if every police action were filmed; if it's not filmed, I can't discredit what eyewitnesses reported". So what did the Prosecution Office start doing? They started conducting criminal investigations into these witnesses. Every time a defence witness comes to testify, the Prosecutor already asks: "Is her ID registered? Because I want to do some research later"

For judges to acquit someone, especially those with a 'standard' profile of prisoners in Brazil— young Black and poor men—they require crystal-clear evidence. While bringing defence witnesses to court can shift the dynamics of a trial, such evidence is rare. The reasons go beyond the actual existence of alibis and include structural limitations within the Public Defence Office—from limited infrastructure to limited contact between public defenders and remanded defendants—and forms of coercion against potential witnesses from disadvantaged backgrounds systematically carried out by police officers and prosecutors. Nevertheless, in the lack of evidence—specifically, defence witnesses—the trial often follows

its expected path towards conviction. In the judges' minds, if you have no defence witness and cannot actively prove your innocence, then you must be guilty.

Inflating convictions by endorsing punitive excesses

Before closing the chapter, a final point must be made. By looking at the dynamics and relations shaping trials and convictions, one may well argue that judges are not the only ones responsible for undue or inflated convictions. Indeed, they are not alone in this practice. I have shown, for instance, how police officers violate identification procedure guidelines and interrogate suspects without legal defence, among other dubious practices—such as arrests in flagrante delicto where defendants are not actually caught in possession of the stolen goods. In other offences, such as drug trafficking, the role of the police is even more central and influential (Semer, 2019; Campos, 2015; Jesus, 2018). I have also shown the deliberate prosecutorial strategy of overcharging defendants to ensure they are locked up at least until trial. Prosecutors' punitiveness and their role in reproducing mass incarceration in Brazil have been more specifically analysed by other researchers (Leão, 2023; Azevedo et al., 2022; Keese, 2024). Judges are therefore far from being the only agents responsible for inflated convictions. However, police and prosecutorial excesses cannot flourish unless judges validate them.

The proximity between judges and prosecutors was emphatically highlighted by many of my interviewees—not only by public defenders, but also by prosecutors and judges themselves. This proximity operates at multiple levels. Physically, they work closely in the courthouse: sitting side by side at the same level during hearings and trials—while the defence sits lower, reflecting an inquisitorial feature—and spending time together during coffee breaks (PD Lucas). They are also close politically-ideologically, often sharing a punitive, and at times

authoritarian worldview, inclusive of law, criminal justice, and their roles as public security agents (Leão, 2023; Azevedo, 2009; Azevedo et al., 2022; Lemgruber et al., 2016). This alignment was evident in the programme of the FONAJUC First Annual Conference, which included several prosecutors as keynote speakers but not a single defence attorney or public defender. This longstanding proximity, well-known among criminal justice actors, became more visible to the wider public after leaks revealed the illegal off-court collaboration between then-Judge Sergio Moro and then-Prosecutor Deltan Dallagnol during Operation Car Wash. The revelations showed Moro offering strategic guidance on investigations and charges that led to the imprisonment of then-presidential candidate Lula. Both later left their posts to pursue political careers with right-wing parties. As PD Marcus told me, the relationship between Moro and Dallagnol was not exceptional, but a reflection of everyday dynamics between prosecutors and judges:

I've noticed that there is often a co-management of decisions between prosecutors and judges. For example, I've walked into rooms where the prosecutor and the judge were discussing, 'oh, look, I think this and that'—very much like what we saw with Moro and Dallagnol. I see this almost every day... and I think it gets even worse in places where there is no Public Defender's Office. I think the Judiciary sees the Prosecution Office much more as a partner than it sees the Public Defence.

This broader picture is confirmed even by prosecutors. During our interview, Prosecutor Paulo acknowledged that while the relationship between Judge Moro and Prosecutor Dallagnol was an extreme example of closeness, similar dynamics are not uncommon at lower levels. According to him, the Prosecution and the Judiciary are state institutions that naturally maintain a close relationship—something that, he pointed out, 'obviously doesn't happen with lawyers, the Bar Association, or the Public Defender's Office'. He also acknowledged that these affinities and close relationships negatively impact the operation of the criminal justice

system, fostering a partiality. This partiality is precisely reflected in judicial activity reduced to mere ratification.

Similar is the relationship between judges and police officers. PD Matheus argued that ‘the role [judges] play is one of “social cleansing”. It’s a complementary role to that of the police. They’re, perhaps, the police’s law firm’. He continued: ‘The judge and the police officer think quite alike. The difference is that one was born into a richer family and the other into a poorer family, but they are absolutely complementary’. I do not have space here to explore more all these close ties, which are equally evident in other punitive, ordinary judicial practices, such as the shelving of police inquiries into killings committed by police officers. For our purposes, the key point is that these proximities materialise in what Prosecutor Fábio calls a ‘counter-constitutional hypothesis’, where police narratives are uncritically adopted by prosecutors and then endorsed by judges. He notes that while the constitutional hypothesis should be the presumption of innocence, in practice the system operates under a presumption of guilt. If judges simply follow the ordinary script without challenging it, the presumption of guilt prevails. This idea succinctly captures the logic of punitive normality in criminal trials. It explains why defendants must actively prove their innocence.

Caution to absolve, tranquillity to convict. In an interview, Judge Gabriel articulated what was already evident from my analysis of trials:

It’s incredibly easy—I assure you, it’s so easy—I feel no pressure at all when I’m about to convict or send someone to jail. Zero pressure. I spend two minutes on the sentence. I don’t even need to think. ... But to acquit or release someone, you spend hours and hours. You know your sentence will circulate, so you even think, ‘I don’t want there to be even a grammatical mistake in this decision’.

Some judges explicitly told me that ‘the judge tries to repair some things from the state that don’t work’ (Judge Julio). In so doing, ‘you bring effectiveness to criminal law’ (Judge Ricardo). These views help explain why the *in dubio pro reo* principle is virtually absent in Brazilian judicial practice. For many judges, lingering doubts simply indicate that the police—or ‘some things from the state’—failed to gather sufficient evidence. If the defendant were truly innocent, judges believe, they would have proven it. In this logic, precarious infrastructure and working conditions are considered only when it comes to the police, but never in relation to the Public Defender’s Office—as judges tend to overlook how the limitations of public defence often results in defendants remaining silent at police stations and lacking defence witnesses in court. The double standards are striking.

At the end of the previous chapter, I indicated that the post-dictatorial Federal Constitution granted judges the power to control the frequent police abuse and arbitrariness of the past. However, the practices and dynamics explored in this chapter show that judges have largely adopted a position of endorsing, rather than controlling, these abuses. By ratifying the versions presented by the police and prosecution, judges are not merely punitive by omission. While people used to be locked up without judicial activity until the 1980s, today, for the counter-constitutional hypothesis to prevail and the punitive normality to be reproduced—essentially, for anyone to be sent to prison—a judicial decision is required. In robbery trials, this decision-making process presumes guilty until proven innocent. In endorsing the excesses of police and prosecutors, judges themselves violate constitutional rights and safeguards. Their role, rather than protecting these rights, is seen as ensuring the effectiveness of a system where other state institutions have failed—ensuring that those presumed guilty are eventually convicted.

Conclusion

In this chapter, I have analysed how judicial practices systematically lead to convictions in robbery cases, highlighting three key dynamics: the reproduction of a punitive normality, the legal endorsement of flawed narratives and illegal practices, and the production of inflated convictions. I have demonstrated how defendants charged with robbery are presumed guilty from the outset, and how cases tend to follow an expected—and almost unbreakable—punitive normality. This presumption of guilt is rarely challenged, effectively reversing the burden of proof: defendants must prove their innocence or that they committed a lesser offence. For a judge to go against the punitive normality, ‘they must have the balls [sic], they must have the guts to do so’ (Appellate Judge João).

At a superficial glance, the typical body of evidence sustaining convictions may seem strong: an arrest in flagrante delicto followed by identification procedure and coherent testimonies. Yet, as the chapter has demonstrated, a closer examination reveals that much of this evidence is dubious, flawed, or even illegal. Judges nonetheless accept virtually any sort of evidence or claim that supports a conviction. They do not question contradictory or unsupported testimonies, nor situations of flagrante delicto where the defendants are not caught with stolen goods or alleged weapons. Nor do they dismiss illegal or unconstitutional evidence such as unlawful identification procedures. The legal endorsement of unproven narratives and unlawful evidence sustains convictions that might otherwise collapse under constitutional scrutiny. Judges, far from acting as guardians of rights, position themselves as agents compensating for the failures of other institutions. As a consequence, rather than controlling police and prosecutorial excesses, judges routinely endorse them in the name of

effectiveness, ensuring defendants spend some time locked up, even if the police and prosecution have failed to produce lawful, concrete evidence.

Ultimately, I have shown how punitive normality, legal endorsement, and inflated convictions intertwine. The odds are stacked so heavily against defendants that convictions are inflated at virtually every stage of the judicial process. While not all convictions are necessarily wrongful, this chapter reveals that judicial decision-making is systematically authoritarian and that defendants are often convicted of crimes more serious than those actually proved—whether from theft to robbery, or from attempted to completed robbery. The next chapter shows how these inflated convictions translate into inflated punishment.

Chapter Seven

Unescapable imprisonment

Reasoning templates, counter-reforms, and cumulative judicial punitiveness

shaping inflated punishment

I used to say [Barra Funda Criminal Courthouse] was a machine of grinding poor people. ‘What am I doing here?’ ... It became completely exhausting for me. I started taking Rivotril.¹ I eventually moved elsewhere as a strategy to stay alive because, yeah... I felt like I was merely watching, from a VIP area, the operation of a concentration camp. It was really crazy, I was absolutely powerless. Those guys... being thrown into the Provisional Detention Centre... I started to feel really bad, like, feeling powerless... Judges would acknowledge [my work] and say: ‘despite the brilliance of your defence attorney, this crime is very serious, so I’m going to keep you in prison’. Like, there wasn’t even any legal reasoning. It was always just ‘the crime is very serious, I’m going to keep you locked up’. I started to feel like a clown (PD Matheus).

This quotation from a Public Defender who formerly worked at the Barra Funda Criminal Courthouse vividly captures the sentencing dynamics in robbery cases. While the previous chapter analysed how judicial punitiveness materialises in inflated convictions, this chapter turns to how judicial punitiveness determines inflated punishments. Closed prison is the standard—or the ending point of the punitive normality. Drawing on my dataset, I show that defendants convicted of non-aggravated robbery receive an average prison sentence of five years and eight months. This sentence length legally qualifies for a semi-open initial prison regime—as I show later in the chapter. However, the vast majority of defendants sentenced

¹ A controlled long-acting tranquiliser used to prevent and treat anxiety disorders.

to intermediate sentence lengths (to which a semi-open prison is legally allowed) were nonetheless assigned to closed prisons. If the previous chapter showed the path toward an almost unescapable conviction, this chapter reveals the path toward an almost unescapable imprisonment in closed prisons. I analyse how judicial punitiveness cumulatively builds up across all sentencing stages to increase sentence lengths, establish harsher initial prison regimes, and deny defendants the right to await appeal at liberty.

The chapter is divided into three main sections, reflecting the stages of judicial sentencing. I first analyse the process of determining the amount of punishment (*dosimetria da pena*), itself made of three steps. I then examine how judges decide the form of punishment (notably the type of initial prison regime). Finally, I assess the judicial reasoning behind decisions on whether defendants may await appeal at liberty.

Across these stages, certain key patterns emerge. One is the centrality of illegal, generic reasoning, often relying on predefined reasoning templates that overlook the particularities of each case. Defendants are not judged as individuals, but as a closed category of presumed dangerous criminals who must be locked up. Another pattern is the recurrent use of double standards: discretion is exercised only to aggravate punishment, never to benefit defendants; precedents from higher courts are followed only when they serve to increase punishment; references to the concrete reality (beyond law in the books) are invoked only to justify harsher punishment. When the concrete reality would support leniency, judges claim they are bounded to the letter of the law. Finally, legislative reforms aimed at decarceration are systematically undermined: judges enforce new law only when they increase punishment, otherwise ignoring or even expressly rejecting them. In practice, judges perform what represents counter-reform measures, neutralising political and higher court

efforts toward decarceration. If the previous chapter portrayed judges as endorsing punitive narratives and excesses of prosecutors and the police, inflating convictions through a shared punitiveness, this chapter shows judicial punitiveness operating more autonomously, as the sole power to inflate punishment.

Amount of punishment

After establishing the defendant's guilt, judges determine the appropriate amount of punishment through a three-step process. As explained in Chapter Two, this process involves: (1) analysing the legal circumstances set out in article 59; (2) considering aggravating and mitigating factors; and (3) applying any causes for sentence increase or reduction. Although the minimum penalty for completed robbery is four years of imprisonment, in over 85% of cases, judges imposed sentences above this minimum. In this section, I examine how this judicial procedure operates, with a particular focus on the legal reasoning—or frequent lack thereof—used to justify the systematic inflation of punishment.

First sentencing step: legal factors under Article 59

As explained in Chapter Two, the Brazilian Penal Code lists eight legal circumstances for judges to assess when establishing the base-penalty (*pena-base*). These are: the defendant's culpability, antecedents, social conduct, and personality; the reasons, circumstances, and consequences of the crime; and the victim's behaviour. Except for antecedents, all are conceptually broad, allowing significant judicial subjectivity. Judges are free to set the base-

penalty anywhere within the minimum and maximum range, provided it is grounded in these factors.

For ordinary robberies, the base-penalty range is four to ten years. Despite this discretion, judges typically impose the minimum four-year sentence at this stage (about 70% of cases). When the base-penalty is increased, it is mostly due to negative assessments of subjective elements (over 75% of cases with increases). In theory, this could suggest an individualised evaluation. In practice, however, increases occur in a generalised, de-individualised manner, detached from the specifics of each case.

When I shared preliminary findings with Judge Ricardo, notably the tendency of discretion being exerted with more harshness rather than leniency, he immediately agreed: ‘I have this impression too, Luiz. ... I myself have heavy hands² for robbery. I think it’s a serious crime’. Across interviews, judges revealed a shared sense that four years is insufficient for robbery, regardless of how it is committed. Judge Vanessa noted that it is in the discretion to establish a base-penalty ‘that all the commonsense and prejudice comes in. Judges act barbarically here, isn’t it? They don’t do the same to a white-collar criminal, though’. Similarly, PD Marcus observed that harsher interpretations are rare in cases like domestic violence. The problem is that defendants charged with robbery are those that PD Lucas described as miserable people ‘at the extreme bottom’, who are invisible to judges except as dangerous criminals. This generic perception fuels the widespread use of reasoning templates—standardised justifications that pre-exist the case, allowing judges to inflate punishment without individualised analysis. In the previous chapter, I showed how reasoning templates are used to automatically validate police and victim statements. Here, they underpin the

² Being informally called ‘heavy-handed judge’ in Brazil corresponds to a tough, punitive judge.

whole sentencing process. To establish the amount of punishment, reasoning templates are mostly used to systematically assess negatively the defendant's personality, and crime circumstances and consequences. Sometimes judges 'fill in the blanks' by inserting superficial case details into the templates; other times, they simply copy and paste generic arguments without any adaptation to the individual case.

The defendant's personality is the subjective element most often used to increase base-penalties (38% of cases). Judges, almost all trained solely in law, claim to assess defendants' personalities, but in practice rely on simplistic templates. Often, they assert that any robbery offender has a 'deformed' or 'perverted' personality (*personalidade desvirtuada*), being 'presumably dangerous,' and 'inclined to aggressiveness'. This sort of reasoning erases individuality and turns any defendant charged with robbery into an intrinsically dangerous and violent offender who deserves harsher punishment. Where specific details are mentioned, they are often random and irrelevant as indicative of one's personality. Judges may cite a lack of formal employment to infer a 'crime-oriented personality'. Yet, other judges claim that committing a crime while having a job shows greater culpability. PD Matheus refers to these practices as 'filling in the blanks', whose purpose is merely to avoid having their decisions appeal and overturned for being generic. Judges thus reinterpret facts to fit pre-existing punitive templates, sometimes even using presumed favourable evidence—such as being employed—against defendants. Similar practices were documented by Valois (2020), who found that judges perversely invoked the principle of resocialisation to justify longer sentences. This rationale prevails and random case details can be spun either way to ground inflated penalty on dangerousness and negative personality traits—such as the defendant acting alone or in groups, or hiding their identity or not, as I have observed. The large

discretionary space allows judges to fill in the blanks of their reasoning templates with any random element.

The same ‘fill-in-the-blanks’ approach is used when evaluating the crime’s circumstances—the second most cited subjective factor (32% of cases). Judges increase base-penalties based on factors as arbitrary as whether the crime occurred in early morning (j.1501188-51.2020.8.26.0228), broad daylight on a busy public road (j.1531317-73.2019.8.26.0228), or near a metro station (j.1504634-62.2020.8.26.0228). It is not a coincidence that defendant’s personality and crime circumstances are the two subjective elements most commonly evaluated negatively to increase base-penalties. Given their vagueness, almost any situation can be included in reasoning templates to highlight how ‘nasty’ the circumstances of the crime were, and how ‘dangerous’ and ‘crime-oriented’ the defendant’s personality is.

Crime consequences, the third most cited element (27% of cases) are often assessed with entirely generic reasoning, where not even blanks are filled in. There is a widespread judicial reasoning that claims society is tired and afraid of street crimes and that rising criminality restricts good citizens’ freedom. A judge literally copied and pasted the same rationale in different, unrelated cases:

society is increasingly cornered due to people like the defendant. Law-abiding citizens cannot leave their vehicles on the street because they are victims of habitual thefts. Others no longer leave their homes at night, becoming victims of robbers and kidnappers of the worst kind (j.0006891-04.2011.8.26.0050; j.0022150-34.2014.8.26.0050).

Although these claims may well resonate with most people, and are, to some extent, consequences of high levels of ‘street crime’, these fears are not consequences of the specific case at hand. Yet judges routinely copy-paste such rhetoric to justify inflating individual

sentences. Thus, spaces meant for individualised evaluation and proportionality of punishment are used to anchor abstract fears and prejudices, turning discretion into a mechanism of punishment inflation.

Discretion is not, however, the only dynamic at work. Defendant's antecedents are the most cited legal circumstance to increase base-penalties (44% of cases). This is the only objective legal circumstance, without any discretionary space. When assessing antecedents, judges often arbitrarily violate constitutional principles and precedents set by higher courts. Antecedents are supposed to cover final, unappealable convictions only. As recidivism is an aggravating factor (analysed in the second sentencing step), several judges have historically violated the principle of *ne bis in idem*, using the same situation (one previous conviction) to increase the base-penalty and further aggravate the sentence in the following step.³ Besides, my analysis reveals that judges continue to rely on ongoing police inquiries and pending criminal cases to increase base-penalties, even after both the STJ (*Súmula* 444, in 2010) and the STF (*Tema de Repercussão Geral*⁴ n.129, in 2014) explicitly prohibited this practice, since considering pending cases as illustration of negative antecedents clearly violates the presumption of innocence. The fact that judges still use pending cases to increase base-penalties combines two underlying practices that shape inflated punishment: double-standard and counter-reforms. Some judges still violate higher court precedents and consider ongoing cases as bad antecedents—despite following other higher court precedents when

³ Only in 2015, through *Súmula* 241, did STJ rule that using the same prior conviction both to increase the base-penalty and to apply an aggravating factor violates the *ne bis in idem* principle, thereby forbidding the practice. Thus, a defendant's antecedents may only be used to increase the base-penalty if they have at least two unappealable convictions—one as bad antecedents, the other as recidivism.

⁴ A Theme of General Repercussion is a procedural mechanism similar to a *Súmula Vinculante*, used to standardise judicial interpretation of constitutional matters deemed highly significant, especially affecting multiple ongoing cases. It was likewise introduced with the 2004 Judiciary Reform.

they have a more punitive rationale. More often, however, to circumvent these prohibitions, several judges have reframed pending cases as evidence of ‘bad personality’ rather than antecedents. As Barrister Douglas put it: ‘Higher courts set a new precedent and deactivate a [punitive] tool; [lower court judges] automatically reformulates it into another, with the same effect’. Judges thus neutralise higher court rulings, promoting their own counter-reforms from below.

Although punishment increases at this first sentencing step are not always substantial in absolute terms, they have significant downstream impacts, notably by pushing defendants into harsher prison regimes, as I show later. The Brazilian Penal Code does not establish specific amounts of punishment to be increased or reduced at this stage. The informal standard is to add one-sixth of the sentence per negatively evaluated circumstance, but I also identified judges who promoted larger increases—such as raising the sentence by half. More importantly, the judicial practices observed at this stage already reveal how authoritarian traits are entrenched in the judiciary, particularly among lower court judges, who systematically violate core due process safeguards such as the presumption of innocence, the individualisation of punishment, and the prohibition against double jeopardy (*ne bis in idem*).

Second sentencing step: mitigating and aggravating factors

Once judges establish the base-penalty, they move on to analyse all mitigating and aggravating factors, defining the sentence length at the second step. As in the first step, most sentences remained unchanged: out of every four convicted defendants, only one had their sentence altered. Different from article 59’s legal circumstances, however, mitigating and aggravating

factors have a more objective dimension. While this reduces potential issues, it does not eliminate them.

The most common mitigating factors observed are ‘confession’ and ‘relative minority’. The latter is entirely objective—it applies if the defendant was aged 21 or under at the time of the facts. One fifth of the convicted defendants were relative minors, and judges always acknowledged this. Confessions, however, were treated differently. Out of 361 defendants, 205 pleaded guilty—69 fully, 136 partially—yet in 35% of the cases, the confession was not considered a mitigating factor. Judges often justified this by claiming the defendant had not fully confessed.

Beyond the specific mitigating factors listed in article 65, Brazilian penal legislation also provides a generic mitigating factor under article 66, allowing judges full discretion to mitigate penalties based on any relevant circumstance not explicitly mentioned in article 65. Despite my dataset including cases of defendants who were lynched, shot, or hospitalised for days, judges never activated this mechanism. Discretion remains widely used to increase punishment but is systematically neglected when it could reduce it.

Recidivism was by far the most common aggravating factor, appearing in over 30% of cases. The second most frequent aggravating factor is very peculiar: article 61 of the Penal Code includes crimes committed during shipwrecks, floods, public calamities, or victim misfortunes. Over 30% of the defendants convicted in my 2020 dataset had their sentences increased based on this, due to the COVID-19 pandemic being framed as a ‘public calamity’. Only one judge denied the prosecutor's request to apply this factor. A judge stated: ‘It is the case of applying the aggravating factor, especially because the order by public authorities is to remain at home, and not on the street, as the accused admittedly was’ (j.1514890-

16.2020.8.26.0050). Here, the defendant was a 19-year-old homeless man. The judge perversely—or heedlessly—distorted this misfortune ('the accused admittedly was in the streets') to justify harsher punishment, even as homelessness in Brazil rose by around 40% during the pandemic (Ipea, 2022).

A crucial issue is how mitigating and aggravating factors interact. If both are present, they usually neutralise each other, leaving the sentence unchanged. The Penal Code allows judges to consider one circumstance more preponderant—especially if regarding crime motivations, recidivism, or defendant's personality. In 2013, STJ set the precedent that confession and recidivism may neutralise each other, with no automatic predominance—precedent later reinforced by STF in 2017. In my dataset, nearly 75% of cases with both factors followed this precedent. However, in the remaining 25%, judges weighed aggravating factors (usually recidivism) over mitigating ones (usually confession), leading to increased sentences. Lower court judges developed the concept of 'multi-recidivism'—two or more prior convictions—to circumvent higher court precedents, despite no such figure existing in Brazilian law. This figure was born out of judicial activity reacting to get around higher court precedents, considering aggravating factors (multi-recidivism) prevalent over mitigating factors (confession). PD Caio noted the irony: 'What about "multi-confession"? If I tell everything in depth, will the "multi-confession" mitigate more? No, it won't. Why? Because we're immersed in an authoritarian culture'.

Like the first sentencing step, the Penal Code does not define by how much sentences should be altered due to mitigating or aggravating factors. The informal standard remains a sixth per factor, but exceptional cases exist. One judge increased a sentence by 3/8 due to recidivism (j.0004269-98.2015.8.26.0635), more than doubling the usual amount of increase.

There is, however, one relevant issue to note on how mitigating factors affect—or actually do not affect—sentence lengths. Although article 65 of the Penal Code mandates that mitigating circumstances ‘always mitigate the penalty’, prevailing judicial understanding denies reductions if the base-penalty was already set at the minimum. Judges argue that only the third sentencing step allows reductions below the minimum, violating the literal wording of the Code. In this case, this interpretation was consolidated by higher courts through STJ *Súmula* n.231, in 1999, and reinforced by STF’s Theme of General Repercussion n.158 in 2009. Consequently, many confessions and cases of relative minority fail to lower sentence lengths. Here, judicial punitiveness clearly exceeds even the limits set by legislation, directly expanding incarceration.

For this reason, many confessions and some relative minorities end up not mitigating the sentence length. In this case, as higher courts’ precedents favour a more punitive understanding, they are smoothly followed by all first-instance and appellate judges. The judicial position on this issue consolidated in 1999⁵ is a clear illustration of judicial punitiveness, which exceeds even the limits imposed by the literal letter of the law, directly affecting the amount of punishment in a punitive manner.

Third sentencing step: causes for sentence increase and reduction

After defining the base-penalty, and analysing mitigating and aggravating factors, judges proceed to examine the existence of causes for sentence increase or reduction. Out of 344

⁵ In June 2024, after this chapter had already been written, Justice Schietti issued a decision against STJ *Súmula* 231. He advocated for a new judicial interpretation in which the literal reading of the Penal Code prevails, allowing mitigating circumstances to reduce sentence lengths even when the base-penalty is kept at the minimum range. As of now, the case remains ongoing, and Justice Schietti’s position still requires confirmation by a majority of the Court to become binding.

sentencing processes, nearly 60% involved at least one cause of increase, and about a quarter involved a cause of reduction. In over 10%, both were present. Considering only robbery convictions⁶ (n=310), the most common cause of increase was the crime being committed by two or more people, leading to harsher penalties in almost 60% of those cases. The second most common was the use of a weapon—firearm or melee—present in nearly 30% of cases. Causes of reduction were predominantly linked to attempted crimes, accounting for 23% of the robbery convictions.

Judicial activity in the third sentencing step not only determines final punishment but also illustrates well how punitiveness materialises in different forms. Armed robberies—cases in which sentence length is increased due to the alleged use of a weapon—are particularly revealing. They highlight both peculiar judicial interpretations about proof requirements and the judiciary's reaction to legislative changes during the research period. I first address these issues, before returning to the role of discretion in applying causes of increase and reduction.

Judicial decision-making related to weapons is particularly problematic. In over half of the armed robbery cases in my dataset, the alleged weapon was never seized. In 2009, STF set the precedent that, provided that there is other evidence, seizure and examination of weapons are not required to apply this cause of sentence increase. In practice, however, 'other means of proof' are usually limited to oral testimony. As shown in the previous chapter, nearly all defendants were arrested in flagrante delicto. Yet the absence of a weapon at the time of arrest appears irrelevant to judges. As previously discussed, if the victim says it happened, that is sufficient. One typical ruling states:

The fact that the knife was not found does not alter the reality of the facts. The victim stated, at the police station and in court, that she saw the knife in the

⁶ Excluded cases of defendants charged with robbery but convicted of lesser offences.

robber's hands. When the defendant fled, he had the opportunity to get rid of it (j.0010067-88.2011.8.26.0050).

In another case, a judge increased the sentence based on a victim's description of the firearm as merely 'black and square-shaped' (j.1507070-43.2020.8.26.0050). Such vague accounts are systematically accepted as sufficient to nearly double a prison sentence. Occasionally, judges also invoked police officer testimony. This, however, poses another question: if the police officer is able to see the weapon, how is he not able to seize it once the defendant is arrested? The response was already flagged in the previous chapter: police statements often merely echo the victim's account rather than offer independent corroboration by first-person accounts. Judges nonetheless invoke STF precedent to justify increasing sentences without weapon seizure or forensic examination. Oral evidence alone thus suffices to establish even material elements of the crime, such as the existence of a weapon.

The impact of this judicial understanding is significant. Prior to 2018, robberies involving any weapon—including firearms or melee weapons—warranted a sentence increase of between one-third and one-half. In my dataset, the average sentence for robberies with one cause of increase was five years and ten months. Following legislative reform in 2018 (Law n. 13,654), robberies committed with firearms now require a two-thirds sentence increase. Consequently, the average sentence rose to eight years and ten months. This harsher legislative change was swiftly and fully adopted by judges, contrasting with their resistance to legislative reforms that benefit defendants, as discussed later. In practice, a mere victim statement such as 'the defendant showed me a gun', unsupported by any additional evidence, can trigger a sentence increase from around four to over eight years of imprisonment. The judiciary has shown itself to be comfortable with this significant increase based on a virtually non-existent body of evidence.

Another problematic trend in this sentencing step is how judges handle multiple causes of sentence increase. The Brazilian Penal Code allows judges to apply only one cause of increase (or reduction), even if multiple causes are present. Nevertheless, in several cases, judges applied causes of increase consecutively, leading to extreme sentence lengths surpassing twelve and almost reaching eighteen years of imprisonment at times (e.g., j.0074405-27.2018.8.26.0050). Most of these excessive sentences involved armed robbery committed by groups, often without weapon seizure and under the aforementioned new legislation. Highlighting such disproportionality, PD Matheus ironically commented:

I'm gonna start instructing my clients to shoot the victim in the leg. Then it qualifies as robbery resulting in grievous bodily harm, and the punishment drops to seven years. So causing injury, if you're armed and with someone else, is a privilege.

His sarcasm underscores the critical role judicial interpretation plays in preventing disproportionate sentences—particularly the importance of applying only one cause of increase, even at its maximum fraction, as allowed by the law. In this case, judges do not even need to create any innovations outside the law—as they occasionally do—as the law itself provides mechanisms to avoid disproportionate—and counter-productive—punishment.

In some cases, judges did apply only one cause of increase. However, they often maximised the fraction of increase and justified it merely by citing the existence of multiple causes. To curb such generic reasoning, the STJ issued *Súmula* n. 443, which states that

the increase in the third sentencing step in robbery with causes of sentence increase requires concrete justification; the mere indication of the number of causes of sentence increase is not enough to increase the penalty.

This *Súmula* therefore does not forbid maximum increases but merely requires concrete reasoning. Yet, several judges have not followed this command. Some judges simply ignore it,

while others explicitly criticise it. One judge wrote in his sentencing: ‘I do not apply STJ *Súmula* 443, as I believe it violates the principle of individualisation of punishment’ (j.0077031-63.2011.8.26.0050)—a principle systematically violated to increase punishment, as we have seen. Another dismissed it as ‘inappropriate and non-binding’ (j.0034024-79.2015.8.26.0050). The invocation of non-binding status reveals a broader trend: higher court precedents are often ignored when it promotes more liberal decisions but eagerly obeyed when it supports harsher sentencing.

Judicial punitiveness also operates through the handling of causes of sentence reduction. One common practice is systematically dismissing robberies that arguably amount to attempted crimes. As shown earlier, many cases closely resemble attempts, yet judges rarely recognise them as such. Recognising an attempted robbery and applying the maximum reduction could lower a sentence from four years to as little as one year and eight months. However, in practice, attempted robbery convictions in my dataset yielded an average sentence of two years and three months. Moreover, when judges do apply a cause of reduction, they often simultaneously assess legal circumstances under article 59 more harshly, thereby inflating the sentence ahead of applying a sentence reduction. These workarounds reveal what Barrister Douglas frames as an ‘inquisitorial mindset’, in which judges consistently find ways to materialise their punitiveness despite legal constraints.

This section has shown how the procedure for quantifying punishment for defendants convicted of robbery typically unfolds. Judicial discretion plays a decisive role in this process, particularly as it is systematically used to increase sentence lengths—to inflate punishment. This occurs through various mechanisms: negative evaluations of legal circumstances in the first sentencing step; weighing aggravating factors more heavily than mitigating ones when

both are present in the second step; consistently ignoring the generic mitigating factor; and purposefully inflating base penalties when judges anticipate a reduction in the third step, especially in cases of attempted crimes. However, judicial punitiveness does not merely materialise in discretionary spaces. In several instances, judicial practices are marked by double standards, leading to arbitrary decisions against defendants. Higher court precedents and legislative changes are smoothly followed when they support harsher penalties but are often ignored—and at times openly criticised—when they favour less punitive decision-making. Judges occasionally use their discretionary power to promote counter-reforms, neutralising legislative changes or higher court rulings they perceive as too soft. Opposing a global trend (Penal Reform, 2021), even the COVID-19 pandemic became a justification for harsher sentencing practices in Brazil. In trials, violations of the *in dubio pro reo* principle already set the tone for punitive judicial punitiveness, resulting in inflated or even undue convictions. These violations persist throughout the sentencing stage. However, it is the violation of the principle of individualisation of punishment that most clearly characterises judicial practices at this stage, culminating in unjust, disproportionate, and inflated sentences. De-individualisation largely occurs in discretionary spaces, where reasoning templates are employed to justify harsher penalties in generic ways.

Initial prison regime

After determining the final sentence length, judges establish the appropriate initial prison type. This decision is primarily based on the sentence length: if sentenced to up to four years, an open prison may be imposed; between four and eight years, a semi-open prison may be assigned; and for sentences longer than eight years, a closed prison is mandated. Recidivism

and negative evaluations of the legal factors under Article 59 can justify the imposition of a more restrictive initial prison regime, while time spent in pre-trial detention may allow for a milder one. However, sentence length remains the main reference point.

As shown earlier, only a small minority of convicts received sentences longer than eight years (9.1%), yet over half (56%) were initially assigned to closed prisons. This discrepancy already flags judicial practices being more punitive than the law prescribes. But to truly capture how judicial punitiveness operates in this stage, it is necessary to examine how initial prison types are assigned within each sentence-length group. Among those sentenced to less than four years—a group eligible for open prison—only 42% were assigned to the least restrictive prison regime, while over 30% were sent to semi-open prisons, and over 25% to closed prisons. One must notice that among those sentenced to open prisons, nearly 85% had committed crimes other than (completed) robbery—such as theft, handling of stolen property, or attempted robbery. This pattern persists for those sentenced between four and eight years: over 70% were assigned to closed prisons, despite legislation authorising semi-open prisons as the initial regime. Thus, just as the punitive normality in robbery trials leads to conviction, the punitive normality in sentencing leads to closed prisons—regardless of their legal compatibility with sentence length. This section examines the judicial reasoning used to justify these mismatches—which again reveals the widespread use of reasoning templates to systematically inflate punishment.

Brazilian law (Article 33 of the Penal Code) clearly states that harsher initial prison regimes can only be imposed if the defendant is a recidivist or if they have legal factors under Article 59 assessed negatively in the first sentencing step. Yet, my empirical research shows a significantly different reality: illegal justifications are frequently provided. Among cases where

the sentence was under four years and a harsher regime was imposed, in just over half of the cases judges provided legal reasons—recidivism (38%) and negative circumstances (15%). In the remaining cases, judges reasoning was illegal (35%) or even absent (11%). Among unlawful reasons provided, the most common was the abstract seriousness of robbery (over 50% of cases), followed by a generalised ‘public fear’, and the presumed dangerousness of the defendant. The same pattern appears among defendants sentenced to between four and eight years who were sentenced to closed prisons. Just over 40% of the defendants were recidivists and about 15% had negative legal factors. Yet, in over 40% of cases, judges imposed harsher initial prison regimes without legal basis, citing again the abstract seriousness of robbery, generic public fear, and the presumed dangerousness of defendants. An illustrative example comes from a judge sentencing a defendant to a closed regime despite a four-year sentence, justifying the decision as follows:

In light of the seriousness of the offence, I set closed prison as the initial prison type, suitable for whoever commits robbery, one of the offences that most disturbs public peace these days and therefore deserves a severe response from the Judiciary.

The judge never unpacked the ‘seriousness of the offence’, leaving it entirely abstract. In fact, this robbery was committed through threats, without violence, no use of weapons, and no participation of multiple offenders. Even the prosecutor, in this case, highlighted that a milder regime could be assigned based on the concrete circumstances of the offence. In this case, not even the prosecutorial activity was enough to limit judicial punitiveness.⁷

⁷ Until 2022, this decision would have been considered a violation of the accusatorial principle by the Brazilian higher courts (STJ, 2022). In 2023, however, STJ changed its own precedent to understand that the prosecutorial request does not set a punitive limit for judicial decisions (STJ, 2023).

One might expect that such unlawful reasoning would be overturned through habeas corpus writs. However, appellate courts often validate these decisions. Although judicial practices vary across Brazilian states (Bottino, 2016; Semer, 2019; Giamberardino and Dal Santo, 2024), these sorts of unlawful reasonings are widely accepted by TJSP. A precedent from a TJSP appellate judge, cited by a first-instance judge, reads:

In cases of robbery, the option for the initial closed regime is indeed the most appropriate. It does not matter whether the robbery is non-aggravated or aggravated, completed or attempted: in any form, robbery is a very serious crime and reveals the deformed personality of the offender. ... A criminal who commits such a serious property crime, through violence—a situation that keeps causing alarm and social instability, obviously cannot remain on the streets and must be segregated (j.0091932-36.2011.8.26.0050).

The three generic ideas—seriousness of the crime, dangerousness of the defendant, and widespread societal fear—are deeply interconnected. Abstract references to the ‘dangerousness’ of robbers suggest that closed prison is always necessary. Similarly, reasoning based on the abstract ‘seriousness’ of robbery disregards the specifics of the case. While the definition of initial prison regimes must be grounded on the individualisation of punishment—and therefore based on the particularities of the offender and the offence—some judges use the same reasoning templates, applying identical justifications across different cases, such as:

Robbery, regardless of being completed or attempted, and even if the perpetrator is a first-time offender, must be punished with deprivation of liberty under the closed regime as a rule. Granting an open or semi-open regime devitalises the intimidating effect of the penalty, meaning that it encourages the offence of robbery (j.0041001-92.2012.8.26.0050; j.0000072-46.2014.8.26.0050).

Thus, if defendants charged with robbery rarely escape conviction, convicted defendants almost never escape being sent to closed prisons. The decision comes first, and the case details are either disregarded or come later.

The invocation of ‘widespread fear’ has also become a standard judicial rhetoric to support harsher penalties at various procedural stages. Judicial arguments often rely on abstract claims that the good society has tired of criminality and demands harsher treatment of crimes like robbery. As one judge reasoned:

Granting a milder prison regime would allow the defendant to return to the streets in a short time, which is certainly against the wishes of society, who calls for harsher punishments for violent crimes (j.0099459-39.2011.8.26.0050).

Another judge similarly stated:

Robbery is a serious crime that has alarmed society and made São Paulo one of the most unsafe cities in the world; the increase in cell-phone robberies demands a tougher stance from the Judiciary (j.1509248-13.2020.8.26.0228).

In such cases, judges act less as a guardian of legality and due process and overstep their powers to act as if they were public security agents fighting criminality—an issue I return to in the following chapter.

Given the frequency of these unlawful, generic reasonings, STF issued two *Súmulas* in 2003. *Súmula* 718 clarifies that the abstract seriousness of an offence is not a valid reason for assigning more restrictive prison regimes. *Súmula* 719 demands concrete motivation for any prison type established if harsher than the one eligible by law. Yet these measures proved insufficient, leading STJ to issue *Súmula* 440 in 2010, explicitly prohibiting harsher prison regimes based solely on abstract crime seriousness when the base-penalty was set at the legal minimum—meaning that no legal factor under Article 59 was deemed negative by the judge. Therefore, in addition to the law being unambiguous, Brazilian higher courts have had to expressly reiterate the unlawfulness of abstract reasonings on generic seriousness of the crime and dangerousness of the defendant. Yet several lower court judges have completely

ignored both the law and the higher court precedents to keep unlawfully sentencing defendants to closed prisons.

Some judges attempt to get around judicial precedents and hide the abstract essence of their reasoning templates, inserting case-specific but trivial details to give a false impression of individualised analysis. For example, one judge provided the same reasoning, word by word, in at least three sentences, with only one minor change to bring a case-specific element to his decision. The reasoning template reads as follows:

Article 33, §2, letter 'c' of the Penal Code says that "a non-convict, whose prison sentence is equal to or less than four years may, from the beginning of the sentence, serve it in an open regime". Despite respectable opinions to the contrary, I understand that the literality of the law does not prohibit setting a harsher regime if Article 59's legal factors point in this direction. Considering the circumstances of the crime, which was [insert case detail], the defendant's terrible behaviour, the fear instilled in the victims, and the social unrest that robbery generates, [defendant's name] must serve the sentence initially in a closed prison.

In different cases, this judge simply replaced the [insert case detail] with minor variations, such as 'serious threat with a knife' (j.0010067-88.2011.8.26.0050; j.0022150-34.2014.8.26.0050) or 'threat through a firearm replica' (j.0003090-75.2014.8.26.0050).

While reasoning templates may sometimes be appropriate for abstract points of law, they are wholly inadequate when specific factual analysis is required, such as determining an initial prison type. Decisions concerning initial regimes must be grounded not in pre-designed templates but in the particularities of the case—from the dynamics of the offence and features of the offender to the concrete amount of punishment imposed. Nevertheless, the systematic use of generic templates remains a widespread practice. Sometimes, judges fill in the blanks. Sometimes they do not. Nonetheless, both practices reveal judicial punitiveness and the punitive normality violating the individualisation of punishment.

In the previous chapter, I indicated how judges tend to provide thorough reasoning not when convicting, but when acquitting. Something similar happens when setting initial prison types. Some judges explain in detail why they are not imposing harsher regimes—even when they are simply following the law or, even more, when they are already establishing an initial prison regime harsher than the one eligible by law, but not the harshest one. For example, in one case (j.0004724-63.2015.8.26.0635), a judge sentenced a defendant to one year and four months and imposed a semi-open prison type. Rather than explaining why they did not impose an open prison—which would be eligible—the judge justified the decision by highlighting the lack of criminal records—a positive penal factor—meaning that what was being justified was the selection of a milder, and not a harsher initial prison regime. In another case, where the defendant received a four-year sentence to a semi-open regime, the judge reasoned that ‘the semi-open prison is enough for the specific case, since the defendant is non-recidivist and did not use a firearm nor serious violence against the victim’ (j.0010269-31.2012.8.26.0050). In this case, again, by highlighting favourable legal factors, the judge justifies a milder regime compared to the closed prison, where they should justify why not imposing the less restrictive eligible by law—the open one. In rare cases where judges somehow deviate from the punitive normality, even if they are still being more punitive than the letter of the law, they are cautious enough to justify their decision with case-related elements.

One final issue links judicial decisions on the initial prison type to the next section on preventive detention. In 2012, then-President Dilma Rousseff enacted Law 12,736, which requires judges to consider time spent in pretrial detention when establishing the initial prison regime. This law responded to the chronic delay of judicial proceedings, where defendants would often spend over a year on remand before trial. Sometimes, by the time they were

convicted, defendants had already served enough time to move to a milder prison regime. The law aimed to alleviate the national prison population by crediting remand time toward the sentence. Since Law 12,736 was already in force for most sentences in my dataset, I could observe its judicial reception. Whenever the judge acknowledged this law, defendants received a less severe initial regime in over 30% of cases, confirming its potential to improve alleviate prison conditions. However, in contrast with the judicial reception to the law that significantly increased punishment for armed robberies, Law 12,736 has been largely disregarded: judges explicitly took it into their consideration in only 26% of cases, openly rejecting it as unconstitutional in more than 25%, and simply ignoring it in almost half of the cases. One judge's reasoning, repeated across cases, illustrates this judicial resistance:

I consider this law unconstitutional, as it violates equality and individualisation of punishment. Considering preventive detention time to assign the initial prison regime benefits those who were detained, disadvantaging those who remained free (j.0019505-36.2014.8.26.0050; j.0022150-34.2014.8.26.0050).

In some rare cases, even when prosecutors requested that judges apply Law 12,736, they were ignored—despite judges ordinarily endorsing prosecutorial practices and narratives unchallengedly. Interviews shed further light on why judges resist applying this law. Some judges openly admitted that the lack of proper prison facilities (such as the 'prison-shelter') drives them to harsher rulings. As one judge—who expressly asked anonymity on this regard—explained:

I've no doubt this harshness in the ruling by TJSP judges and its corroboration by appellate judges is because they're trying to fix a gap left by the state—who has the role of creating a prison-shelter but doesn't do it. The judge then thinks "I'm gonna be harsher here so that this person suffers some kind of punishment", do you know what I mean? ... I've no doubt that due to this state inertia, this gap, judges try to give a response to society—which should've been in a legal way.

Open and semi-open prison models are indeed often non-existent or poorly implemented in many regions. Alternatives like house arrest or electronic monitoring are widely perceived as non-punitive—not only by judges, but some defendants too. One judge recounted hearing defendants mock such sentences: ‘Did Your Honour sentence me just to come sign in [at court]?’.

Judges commonly view open regimes as equivalent to impunity. Judge Francisco commented: ‘Open prison equals acquittal. No real control exists. ... All this pressures judges to respond more punitively, even if they sometimes feel conflicted about it’. Judges consistently emphasized a ‘gap’ between law and reality. Lacking state infrastructure to support non-custodial sentences, judges feel pressured to act as agents of public security. As Judge Sergio noted: ‘In the closed regime, you know the person is locked up. It’s the only visible form of judicial response to avoid impunity’. Judge Francisco admitted that harsher sentencing often stems from an unconscious impulse: ‘At some level of the psychic process, the judge thinks, ‘I’m going to screw this one over a little so he serves some real time’”.

Nevertheless, these concerns with the reality beyond the books are invoked selectively. Judge Carlos emphatically highlighted:

The prison of reality is one thing; the prison of the law is another. If we followed the law considering reality—overcrowding, diseases, gangs—nobody could be imprisoned in Brazil, man. No one! Every imprisonment is illegal in Brazil ... But if I release them, I’ll be the one going to prison.

Judge Carlos’ comments reveal a much deeper dynamic shaping judicial decision-making, to which I turn my attention in Chapter Nine. But his words also expose how double standards shape judicial practice. Inhumane prison conditions are disregarded by judges and does not impact their decision-making. Other aspects of the ‘reality’, however, are more often argued

to justify certain decision-making patterns. Ultimately, 'actual-reality' claims are occasional and typically serve to justify harsher punishments only. Hardly ever do they serve to expand rights of suspects, defendants, and convicts.

This section has shown that closed prisons are almost an automatic judicial response to robbery convictions, even when less severe regimes are legally eligible. Judges rely on generic reasoning templates, treating both robberies and robbers as closed categories. All individuals convicted of robbery are seen as inherently dangerous and violent, irrespective of their particular circumstances. All robberies are regarded as gravely serious, regardless of the concrete facts of the offence. Judges claim that any prison regime other than the closed one is perceived—by convicts, judges themselves, and an imagined general society—as impunity, supposedly fuelling further crime. Appeals to 'concerns with reality' are occasionally invoked, but primarily to justify harsher sentencing. By deliberately and unlawfully imposing closed prison regimes—or semi-open when open is due—judicial punitiveness inflates punishment. In the name of compensating what other state institutions fail to do, judges overstep their power and reproduce excesses they had been trusted to contain.

Preventive detention

Under Brazilian law, the presumption of innocence ends only once a conviction is final and no further appeals are possible. Until then, even if found guilty in a first-instance trial, a defendant cannot serve their sentence, except under preventive detention. This measure, in theory, should not relate to the case's merit, but rather be a precautionary step. For this reason and given that defendants charged with robbery usually spend the whole process in pretrial detention, prosecutors request that defendants are not granted the right to appeal at

liberty in their closing remarks, making the case for a preventive (post-trial pending appeal) detention. When sentencing, after establishing conviction, punishment, and initial prison type, judges determine whether the defendant is granted the right to appeal at freedom. In this section, I examine not only how often preventive detentions are upheld or revoked, but also the reasoning behind these decisions. In so doing, I highlight once again several dynamics discussed in the previous sections: the reliance on reasoning templates that de-individualise a necessarily individualised decision, the frequent use of unlawful justifications, the recurrent disregard for higher courts' precedents, and the apparent, occasional concerns with the reality beyond law in the books.

Once sentenced, over 70% of convicted defendants in robbery cases are ordered to remain in preventive detention. Compared to 97% of defendants charged with robbery being arrested in *flagrante delicto* and around 90% being on remand by the time their trial is held, this might seem like a gradual softening of judicial decision-making. However, it merely reflects the actual sentencing. Among the 10% not on remand during trial, only a quarter received a closed-prison sentence. Of the 26% of convicted defendants granted the right to appeal at liberty when sentenced, less than a sixth were sentenced to closed prison—almost all had already awaited trial at liberty. This strong match between imposition of preventive detention and closed-prison sentences reveals some of the hidden, yet significant, roles pre-trial detention plays, a topic I return to later in this section.

The grounds for preventive detention require justification based on at least one of four reasons: to guarantee public or economic order, ensure the criminal investigation, secure application of the law, or to replace previously assigned but violated precautionary measures. As with the initial pretrial detention following arrest in *flagrante delicto*, maintaining public

order plays an important role in decisions that re-examine and reaffirms the need for a preventive detention at sentencing. Nevertheless, in 50% of cases, judges provided no legal reasoning when ‘renewing’ preventive detention and denying defendants the right to appeal at liberty. Where reasoning was given, it was often unlawful. In most cases, judges simply argued that because the defendant was already detained before conviction, release post-conviction made no sense—treating preventive detention as de facto punishment rather than a precautionary measure. Though this rationale is not usually exposed in case files, some judges acknowledged it in interviews. Judge Ricardo explained:

In the past, Luiz, a theft trial could take ten years. Trials became meaningless, so judges and prosecutors started using preventive detention to anticipate punishment. You'd already served your sentence by being caught in flagrante delicto. You'd served your sentence [through preventive detention] because you were arrested in flagrante delicto. Nobody believed in trial proceedings anymore. Five years [for someone to be tried]? Don't even know if the guy will still be alive! But that's changed ... Today, in [his jurisdiction], in three months you're tried, so there's no reason [to use preventive detention as punishment]. Still, many judges are stuck in a 1990s mindset, you know? “He's guilty, keep him in jail”. It's cultural, for you to bring effectiveness to a criminal justice system where proceedings used to not move forward, you know? But this is no longer necessary today.

Despite quicker proceedings today, this culture persists. Judges often justify continued preventive detention merely because defendants were already on remand. Such reasoning is not only unlawful, but perverts the preventive nature of detention, turning it into a tool for anticipated punishment instead.

Other decisions reveal the lack of meaningful reassessment of preventive detention. In over 15% of cases, judges vaguely asserted that the original conditions for pre-trial detention ‘persists’, but not mentioning what these conditions were and why they still apply. Aimed at addressing this automatic ‘renovation’ of preventive detention without assessment, Law 13,964, introduced in 2019, mandates judges to reassess preventive detention every 90

days through a reasoned decision, or else detention becomes illegal. Yet, just as with other laws that somehow challenge the punitive normality, this requirement has been largely disregarded, with many judges simply renewing detentions without meaningful and lawful justification. In some cases, judges actually reverse the burden of proof, claiming the defendant ‘had no conditions for release’.

Where apparent lawful reasoning is provided, it is still often vague and disconnected from the specific circumstances of the case. Judges commonly invoke public order or the need to ensure the application of the law without linking these claims to any concrete risks posed by the defendant’s release. Reasoning templates and abstract concepts such as the ‘dangerousness of the defendant’ and ‘seriousness of the offence’ are once again applied, undermining the need for individualised assessment of each case. As discussed earlier, this reflects a practice where prosecutors overcharge thefts as robberies to ensure custody, knowing judges will focus on the offence’s label rather than its concrete features. Judge Antonio candidly described the mentality: ‘Dogmas are created and outweigh the law. “Robbery? I don’t grant conditional release!” I used to think very much like that too’.

Explicitly unlawful reasonings—such as ‘no conditions for release’ or ‘original reasons persist’—appeared in half of the decisions denying defendants the right to appeal at freedom. However, even in the other half where judges used legally recognised grounds, reasoning was often abstract and unsubstantiated. ‘Public order’ was invoked in almost 40% of cases and ‘application of law’ in less than 34%, with both being combined in 25% of cases. Yet judges rarely demonstrated concretely how a defendant’s release posed a risk either to public order or to the application of law. In nearly 90% of these cases grounded in legal reasons, motivations remained entirely abstract and disconnected from the actual case, not even

‘filling in the blanks’ of their templates. One judge used the same reasoning to justify different preventive detentions:

guaranteeing public order rests on maintaining public tranquillity and ensuring the legal system is respected, so that security can reign in the social environment. A judge cannot turn a blind eye to this (j.0025761-97.2011.8.26.0050; j.0060255-85.2011.8.26.0050)

In a similar vein, another judge argued that

the crime of robbery is serious and the rampant crime is a factor of social preoccupation, putting at risk the public order that public authorities must preserve; therefore, I maintain the defendant's precautionary detention' (j.0005220-09.2012.8.26.0050).

When grounding the decision on the need to ‘ensure the application of law’, judges merely argue that detention would prevent the defendant from fleeing justice, without indicating any evidence that the defendant would otherwise flee. In one case, a judge blended both rationales—public order and application of law—in such a way that neither was actually legal in essence:

Society is terrified by rising criminality and violent offenders ... putting good citizens in a state of alarm. It is worth highlighting the series of crimes against property that have been committed in our capital. Therefore, to guarantee public order and the application of penal legislation, with requirements for preventive detention persisting, I deny the defendant the right to appeal at liberty (j.0033401-20.2012.8.26.0050).

Therefore, despite their apparent legality, these decisions were still essentially unlawful as unrelated to the specific case.

Brazilian higher courts have consistently rejected generic justifications for preventive detention. STJ has ruled that vague references to crime seriousness, public opinion, or social alarm do not justify detention, which must be supported by concrete facts (STJ, 2015). Since the enactment of Law on Precautionary Measures (Law 12,403) in 2011, judges have nine

alternatives to pre-trial detention (e.g., electronic monitoring, periodic court appearances, or nighttime curfews). Yet, as in several other countries, this legislative innovation ended up only ‘widening the net’ (Cohen, 1979: 346–350) and accelerating a transcarceration process (de Giorgi, 2015). In none of the cases studied—robbery charges—did judges apply or even consider alternative measures, nor did they explain why less severe options were inadequate. Once again, lower court judges not only violated legislation but also go against precedents established by higher courts.

Concerns with realities beyond the law in the books arise again in this context. Several judges I interviewed justified their refusal to impose alternative precautionary measures by claiming there is no real control over them. Judge Francisco explains:

What control do we have over mandatory night rest? None. Control only happens later, when the guy reoffends and we realise “damn, he committed another crime at night, he’s already violated [the alternative measure]”.

He also questions the efficacy of other measures: ‘Periodic appearances in court? What activities are they justifying? Is it enough just to show up and say “hi, I’m alive, I’m here”?’ It offers some control but loses its function’.

Implicit in these claims on preventive detention replacing ineffective monitoring is that judges have perceived themselves as public security agents—or even as if foreseers they were. While Judge Francisco hinted at this view, other judges made it explicit, both in interviews and sentencing. Judges often positioned themselves not merely as adjudicators, but as public security agents predicting and combatting future crimes. Judicial decisions frequently asserted, through those reasoning templates without meaningful evidence, that defendants would reoffend or flee if released. This is portrayed in several decisions: ‘Everything indicates he, at liberty, will commit crimes again’ (j.0084343-22.2013.8.26.0050); ‘Custody is necessary,

given that, sentenced to a closed regime, [the defendant] will certainly attempt escape' (j.1504795-24.2020.8.26.0050); 'if released, the defendants will escape and reoffend, as revealed by the body of evidence' (j.0043665-28.2014.8.26.0050). In all these cases 'everything' or 'the body of evidence' reflects a circular logic, where the fact that the offender has committed a crime is considered as indication that they will reoffend. But even when judges referenced concrete circumstances, the logic remained speculative: 'The defendant did not prove ties to the district or regular employment. At liberty, he will certainly reoffend, following his habitual path' (j.0068092-94.2011.8.26.0050).

Judge Julio's remarks capture the essential dynamics behind decisions to deny defendants the right to appeal in freedom: discretionary spaces, generic reasoning templates, counter-reform measures, the judiciary stepping into the role of public security agents, and appeals to 'reality' as an excuse for judicial punitiveness:

There's a set of things you'd have to change: change the law, change criteria; the State take charge and actually build prisons, open-prisons, monitor [alternative measures]. There's no monitoring, sometimes the judge goes on and say: "oh, I'm gonna arrest the guy because the State won't give me an ankle bracelet to know if the guy's at home. So I stretch a little bit here and detain him to ensure he won't be out on the streets and there won't be a feeling of impunity". "I'm gonna force here in the preventive detention, in the 'public order', so I don't release him, because if I grant him mandatory night rest, there'll be nobody monitoring". "Well, the right thing to do is to grant him mandatory night rest with an ankle bracelet, but there isn't [ankle bracelet], so let me send him straight to detention so that I can do justice, which is the justice the State isn't doing". Well, then you're doing transversal justice.

Beyond sentencing rationales, analysis of case files reveals the real costs of preventive detention practices. Many defendants spent longer in pre-trial custody than the sentences ultimately imposed—if they were convicted at all. Examples include: a defendant who spent over five months in remand but was sentenced to community service; defendants who spent at least three months detained before receiving non-custodial sentences; others who, after

four or more months in custody, were acquitted; one defendant had his sentence suspended; another, initially charged with robbery, was convicted only for home invasion, with his pretrial detention exceeding the final sentence, rendering the penalty extinct; several others spent months in pretrial detention and were eventually sentenced to open and semi-open prisons. These cases⁸ are not simply a natural cost of pretrial detention as a more restrictive precautionary measure. They represent intentional decision-making practices aimed at ‘bringing effectiveness to the criminal justice system’, in which defendants who are usually at the ‘extreme socioeconomic bottom’ hold a precondition status of guilty and, through pretrial detention, judges ‘at least ensure they spend some time locked up’.

The pervasive misuse of preventive detention in the Brazilian criminal justice system has deeply detrimental effects. In my sample, nearly 95% of preventive detention orders were grounded in openly unlawful or purely generic reasoning. This pattern of reasoning not only facilitates the standard and almost automatic imposition of preventive detention but also results in unnecessary, undue, and overextended incarceration. Flourishing within broad spaces of judicial discretion but also through arbitrary decisions that violate the law and higher court precedents, judicial punitiveness—often camouflaged by occasional appeals to concrete reality—not only neutralises decarcerating measures but also actively inflates punishment and expands the prison population at yet another sentencing stage.

Cumulative judicial punitiveness: reasoning templates, counter-reforms, and occasional concerns with the reality

⁸ Cases in my dataset with longer pretrial detention are mainly from the early 2010s, where the gap between arrest in flagrante delicto and trial was significantly longer than nowadays.

In this chapter, I have thoroughly analysed judicial activity in sentencing stages. I have explored judges' ordinary decisions and their legal reasoning, identifying standard outcomes and general patterns in judicial decision-making. Drawing on empirical data, I have demonstrated how judicial punitiveness systematically inflates punishment. Except in cases of armed robbery under the new 2019 law, sentence length alone may not accurately capture how punishment becomes inflated—nor the mechanisms through which this inflation develops. However, a detailed examination of judicial reasoning reveals the centrality of unlawful rationales in justifying harsher punishment across all sentencing stages: the amount of punishment (sentence length), the form of punishment (type of prison regime), and the timing of punishment (anticipating punishment through preventive detention). Reasoning templates, counter-reforms, and occasional concerns with the reality beyond the law in the books are the main forces driving the inflation of punishment.

Judges de-individualise sentencing, detaching the establishment of punishment from the particular circumstances of the case and the individual needs of defendants. Primarily through spaces of discretion, judges provide abstract, generic reasoning templates to justify harsher outcomes at all sentencing stages. This ranges from increasing sentence length by negatively assessing crime circumstances and defendants' personality traits in the first sentencing step, to overweighting aggravating over mitigating factors in the second step, to denying defendants the right to appeal at liberty under the broad justification of securing public order or ensuring penalty enforcement. Reasoning templates are deployed not only within discretionary spaces but also in arbitrary decisions that violate the law. A clear example is the imposition of closed prison regimes where no legal grounds exist to support them. Defendants convicted of robbery are often treated as belonging to a closed category, assumed to be equally dangerous and violent, and automatically deserving of the harshest penal

response, regardless of their individual circumstances. Even when judges invoke concrete facts, these are often trivial elements—strategically inserted (‘filling in the blanks’) to avoid having decisions overturned on appeal, rather than substantively justifying harsher punishment.

Reasoning templates are also instrumental in promoting judicial counter-reforms. Because my sentencing analysis spans a decade, I have been able to observe how judges react to changes in legislation and higher court precedents. When these changes enable a more punitive decision-making, judges tend to adopt them readily and without resistance. However, when perceived as constraining judicial punitiveness, changes in legislation or precedents are frequently contested or outright ignored. This dynamic is evident in the judicial response to reforms expanding alternatives to preventive detention, and to legal requirements mandating consideration of time spent on remand before assigning prison regimes. It also extends to higher court precedents aimed at protecting fundamental rights and procedural safeguards, such as the presumption of innocence, *ne bis in idem*, the individualisation and proportionality of punishment, and the obligation to provide motivated decisions.

Importantly, reforms do not need to be explicitly framed as decarceration measures to be resisted. They merely need to be perceived by judges as limiting punitive discretion. The introduction of detention hearings (*audiência de custódia*) in 2015 illustrates this point. As Prosecutor Paulo explained, most prosecutors and judges have perceived these detention hearings as mechanisms ‘created to release criminals’, despite their internationally consolidated role in safeguarding against illegal arrest and detention under the American Convention on Human Rights of 1965. Thus, custody hearings—intended to protect

fundamental rights, not explicitly to reduce incarceration rates—were nonetheless met with deep judicial scepticism.

Several of my interviewees confirmed this scepticism and resistance. As PD Marcus noted, reforms perceived as limiting punitiveness ‘have an expiration date’. Shortly after their introduction, judges either circumvent these reforms through existing discretionary spaces or openly violate them, deciding contrary to law and precedents. This double standard is revealing: when a new law or precedent enables harsher punishment, it is followed without hesitation; when perceived as protective of defendants’ rights, it is resisted. In doing so, judges effectively promote counter-reforms, neutralising innovations that could reduce incarceration levels.

While some unlawful judicial decisions may eventually be overturned on appeal, this process is slow. By the time higher courts intervene—if they do at all—much of the punishment has already been served. Mass incarceration is thereby reproduced. Off the records, judges often justify their unlawful decisions by appealing to concerns about ‘the reality beyond the law’—such as widespread impunity, ineffective penal responses, or the lack of resources and institutions that the Executive should provide. However, these concerns are selectively invoked. They are mentioned only to justify harsher decisions, never to argue for less punitive responses. If concerns with concrete reality would favour more liberal decision-making, the prevailing judicial attitude is, as PD Rodrigo explains, one of non-accountability: ‘I, the judge, have to send this guy to jail. Whether there is a prison bed or not, whether there is a place for him to work and study or not, that’s a problem for the Executive’.

While the chapter may at times seem to insist on similar claims across different sections, this is not a matter of rhetorical repetition. Rather, the structure of the chapter

deliberately mirrors the structure of judicial decision-making itself. By tracing sentencing step-by-step, it becomes clear that the same patterns of reasoning—characterised by unlawful practices, disregard for procedural safeguards, and generic templates—recur systematically across all sentencing stages. This perceived repetition is thus analytically significant: it reveals that inflated punishment is not produced at a single point but is instead the cumulative outcome of rights violations and discretionary abuses embedded throughout the sentencing process. Inflated punishment, then, is the result of cumulative judicial punitiveness.

Ultimately, Chapters Six and Seven converge analytically and support the argument developed in Chapter Five. Together, these empirical chapters demonstrate that judges, far from fulfilling the role of guardians of liberal democracy and the rule of law—as naïvely expected by liberal forces during the democratic transition—have instead reproduced systematic abuses of power from within the legal system itself. The transition from informal and hidden state punishment to official state punishment partially explains the expansion of incarceration. However, the empowerment of a protagonist judiciary—without meaningful reform of its reactionary ethos and inquisitorial culture—has further entrenched arbitrary repression under the appearance of legality, directly fuelling mass incarceration.

If judges' off-the-record justifications for harsher punishment are contradicted by their own concrete actions, deeper questions arise: Why do judges behave as they do? Why is judicial decision-making so consistently punitive? What about the exceptional decisions—the 4% of acquittals on robbery charges, for instance? Why are they so rare and how are they possible? Why have these reactionary ethos and inquisitorial culture persisted under external judicial independence and survived attempts of democratisation? Having provided a detailed empirical picture of contemporary judicial punitiveness in Brazil, and identified mechanisms

through which it manifests, the next chapter turns to these 'why' questions, exploring the historical, structural, and institutional foundations of judicial punitiveness.

PART FOUR
UNDERSTANDING JUDICIAL PUNITIVENESS:
CONSENSUS AND COERCION

Chapter Eight

Reproducing punitive consensus

Bureaucratic and class filters in judicial recruitment

In the previous chapters, I analysed judicial decision-making in trials and sentencing, revealing how punitive decisions are not exceptional but rather the systematic product of judicial practices. I showed how, when, and where judicial punitiveness materialises in practice. Judges have not only reproduced inflated convictions and inflated punishment but have also purposely neutralised legal reforms and higher court precedents intended to reduce incarceration, effectively promoting counter-reforms from within the legal system. I have not, however, discussed the underlying sources of judicial punitiveness.

This chapter addresses these questions by examining how a punitive consensus is produced and sustained within the Brazilian judiciary. Although the democratic transition empowered the judiciary—even with external independence, freeing it from the executive control exercised by the military dictatorship—it did not promote any substantial internal reform. The judiciary maintained its historical reactionary ethos and inquisitorial culture, even as its protagonism in the democratic order grew. The widespread adoption of the civil-service examination (*concurso público*) as the standard mechanism for judicial recruitment was supposed to democratise access to the judiciary, opening it to broader social sectors and

fostering a new institutional culture. However, as I demonstrate, the recruitment process has instead reinforced conformity, bureaucratic profiles, and dominant punitive views.

By tracing how judges are selected into the institution, this chapter contributes to the overarching argument of the thesis: mass incarceration in Brazil cannot be fully explained without understanding how the judiciary became a central agent of punitiveness that has not controlled or regulated punitive excesses of the state penal apparatus but have been reproducing these excesses itself. The focus here shifts from decision-making outputs to the making of decision-makers themselves.

The chapter is divided into four main sections. In the first, I briefly analyse some explanations offered by my interviewees for judicial punitiveness, including dynamics such as the place where judges work, their career stage, and handling of workload. While these factors do not reach the deeper roots of punitiveness, they are symptoms of a broader punitive consensus. In the second section, I unpack the meaning of punitive consensus, exploring judges' worldviews on law, crime, punishment, and justice. In the third section, I analyse how the judicial recruitment process shapes the profiles and attitudes of those who enter the judiciary, particularly toward a bureaucrat profile. Finally, in the fourth section, I discuss the emergence of a new social category, *concurseiros* (civil-service seekers), whose class background, socialisation, and experiences further consolidate the reproduction of punitiveness within the judiciary.

Extrajudicial influences or symptoms of a punitive consensus?

In the previous chapter, I demonstrated that judicial punitiveness in Brazil is not only intense but systematic, permeating both conviction rates and sentencing practices. In this chapter, I begin to explore why judges act this way. In this section, I examine some of the explanations offered by my interviewees to understand mass incarceration and judicial punitiveness. Beyond widely discussed factors such as race, class, media influence, penal populism, and authoritarian legacies, several interviewees pointed to three dynamics that have received less attention in the literature: differences between being a judge in small towns versus cities; the stage of a judge's career; and the pressures stemming from work overload. While relevant, these perceptions cannot be understood as causes of but rather symptoms of judicial punitiveness.

Several interviewees emphasised important differences between being a judge in a town versus a city, particularly regarding social order, relationships with local elites, exposure to ordinary citizens, and expectations around judicial roles. Appellate Judge João observed: 'in town, you're unique; in the capital, you're one among many', pointing to the scarcity of judges in smaller communities. Judge Claudio explained that in small towns, judges are quickly courted by local elites: 'on your first day, you get a visit from the mayor, the businessman, the doctor—all inviting you to dinner or a barbecue'. In contrast, in larger cities, this process is slower and less direct. The concentrated power judges hold in towns makes them immediate targets for elite influence, with social invitations becoming routine. Drawing from his experience in a town of fewer than 8,000 residents, Judge Claudio noted that judges are often seen as part of the local nobility, recalling how a private club once offered to close its pool for his exclusive use. Such dynamics encourage judges to identify with elite interests and, even unconsciously, to reproduce their worldviews in judicial decisions. PD Marcus reinforced this

point, arguing that, from his experience as former police chief, penal selectivity is more pronounced in smaller jurisdictions.

Judicial punitiveness in small towns is also linked to a distinct public perception of judges' roles. According to PD Marcus, in these communities, judges are seen—and expected—to act as public security agents actively combating crime. Influenced by a deeper involvement in local life, town judges sometimes behave like enforcers of public morality. He illustrates that with a case of a minor who was detained for 'contempt' of his own mother—which is not even legally classified as crime. Beyond this expanded role, judges in small towns are also more exposed to the public. Trials attract greater attention, and rulings often spark stronger reactions. As argued in Chapter Two, Brazil's judicial design is meant to insulate judges from external pressures. But in smaller communities, that insulation often feels illusory. As Judges Luiz and Gabriel note, judges in these settings must be particularly courageous to resist such heightened public scrutiny.

Rather than creating judicial punitiveness, town dynamics shape how intensely it is expressed. Judges also integrate into elite circles in cities, though the process may take longer and be less organic—judges often seek out these spaces rather than being passively absorbed into them. Public exposure is not unique to small towns either. In cities, the threat of visibility and a self-image as public security agents also strongly influence judicial behaviour, as I explore in detail in the following chapter. While such dynamics may help explain perceived higher punitiveness in towns, they do not fully account for the judiciary's role in driving mass incarceration in Brazil. Judges in cities are also extremely punitive, as demonstrated in the previous two chapters with evidence from São Paulo. In this sense, the social order of towns amplifies broader forces underlying judicial punitiveness.

A similar pattern emerges when considering how career stages might influence judicial punitiveness. Several interviewees noted that early-career judges tend to be more punitive than those with more experience. Appellate Judge Jorge, who coordinates training for novice judges, points out that mock sentences handed down by these judges are often far harsher than those he issues. Early in their careers, he explains, judges lack proper parameters and are more susceptible to external pressures like public opinion. Over time, they gain experience, learn to navigate public opinion, and develop their own approach. However, the question remains: why would a lack of ‘parameters’ lead to harsher sentences? Judge Ricardo offers a different perspective, arguing that the ‘lack of experience’ behind harsh decisions does not depend on age or career stage, but on life experience. Regardless of the reason, many judges I spoke with shared similar reflections, acknowledging they used to be harsher than they are now. Judge Francisco’s confession captures this shift well:

I was one of those judges who, in a 50-50 ball, would look for comfort. But then something comes into play: maturity. The more familiar you become with the subject, the more experience you gain, and eventually you think: ‘No, I’m not gonna add another brick to this pile. This time, I’m gonna take one out’.

Judge Francisco’s confession offers rich insight through its subtle details. When he talks about ‘looking for comfort’ in a ‘50-50 ball’ situation or ‘putting another brick in’, he alludes to institutional conformity. In this context, seeking comfort and adding another brick means adhering to institutional decision-making patterns and taking the safer route promoted by the institution. This theme also appears in Appellate Judge Jorge’s description of the influences early-career judges are more susceptible to: ‘trying to align their decisions with how their Court of Justice typically operates, following the internal trends of their Court’. Institutional conformity here is not just about consensus—marked by ‘adding another brick’. It also involves coercion—reflected in the urge to ‘look for comfort’ and stick to the safer, punitive path

established by the institution. Nonetheless, while career stages may influence the degree of judicial punitiveness, they do not create it. Previous research shows, for example, that TJSP Appellate Judges are among the most punitive in Brazil (see Bottino, 2016; Semer, 2019). If career experience cannot fully explain judicial punitiveness, it reveals deeper dynamics shaping it—namely, consensus and coercion, which I address later.

Another frequently mentioned extrajudicial factor influencing harsher judicial decision-making is work overload. Several judges I interviewed described their routines as exhausting, with hundreds of ongoing cases and a constant case backlog in any court. Court hearings take up entire afternoons, leaving little time for case analysis. Judges also criticised the institutional focus on quantity over quality when evaluating their work. Appellate Judge Sergio explains that judges become vulnerable if they ‘don’t produce adequately’, which often translates to judging a high volume of cases. However, as shown in the next chapter, ‘producing adequately’ is not just about quantity—it also includes adhering to punitive norms, with decisions deviating from the punitive normality often facing disciplinary consequences. Judge Sergio recalls senior judges telling him: ‘we don’t want jurist judges, we want judges who sort things out’—meaning judges who handle the volume of cases. PD Lucas points to Justice Nunes Marques, dubbed the ‘champion of productivity’ for reportedly issuing over 600 decisions in one day (Veleda et al., 2020; Lima, 2020). In this context of overwhelming workload and institutional pressure for efficiency, the use of reasoning templates becomes almost unavoidable.

The combination of case backlog, a constant flow of new cases, and the demand for speedy processing offers a compelling explanation for low-quality judicial decision-making in Brazil. However, poor quality does not necessarily equate to harsher decisions. Work overload

does not directly cause judicial punitiveness, nor can it fully explain it. I asked my interviewees about a widespread issue in Brazilian jurisdiction: generic, de-individualised charges, particularly in drug trafficking and organised crime cases, which judges often hear despite their procedural flaws. According to the Brazilian Penal Procedure Code (Article 41), such charges are null and should be dismissed. In practice, however, they are ordinarily accepted. If work overload were the deciding factor, why would judges admit these charges when dismissing them would reduce their workload? Interviewees unanimously agreed that dismissing a charge would lead to an appeal by the prosecution, resulting in the charge being reinstated by the appellate court—adding even more work. So, in a context of overwork, why do appellate judges insist on hearing these flawed charges, going against the law and creating unnecessary additional work? This situation, along with others, suggests that, pragmatically, pressure to manage workloads could encourage a more garantist approach. However, other factors often override these concerns. If work overload does not explain judicial punitiveness, it helps clarify why decisions conform to institutional norms—and, as shown in previous chapters, to punitive normality.

Ultimately, dynamics such as city versus town, career stage, and work overload do not explain judicial punitiveness. However, they reveal symptoms of a broader, more entrenched punitive consensus within the judiciary, manifested in varying degrees. What truly explains judicial punitiveness and the punitive normality? The next section explores why such harsher decision-making is institutionally encouraged and promoted, rather than being an individual or sporadic phenomenon.

A punitive consensus

What constrains and shapes judicial decision-making as fundamentally punitive is primarily institutional conformity. To understand this, we must explore the roots of judicial punitiveness, particularly how a punitive consensus is produced and perpetuated among judges. To do so, I examine two key dynamics that make up the punitive 'body and soul' (Vianna et al., 1997) of the judiciary: the judicial recruitment process (*concurso*) and the trajectory of civil service seekers (*concurseiros*) who eventually become judges. Before analysing these crucial dynamics, I first unpack the concept of 'punitive consensus'.

The previous chapters demonstrate judicial punitiveness in action, particularly in trials and sentencing. In practice, punitive consensus translates into a general tendency to prioritise punishment over fundamental rights and procedural safeguards, such as the presumption of innocence and the individualisation of punishment. This is evident in judges using reasoning templates that lead to harsher, longer sentences, often resembling a production line. In the context of this thesis, a punitive consensus enables the punitive normality and manifests as almost automatic convictions to closed prison in robbery cases.

Judges' punitive practices stem from a broad consensus on law, the judiciary, and penal policies. Brazilian judges consistently support punitive measures, as shown in surveys where they favour proposals such as: lengthening juvenile detention (85%); expanding internment options for juveniles (80%); increasing sentences for serious crimes (90%); limiting conditional release for drug trafficking (67%); and raising the maximum prison sentence for certain crimes (70%) (Sadek, 2015). First-instance judges also largely agree that Brazilian laws are outdated (80%), judicial work is hindered by inefficient agents (80%), and judicial procedures are overly formal (78%) (Vianna et al., 2018). Additionally, over 85% of judges believe that excessive appeal options contribute to impunity in Brazil (Sadek, 2006a). My empirical research provides

a deeper understanding of the punitive consensus held by Brazilian judges. It identifies three interrelated beliefs that drive judicial punitiveness: false conceptions about the causes of crime, the myth of mass incarceration, and the judge as a public security agent.

Judges tend to hold a reductionist view where impunity leads to higher crime rates. As Judge Sergio explained, ‘the feeling of impunity, anywhere in the world, is the great driving force for crime to keep growing’. Judges attribute this impunity to a lenient executive, weak legislation, and ineffective crime control. A good example of this view is offered by Appellate Judge Edison Brandão, who, in speech at the 2021 FONAJUC Annual Conference, compared homicide rates from 1984 and 2021 in Brazil. He claims that the lower homicide rate in 1984 was due to stronger law enforcement, indirectly referring to the military dictatorship-era laws as ‘our nostalgic legislation’. In a podcast interview, Brandão further criticises post-1980s ‘fool’ decarceration policies, blaming them for the country's increasing homicide rate (Nucci and Brandão, 2020). Similarly, in a blog post, Appellate Judge Guilherme Nucci advocates for expanding prison capacity ‘rather than a mass release [of prisoners]’, arguing that this would better tackle crime and organised gangs (Nucci, 2019).

To support his argument that increased punishment reduces criminality, Appellate Judge Brandão cites São Paulo, which has one of the highest incarceration rates and the lowest homicide rates in Brazil. He argues that:

São Paulo's harshness ... is absolutely natural in the rest of the world. There's nothing Nazi about it... it has an incarceration rate of the modern, civilised world... it's the only state to have solved the problem of homicide.

This premise ignores rising rates of other crimes like robbery in São Paulo (Feltran, 2020; 2021) and the declining incarceration trends in what Brandão considers the ‘modern, civilized world’ (Walmsley, 2016; Brandariz, 2022). He claims the issue with Brazil's penal system is not

superpopulação (mass incarceration) but *superlotação* (overcrowded prisons), which requires more prison spaces and stricter action from the Executive.

Drawing on this rationale, judges often consider mass incarceration as a myth. Both Appellate Judges Guilherme Nucci and Edison Brandão argue that, rather than punishing too many, Brazil punishes too few (Nucci and Brandão, 2020; Nucci, 2019). They believe that Brazil's high crime rates make high incarceration rates both necessary and natural—despite the reality that the prison population is predominantly composed of offenders convicted of minor drug-related and property crimes (Dal Santo, 2024). Contrary to what was shown in the previous chapters, Brandão claims that very rarely people are imprisoned: 'only the most serious crimes lead to prison' (Nucci and Brandão, 2020).

Judges argue not only that mass incarceration is a myth, but also that a mass decarceration policy has been in practice. Appellate Judge Edison Brandão asserts that the media fabricated a mass incarceration crisis, which led legislators to introduce decriminalising measures that have worsened public security. He claims that decarceration policies have fuelled violence, contributing to the ongoing 'bloodbath' the public has witnessed for decades. Similarly, FONAJUC recently issued a statement condemning the 'decarceration system'. They argued it had harmed both defendants and society, citing high recidivism rates and the 'Revolving Door' phenomenon, where released prisoners return to jail after committing more crimes, leading to longer sentences, so that an early release is detrimental to defendants themselves (FONAJUC, 2021a).

For most judges, increasing violence, reoffending, and impunity are all seen as consequences of a supposedly lenient executive and legislation. During the 2021 FONAJUC online conference, guest speaker Prosecutor Edilson Mougnot criticised Brazil's 'weak

legislation', claiming it obstructs social defence. In the audience, judges showed strong support for his views through the live YouTube chat, with comments such as: 'Brazilian criminal legislation is TERRIBLE', 'it's too difficult to be a criminal judge', and 'to be a good judge, you have to be a citizen. And a good citizen never ignores the victim, nor society'. In praising Mougnot's lecture, several judges strongly criticised the criminal justice system and called for changes, including the abolition of 'prison regime progression' and a more effective system where 'punishment effectively means imprisonment'.

This perception of failed because too lenient system was also portrayed by my interviewees. Judges often view legal safeguards, such as the right to appeal and detention hearings, as mechanisms of impunity that hinder crime control. These measures, meant to protect defendants' rights, are seen as delaying justice and fostering rising crime. For instance, Judge Julio described how defendants released on bail often reoffend quickly, highlighting a sense of impunity. Similarly, Judge Francisco argued that open prison sentences equal acquittals, while Judge Sergio argued that milder punishments, such as short sentences or conditional releases, contribute to reoffending. The consensus among judges is represented by Appellate Judge Edison Brandão's words: 'In Brazil, the system is designed to prevent incarceration. Everyone knows that. Most criminals don't end up in prison' (Nucci and Brandão, 2020).

Besides criticisms to the legislation, judges are widely critical of the concrete conditions of the criminal justice as a whole. This perception, in turn, significantly shapes their decision-making. Concerning early dynamics in a criminal case, judges believe that the police do not have sufficient infrastructure to conduct thorough investigation. Judge Sergio claims that this leads judges to be satisfied with 'very little [evidence] for a conviction'. Then,

throughout a criminal case, judges argue that the lack of human resources renders alternative measures useless, as there is not enough staff to supervise them. This, in turn, makes pretrial detention the only effective precautionary measure. Similar is the situation of open and semi-open prisons, where judges believe to be no control. Judge Francisco reports being criticised by colleagues for convicting defendants to open-prison sentences, with many believing ‘nothing happens in the open regime’. As a result, closed prison is the only option where ‘punishment effectively means imprisonment’. Ultimately, as Judge Sergio summarises, in response to a flawed system, judges often compensate by assuming responsibilities outside their role, leading to harsher punishments.

In the context of widespread dissatisfaction with a supposedly lenient executive, weak legislation, and discredited penal institutions, judges feel an intense responsibility to ensure justice is delivered. For many, this translates into prioritising punishment over legal safeguards, ignoring illegalities, and circumventing rules that allow for perceived impunity. As some of my interviewees put it, judges aim to ‘repair things from the state that don’t work’ (Judge Julio) and so they ‘bring effectiveness to the criminal law’ (Judge Ricardo). This rationale explains the punitive decision-making detailed in Chapters Six and Seven—such as turning a blind eye to overcharges aimed at securing pretrial detention, convicting based on poor, illegal, or even non-existent evidence, and imposing harsher prison sentences than legally required or eligible. Ultimately, judges perceive themselves as enacting justice where the state has failed, creating a ‘transversal justice’ (Judge Julio) that mirrors the actions and rationale of the death squads discussed in Chapter Five. Just as off- and on-duty police officers compensate for the perceived excessive rights through extrajudicial and staged killings, many judges similarly find unlawful ways to achieve what they regard as ‘effective justice’—precisely what was identified in the earlier discussion on trials and sentencing.

This brings us to a central aspect of the consensual view on judges' roles: most judges see themselves as public security agents fighting against crime. Previous research (Casara, 2015) has pointed to this direction, which is confirmed by my own findings. All of the AJD judges I interviewed acknowledged that this perception is common among their colleagues. Judge Ricardo, a non-AJD member and former Police Chief, expressed concern over this view, noting that it is reinforced by various actors—judges, the media, and academics. He even remarked that the perception is so ingrained that he struggles to identify who is primarily responsible for promoting it.

In an unguarded moment, Judge Francisco, who is widely regarded by barristers and public defenders as one of the most considerate and decent judges in São Paulo, inadvertently revealed this mindset when explaining something else to me. He said: 'I'll give you an example: the big drug-dealer that we [judges] used to fight or thought we were fighting against...'. Quickly realising his slip of the tongue, he amended: 'I mean, "fighting" is a figure of speech, please'. This reflects the view of judges as crime-fighters, as described by Judge Antonio, who act as a 'censoring agent, the person that restricts freedom, not the one who guarantees rights', conflicting with the role of judges in a liberal democracy.

What emerges from this punitive consensus is a distinctive figure I call 'robed vigilantes': judges who, while operating within the institutional core of liberal democracy, act beyond the bounds of legality in the name of protecting social order. This figure must be understood within Brazil's broader historical reliance on extraofficial forms of state punishment—such as death squads and *justiceiros*. With the democratic transition, there was hope that due process and the rule of law would constrain such abuses. Instead, the judiciary—empowered as the constitutional guardian of democracy—has absorbed aspects of

this repressive rationale. In a system that has never meaningfully reformed or democratised, most judges now see themselves as the last line of defence against those who threaten the dominant social order—disguised as a fight against crime and impunity. This sense of mission justifies, in their eyes, decisions that bend or bypass legal safeguards, perceived as mechanisms that obstruct effective social control. Robed vigilantes thus embody a dangerous combination: liberal institutional authority with authoritarian practices, constitutional legitimacy with inquisitorial culture. Empowered by their institutional role and frustrated by what they see as the failure of the executive, legislature, and the criminal justice system, these judges feel entitled—even obligated—to act where others cannot.

In the most subtle details, even those judges not typically considered tough or *punitivist*—those who, opposed to *garantist* judges, prioritise punishment over due process, expanding the state’s punitive power, interpreting the law to maximise incarceration and disregarding constitutional and procedural guarantees—inadvertently reinforce the existence of a consensus among the vast majority of judges on issues related to crime, punishment, justice, and the Brazilian criminal justice system. The notion of the ‘myth of mass incarceration’, for example, though riddled with inaccuracies, is widely representative of both the judiciary and the prosecution (Carpes, 2017/2023; Abrahão and Monteiro, 2017; Pessi and Souza, 2017). What my interviewees revealed—sometimes requesting anonymity—in more detail and nuances are perceptions closely aligned with those expressed more rarely and often anonymously or unguardedly, such as in previous long-scale surveys (e.g., Sadek, 2006a; Vianna et al., 2018) or online discussions (FONAJUC, 2021a; 2021b; 2021c). More rarely, a smaller, but notable group of judges more openly and deliberately expresses these punitive views in public forums too, such as podcasts and blog posts (e.g., Nucci and Brandão, 2020; Nucci, 2019). Appellate Judge Edison Brandão, appointed in 1985 at age 21, holds numerous

influential roles, including advisor to the São Paulo Judges Association, president of the Judges' Prerogatives Committee, and a board member of the FONAJUC. In 2023, he represented the Brazilian Judges' Association at a public hearing on criminal justice reform in the Brazilian Senate (APAMAGIS, 2023). Similarly, Appellate Judge Guilherme Nucci, a professor at PUC-SP and prolific author, is one of the most cited authors by Brazilian judges (Vianna et al., 2018) and has a significant presence on social media. While judge Brandão is a staunch 'tough-on-crime' advocate, judge Nucci is seen as one of the TJSP's most 'garantist' appellate judges. Despite their differing spectrums, both share a common vision that aligns with the broader punitive consensus within the judiciary.

Identifying a punitive consensus among judges—and understanding its implications—is crucial for several reasons. First, it helps explain how judicial decision-making can lead to the punitive normality outlined in the previous chapters. Judges hold widely shared views on crime, punishment, justice, and their role within the system, and these views enable them to comfortably violate the fundamental rights and procedural safeguards they were entrusted—and empowered—to uphold. In their eyes, these rights are ultimately excessive and counter-productive, and in a context where executive power is perceived as soft, legislation is considered lenient, and criminal justice institutions seen as failing to deliver, judges believe it is their responsibility to enforce what they perceive as 'effective' justice—even if outside the bounds of the law. Second, the existence of a punitive consensus challenges the notion that judicial punitiveness is the result of individualistic perceptions or sporadic actions. Rather, it underscores how these tendencies are deeply ingrained in the broader judicial culture. In the next section, I explore the dynamics that have shaped this homogeneous, punitive-oriented judiciary.

Reproducing consensus through judicial recruitment

Different countries have adopted various models for recruiting judges. These models are often more complex than they appear, involving multiple mechanisms to select judges at different levels (first instance, appellate, and higher courts) and across systems (federal and state). Broadly, judges may be elected, nominated, or selected through civil service entrance examinations. When judges are appointed by politicians, recruitment tends to be more politically driven, potentially undermining judicial independence and resulting in a more homogeneous judiciary. In contrast, civil service examinations are often viewed as the most democratic method, presumed to prioritise technical skills and yield a more independent and heterogeneous judiciary (Zaffaroni, 1990; 1995; Griffith, 1977; Bandeira, 2002; Gallo, 2014; Nelken, 2010; Mancini, 1980).

In Brazil, civil service examinations (called *concursos públicos*, hereinafter *concurso*) are currently the dominant model, though this was not always the case. They were firstly introduced nationally by the 1934 Federal Constitution. Previously, judges were appointed by governors during the First Republic (1889–1930) and by the Emperor and his Minister of Justice during the Empire of Brazil (1822–1889) (Koerner, 2010; Feitosa and Passos, 2017). Initially, the civil service examination system did not encompass all spheres of the judiciary, excluding Federal, Military, and Labour Justice (Rezende, 2018). The 1988 Constitution then mandated examinations as the rule for judicial recruitment, aiming to foster diversity, technicism, neutrality, and independence—countering an authoritarian and nepotistic tradition. Despite some gradual plurality achieved through the democratisation in its recruitment method, the Brazilian judiciary remains highly homogeneous, being dubbed a

‘robed nobility’ (Almeida, 2010; Mascaro, 2018). To understand this limited pluralisation and even more limited effects in judicial decision-making, we must examine how *concurros* unfold in practice.

These *concurros* comprise five stages. The first is a multiple-choice test with 100 questions. The second involves two written tests: one discursive and one requiring the drafting of two mock sentences. Both are eliminatory and classificatory. The third stage, purely eliminatory, includes a background investigation, health exams, and psychotechnical evaluations. The fourth stage is an oral examination (eliminatory and classificatory), and the fifth is a classificatory evaluation of titles.

Most of my interviewees, aligned with previous research (Feitosa and Passos, 2017; Rezende, 2018), highlight that this structure favours candidates skilled in rote memorisation, while also allowing subjective discretion that shapes a preferred candidate profile—effectively reproducing a less democratic, more conservative judiciary. Most knowledge assessments, particularly in the first two stages, require a rigid memorisation of legislation and precedents. A typical example comes from Question 32 of the 189th Judicial Entrance Examination for the TJSP, held in 2021:

The following are exclusions of unlawfulness:

- (A) irresistible coercion and therapeutic abortion.
- (B) hierarchical obedience and self-defence.
- (C) strict compliance with legal duty and therapeutic abortion.
- (D) hierarchical obedience and strict compliance with legal duty.

Besides written law and precedents, several questions require knowledge of dominant legal doctrines—the academic works most cited by judges to support their judicial reasoning. Appellate Judge Guilherme Nucci, who was previously shown as a mass incarceration denialist, is the scholar most cited by judges (Vianna et al., 2018), having extensively written on Criminal

Law and Criminal Procedure. Retired Appellate Judge Benedito explained a significant effect of this examination structure. First, by demanding knowledge of only dominant doctrine, the recruitment process effectively reproduces the existing, homogenous profile of judges. More importantly, it shapes legal education across the country. Since this dominant doctrine is what is required in *concurso*s, it becomes the foundation for 5-year Law Faculty programmes. In practice, legal education and training do not encourage plural and critical thinking, but rather reproduce dominant understandings—which, as we have seen, include the beliefs that excessive rights prevent justice from being effective and the existing phenomenon in Brazil is not mass incarceration, but mass decarceration instead.

Civil service exams thus prioritise dominant institutional perspectives. Candidates must align with prevailing doctrines to succeed, signalling they are able and ready to reproduce institutionally consolidated understanding and practices, then ensuring the institution's ideological continuity. However, this is not necessarily a compulsory feature of civil service examinations. In practice, entrance examinations for the Public Defence Office incorporate divergent doctrines (Tulio, 2020), promoting a plurality of perspectives—an element crucial for institutional impartiality (Zaffaroni, 1995)—and in so doing, allowing a more meaningful democratisation of the institution.

*Concurso*s' wide scope also burdens candidates. In the 189th TJSP Examination, 100 questions spanned 17 legal areas. This breadth—shaped as written legislation, precedents, and dominant doctrine—prioritises memorisation over critical or even humane thinking. Judge Francisco defended the pragmatic rationale for this approach:

it's difficult to demand much critical thinking in *concurso*s ... It's an absurd number of people taking the exam. You can't evaluate all applicants if assessing

critical knowledge ... That's why this part of *decoreba*⁹—let's put it this way—still prevails.

Indeed, in 2018, the 188th TJSP Examination admitted 86 candidates from 23,122 applicants (TJSP, 2020). Nonetheless, it remains possible to frame objective tests to include critical perspectives. Once again, this has been proved by Public Defender's *concursos*. For example, the 6th Examination for the São Paulo Public Defender's Office¹⁰ included a question on Michel Foucault's *Discipline and Punish*, demanding awareness of critical theory, even if memory-based. Nevertheless, highlighting the uncritical and limited features of legal education and preparation for many judges, as Judge Carlos noted, are unfamiliar with thinkers like Foucault.

Beyond pragmatism, Judge Francisco argued that this memorisation skill reflects the profile urgently needed by the judiciary:

Unfortunately, given the volume of cases, we need a lot of 'workman' judges who ... apply the literal law without further digression, who are there 'kneading clay' to deliver swift decisions, who are efficient.

As implicit in Judge Francisco's words, the first *concurso* stage filters candidates for bureaucratic aptitudes, ready to function within rigid institutional structures and expectations—a trend consistent with Zaffaroni's (1995) observations about technobureaucratic judiciaries worldwide. As Rezende (2018: 230) claims, this is a successful mechanism to select those who apply the law 'in a servile and standardised manner, as advocated by positivism and the technobureaucracy'.

If the first *concurso* stage follows a worldwide trend, we must understand the dynamics shaping the following stages. Candidates who successfully move to the second stage

⁹ Derogatory term close to rote memorisation.

¹⁰ Available at: https://arq.pciconcursos.com.br/provas/23194042/ae631e7b3d8b/defensor_publico.pdf

answer discursive questions and write two mock sentences. In principle, this assesses their argumentative capacities and the ability to apply their extensive knowledge (shown in the previous stage) to concrete cases. In practice, it once again tests conformity with dominant judicial positions. As PD Rodrigo described:

Answer templates demand adherence to judicial understandings that may be questionable ... For you to get the marks, you must adhere to some positions, otherwise you lose marks and may fail. I mean, it's an evident formatting mechanism.

Appellate Judge Antonio corroborates this view, arguing that mock tests are more 'like a chemistry test. You have to combine the right elements'. Candidates are trained to mimic prevailing interpretations, rendering critical doctrines and minority judicial positions not only irrelevant but actually inadequate for success in these examinations. For example, when faced with a robbery case where the perpetrator is immediately chased and arrested, without ever possessing the victim's object unguardedly, candidates must apply the dominant interpretation identified in the previous chapters—that it qualifies as completed robbery, despite possible alternative interpretations. Once again, since this is the response deemed correct in the exams, it becomes the interpretation taught as the 'right'—the one and only—judicial interpretation in both undergraduate law programmes and preparatory courses for *concursos*.

It is in the third and fourth stages that broader discretion comes into play. The third stage includes psychotechnical exams, health checks, and a background investigation. While psychotechnical and health checks are formalities, the background investigation may significantly affect outcomes. Here, subjective notions of what constitutes a 'suitable' judicial candidate become crucial. For instance, as highlighted earlier, most judges in criminal division view their role as crime-fighters, while a minority see themselves as rights guarantors, rather

controlling the state use of force. These differing understandings shape how life histories are evaluated. PD Rodrigo recalled:

In some exams, evaluators even questioned building porters about candidates' behaviour ... Nowadays, candidates scrub their social media presence. Look how violent this is from the perspective of shaping the candidate's subjectivity even before approval and appointment.

However, disqualifications during background investigation must be reasoned and are appealable. Nonetheless, the fourth stage—oral examination—is discretionary and unappealable. One interviewee highlights an important interplay between these stages:

The *sindicância* [background investigation] is conducted before the oral exam, right? To avoid problems, like “oh, I was failed because of this or that”, [examiners] are harsher in the oral interview and fail the candidate there, you know? Because the oral exam—I don't know if you can quote me saying this, ok? Because I may have problems—but the oral exam is something very manipulable, isn't it?

Oral examinations enable assessment of not only legal knowledge, but also broader traits considered desirable in judges (Tulio, 2020; Rezende, 2018). Concerning assessment of knowledge, this stage is not too valuable, as candidates prepare to meet the expectations—as I better explain later, they know what they are asked and what they are expected to respond. Candidates' responses are usually prefabricated, to the point that ‘you can even tell which preparatory course the candidate attended’, argued one Public Defender (*apud* Tulio, 2020).

In practice, oral examination reveals how candidates behave when uncomfortable, under pressure. Appellate Judge Antonio, recalling his experience, warned that oral exams often put candidates in humiliating situations. The problem, however, is that situations of pressure and vulnerability under which candidates are put during oral examinations do not

reflect the situation of power under which they are throughout their professional activity. He argues:

The situation where you're placed in a vulnerable position won't happen on a day-to-day basis. The judge's risk is not vulnerability; it's exceeding the use of power ... The problem of the reality is ... how the judge behaves in a position of power, on the other side [of the situation of pressure and vulnerability]

Appellate Judge Antonio is right in highlighting that judges are usually not in vulnerable positions, but rather in positions of power. However, here lies the importance of who the examiners are in these examinations.

Typically, panels consist of five members: four appellate judges and one Bar Association representative. Despite recent efforts to diversify panels, they remain largely homogeneous: white, male appellate judges continue to dominate—reflecting the overall composition of Appellate Courts, as illustrated in the image of TJSP appellate judges (Figure 9). Appellate Judge Antonio noted he had never seen a woman presiding over a panel by the time of our interview (May 2021). Judge Pedro said he had never seen a non-white examiner. These patterns are the result of institutional choices and power dynamics within the Superior Council of the Judiciary (Tulio, 2020), since other institutions have established rules to foster plurality—such as Public Defender's Office that have included non-legal academics in their panels.



Figure 9. TJSP appellate judges, 2019

Source: TJSP

The predominance of appellate judges in panels takes us back to the assessment of judges in position of vulnerability. Although trial judges are not normally in those situations of vulnerability, the assessment over their performance before an intimidating panel composed of appellate judges proves very useful. In practice, oral exams filters candidates based on how submissively they respond under pressure from those whose decisions and practices they will be expected to unchallengedly follow. This stage therefore plays a role of reinforcing existing institutional patterns and hierarchies.

Likewise, the lack of diversity among examiners has profound consequences. As Judge Pedro emphasised, the judiciary homogeneity starts with the homogeneity of their examiners. Appellate Judge Antonio argues that the profile of candidates selected by these examiners is eventually ‘the profile of a judge they are’, candidates ‘who mirror who [examiners] are’. Ultimately, examiners enjoy wide, unchecked, and unappealable discretion at this stage: they

also formulate questions and define the ‘correct’ answers with minimal external oversight (Tulio, 2020). Thus, candidates’ answers reflect not just technical and legal knowledge, but alignment with the examiners’ ideological leanings that embed their legal interpretation and decision-making—for example, whether favouring rights protection and due process or prioritising crime control. As Judge Antonio claims, with these mechanisms of reproduction and homogeneity at the very recruitment process, the judiciary cannot change.

Besides shaping the contents of questions—and expected answers—in oral exams, the profile of examiners also influences the whole dynamic between candidate and examiners in that stage. Several interviewees shared cases of racism and sexism during oral examinations.

Appellate Judge Antonio recalled:

Before 1990, written tests were identifiable, and women and Black candidates were often eliminated early. ... Later, they began to be failed in oral exams with restricted personal interview.

Restricted personal interviews were part of oral exams until 2021, when they were finally forbidden by CNJ. They used to be conducted in restricted settings, only between candidate and examiners. On those occasions, penal would ask the most invasive sorts of questions not defined by the edict for the examination (see Nalini, 2008). Judge Antonio mentioned women being asked about their marital status or subjected to sexist remarks, such as ‘oh, are you divorced? What are you going to do if the mayor chats you up?’, among other ‘humiliating questions to mess with [their] mind’. In one infamous case, the first female judge appointed to Rio Grande do Sul’s Court of Justice was asked whether she was a virgin during her examination (Bianchi, 2015).

While written tests are now anonymous and restricted interviews are banned, dynamics such as racism and sexism have moved from overt to covert forms. Panels continue

to be composed of examiners with the same profiles as those who once purposefully failed female and Black candidates, thereby maintaining a more homogeneous and traditional judiciary. These predominantly homogeneous examiners retain unchecked discretion during oral exams—the stage ‘where the greatest filters of homogenisation are at play’ (Rezende, 2018). Evaluation panels ultimately select candidates who align with the prevailing institutional model, ensuring the reproduction of institutional standards. In practice, rather than promoting diversity, *concurros* favour the selection of candidates with a bureaucratic profile—those who are ready to adhere to and reproduce the prevailing positions and understandings of a conservative institution. In parallel, homogeneous examiners operate within significant channels of discretion where hidden factors may shape examination outcomes. By doing so, the particularities of *concurros* in Brazil enable, reinforce, and reproduce a conservative, bureaucratic judiciary where a punitive consensus prevails. However, discretion only plays a role in the later stages of judicial recruitment. Before that, several other dynamics have already significantly influenced who is able to reach this examination stage. For this reason, the bureaucratic aspect is only part of the explanation for judicial punitiveness. To fully understand it, we must also consider the pathway of civil service seekers who eventually become judges.

Civil service seekers (*concurseiros*)

Besides the complexity outlined above, the Brazilian judiciary's entrance examination is highly competitive. For instance, the 188th TJSP entrance examination had 23,122 applicants, of whom 99.6% were not successful. Given these odds, what does it take to succeed? Previous research shows that judges are, on average, 33 years old when appointed (Vianna et al., 1997;

Sadek, 2006a), with nearly six years between graduation and success in a *concurso* (Vianna et al., 1997: 155). I have already highlighted the broad range of topics covered in these *concursos* and the importance of memorisation skills. Taken together, these factors point to the emergence of *concurseiros*—a social category largely unique to Brazil.

Concurseiros are individuals devoted primarily to studying for civil service examinations. They are a kind of professional applicants, whose main activity is centred on this preparation. It often involves structured daily routines, private preparatory courses (*cursinhos*), and a significant financial amount of money invested. Understanding how this figure emerged in requires examining broader socioeconomic changes in the Brazilian society.

Historically, law graduates have held privileged roles in Brazilian society. In the late 19th and early 20th centuries, they dominated political and intellectual life. In 1886, 65% of congressmen were law graduates (Sadek and Dantas, 2000: 102). Until the 1930s, Law graduates were mostly employed in the public sector, but often involved in newspapers, literature, and education. Broadly speaking, they were drivers of culture and politics in the building up of the bourgeoisie order and ideology in Brazil (Neder, 1995; Adorno, 2019). Legal education was very exclusive, widely prestigious, and economically rewarding. Throughout the 20th century, there was a slow but gradual expansion in law degrees across Brazil (Rezende, 2018; Bonelli, 2013: 126). This pattern of expansion intensified significantly with neoliberal reforms in the 1990s, in such a way that law degrees were no longer exclusive. Deregulation and privatisation led to a proliferation of law schools—from 235 in 1995 to nearly 1,900 by 2023 (Brazilian Bar Association *apud* Carvalho, 2023).

Today, as a result of those trends of deregulation and privatisation, law is the most popular in-person undergraduate degree in the country, enrolling over 700,000 new students

annually (Souza, 2024: 66). Brazil now has the world's highest ratio of lawyers per capita (OAB, 2022). However, with oversaturation, law degrees lost their prestige and economic viability: a third of lawyers earn only up to twice the minimum wage, and many hold secondary jobs (OAB, 2024).

Meanwhile, legal professions in the public sector—such as judges—experienced real valorisation. After the 1988 Constitution, these roles gained social relevance and substantial wage increases. Accounts from all my interviewees who became judges in the last century go in this direction. Retired Appellate Judge Benedito told me that when he became a judge in the early 1980s, he lost money in comparison to his previous work as a lawyer. He even mentions that judges went on strike demanding better wages in 1985—something also emphasised by Judge Carlos. Retired Appellate Judge Oswaldo used to be a Prosecutor until the late 1980s, when he became a judge. He mentions that when he left the Prosecution Office, he was earning around \$1,100, and that his first salary as a judge was around \$700. Soon after, he explains, the government found ways to make the career more valuable. Today, judicial salaries place judges among Brazil's top earners. Judge Francisco told me:

When I became a judge in the early 1990s, I did so out of vocation. Back then, the salary was around \$1,000. Honestly, I did it out of vocation... During the 1990s, the issue of wages was quite poor, undervalued compared to other careers, even when compared to lawyers. Obviously, over the course of this career, with changes in salary policies, there's been a real improvement—let's say, a real enhancement of this profession. And when there's this economic valorisation, it clearly increases the general interest from prospective candidates. And then there's the danger of differentiating those who're looking for a job from those who're seeking their vocation.

Judge Francisco exposes an important change within legal careers and law degrees. As private legal practice became less lucrative and public careers more stable, prestigious, and economic rewarding, the figure of *concurseiros* emerged.

Law students increasingly aim for civil service roles not out of passion, but for job security and financial stability. Barrister Bruno observed that today's students often aspire to 'any career' via *concurso público*, indifferent to specific roles—reflecting a strategic, careerist approach rather than a vocational one. Civil service entrance examinations for legal careers such as judges, prosecutor, police chief, public defender, and judicial analyst are all very similar. They are all based on the structure presented in the previous section. This standard allows a generic study for public examinations, which is not focused on any specific career. This is a particular feature of *concurseiros*: their usual goal is to succeed in any civil service examination. Many judges originally applied for prosecution roles and vice versa (Vianna et al., 2018). Accounts from most of my interviewees confirm this trend. Judge Ricardo shared:

I applied for the Prosecution Office. I never wanted to be a lawyer, so I studied for *concursos*. I got to the second stage of the Prosecution exam four times but God graces me with the judiciary and I thank him every day.

While law degrees used to prepare their students to become part of the political and intellectual elite in the 19th and early 20th century (Adorno, 2019), they now prepare students to become successful *concurseiros*. This trend was unanimously criticised by my interviewees. As advocacy is continuously highly competitive and only financially rewarding to the top 5%, civil service examinations have become the main goal for law graduates, especially given its high salary and financial stability (Fontainha, 2011; Souza, 2024; Lemgruber et al., 2016). This is why, as I claimed earlier, legal education has been shaped by the demands imposed by *concursos*.

While private lawyers face ongoing competition throughout the whole career, public sector careers mainly require overcoming the entrance hurdle. Until the 1980s, most judges succeeded on their first exam attempt. Since then, multiple attempts and several years of

dedicated study are typical (Sadek, 2006a; Vianna et al., 2018: 182). What it takes for candidates to do between graduating and being successful in public examinations works, in practice, as a class filter, as acknowledged by my interviewees. As a pre-condition to secure that judges have some practical experience, a constitutional amendment established in 2004 that eligible candidates must have at least three years of 'judicial practice' after graduating in Law. The criteria to qualify for judicial practice, however, are loose and easily circumvented (Souza, 2024: 44). In practice, after graduating, rather than exercising legal practice for three years, *concurseiros* spend this time enrolled in postgraduate and preparatory courses designed to maximise exam success. Ultimately, concrete working knowledge and experience are almost useless for public exam purposes. As Appellate Judge Antonio puts it

If you're a good lawyer, you've specialised in a certain area and will have left other areas out [of your daily activities and expertise]. I mean, whatever area you're experienced in, it'll contribute very little to the first stages [of the public exam].

PD Matheus added: 'those who genuinely work as lawyers often continue down that path instead of applying for exams'. In other words, a genuine judicial practice diverts law graduates from the path of civil service examinations.

Thus, systematic full-time study became the ideal. Historically, most judges were approved in *concursos* without *cursinhos*. In 1966–1977, 83% of judges had not attended any preparatory course; by 1991–1995, this dropped to 35% (Vianna et al., 1998: 180). By 2018, 93% had attended some form of preparatory course (Vianna et al., 2018). The question is: how is able to afford a few more years of unpaid, full-time studies after five years of undergraduate studies, not only giving up from working but actually paying for private preparatory courses?

Preparing full-time for exams requires significant resources. Beyond course fees, *concurseiros* incur additional costs—for example, registration fees, travel for exams across Brazil, accommodation, and *cursinhos*. Unlike countries like France (Fontainha et al., 2014: 113–125), Brazilian civil service examinations are not free.¹¹ As Judge Vanessa pointed out, successful candidates often travel nationwide in pursuit of opportunities, since the opening of *concursos* is uncertain and do not take place regularly.¹² Thus, socioeconomic privilege becomes a near-prerequisite. PD Lucas candidly reflected on his own trajectory:

I spent four years of my life only studying [for *concursos*]. Not earning anything. Nothing at all ... I was living with my mother, and my father would give me money to pay my things, including *cursinhos*. So, I mean, I'm privileged. Only a few have access to the same conditions to be successful in a *concurso* as I had.

Similarly, Retired Appellate Judge Sonia confessed: 'I stopped everything to study full-time for a year. Who can afford that? I beat countless people just by having that possibility'. This financial buffer acts as a preliminary class filter—excluding those who cannot afford years of unpaid study.

Exceptions granted, current judges are successful *concurseiros* who studied full-time, investing time, money, and energy for over three years after graduating. This privileged path produces two common consequences that shapes judges' general behaviour: a strong belief in meritocracy and alienation. First, many judges attribute their success solely to personal merit, overlooking the socioeconomic advantages that enabled them to succeed. As Judge Carlos noted, most judges perceive themselves as hardworking individuals whose success in ultra-competitive *concursos* is a consequence of their merit. For that reason, they believe to

¹¹ Registration fees are currently over R\$300. For the latest TJSP examination, they were R\$323.50—almost a quarter of Brazilian minimum wage (R\$1,412).

¹² For example, the first stage of the 188th, 189th and 190th TJSP Examinations took place in December 2018, November 2021, and April 2023, respectively.

have earned all the privileges and benefits provided by the career. Souza (2024) highlights a motto for *concurseiros*: life begins after the appointment. Their discipline and dedication for years pay off, as they eventually reap the rewards later. PD Lucas described this mindset as ‘winning the lottery in instalments’. The idea of ‘lottery in instalments’ is the reward later reaped, representing financial stability and a wage that places them among the top 1% highest remunerated in the country. Enjoying ‘life that begins after the appointment’ means taking advantage of socioeconomic rewards and possibilities, but also living without the pressure of daily competition in the job market faced by lawyers. Fulfilment comes not from a sense of public duty but from securing personal comfort. Lucas pointed out: ‘when concerns revolve around [socioeconomic] rewards, I believe worries about rights, safeguards, and republican responsibilities fade away, right?’.

Second, this meritocratic narrative often fosters a sense of intellectual superiority. After all, they are among those 0.4% successful candidates. Judges feel authorised to overstep the powers constitutionally granted to them. This includes, for example, when they claim their decision-making reflects attempts to deal with outdated laws, ineffective actions of other state agents, or excessive constitutional rights and procedural safeguards, or even when they feel responsible for fighting criminals and tackling criminality. They feel legitimate to ‘amend’ legislation whenever they find it inadequate, outdated, or unjust – after all, they trust their own judgments over elected legislators, perceiving themselves as more capable, having proved their intelligence through highly competitive exams.

This attitude is not formed solely through exam preparation but also reflects judges’ class backgrounds. Nearly 70% attended private secondary schools (Vianna et al., 2018), compared to just 12.8% nationally (INEP, 2024). About 76% had parental incomes exceeding

three times the minimum wage—versus 8% nationally (IBGE, 2023b). Over a quarter of judges have parents whose monthly income exceeded 20 times the minimum wage. Parental income combined with type of secondary school tell us that not all but the vast majority of judges comes from a privileged background. Not losing track of the significant social inequality in Brazil, coming from a ‘privileged background’ does not necessarily mean coming from rich families, but, as Almeida (2010: 289) puts it, this majority of judges comes from at least a rising middle class that earn enough to investment family capital in high-level education. A significant proportion of judges therefore grew up in upper-middle-class environments, far removed from the majority experience.

Another common consequence of this pathway towards success in public exams is alienation. This distance fosters alienation. As Mascaro (2018: 56) explains, besides embedded in class barrier, civil service preparation isolates candidates from productive, political, and cultural life. Interviewees noted that, owing to their socioeconomic background, most judges have little to no exposure to marginalised realities. PD Lucas emphasised: ‘They’ve never been to the periphery—to São Mateus, to Sapopemba... They have no idea how most people live, no idea how’s the world out there’. Prosecutor Fábio and Appellate Judge João similarly observed that many judges only view marginalised communities as threats, as unwanted and undesirable, not citizens deserving rights. In practice, this is how those who judge see those who they judge—as people from marginalised communities are those who typically represent suspects, defendants, and convicts. For most judges, a state of disconnection from the wider society predates the study and preparation for the judiciary—which nevertheless preserves this state.

For a minority of judges who exceptionally have a more diverse background but somehow manage to prepare and succeed in *concurros*, this period of preparation is responsible for disconnecting them from ‘the world out there’. Their education, from law degree to preparatory courses, does not simply make sociological and criminological perspectives irrelevant; knowledge on these perspectives may actually play against them in public exams. As Judge José highlights, their education and preparation are void of democratic values, being mostly focused on learning tricks to get multiple-choice questions right and learning dominant doctrine and prevailing judicial positions held by the Court in which they aspire to work. Legal training rarely problematises the actual functioning of penal institutions. Instead, prisons and police are taught in idealistic, normative terms, detached from reality. Retired Appellate Judge Benedito observes that within more traditional legal-philosophical perspectives that dominate law degrees, prisons are taught as an institution that can only do good for the good society, either by treating those that can be treated or neutralising the untreatable. PD Marcus captured this mentality: ‘It’s almost mathematical: $2+2=4$; you commit a crime, I send you to prison’. Judge Sergio echoed that education teaches incarceration as the default, overlooking its societal consequences, so that judges later on do not ‘notice that in [their] daily activities [they] become a gear that grinds people down’. Legal education and preparation for *concurros* are part of a pathway that alienates and desensitises—or keeps judges alienated and desensitised.

Due to these life experiences and training, *concurseiros* struggle to understand the concrete reality of the criminal justice and recognise systemic injustices when they take office. PD Lucas shared a telling example: when presenting evidence of police misconduct, a judge responded sceptically, suggesting it was exaggerated: ‘oh, why would police officers do that? This is to impute evil to the police’. PD Lucas reflected:

Man, this is the subjective-ideological framework of judges. Elitist people who live in bubbles. They've never been inside prisons, youth detention, or peripheral neighbourhoods. It's crazy because she's not even the most punitivist judge. But that's the thing, she's an upper-middle class judge ... Whenever she's faced with the naked truth, confronted with harsh realities, she just can't believe it. She thinks it's an exaggeration, that I'm too radical.

Many judges, he argued, are de-attached from reality, unaware of the real consequences of their actions, and operate under a dehumanised rationale. Barrister Bruno, Retired Judge Marcia, and Judge Carlos all reinforced this view, noting that many judges from criminal sections have never even visited a prison. The idea is that not only their preparation and general pathway are alienating, but so is their ordinary professional routine once they take on the job. When they eventually go inside a prison, they are often shocked. Some judges experience a profound transformation when exposed to incarceration conditions, notably when assuming roles in presiding detention hearings or prison oversight. In our interviews, many confessed to have become less punitive when they got exposed to this concrete reality. Judge Francisco offered a vivid personal account:

I was one before and am one after detention hearings. I can assure you that I used to be extremely tough ... I think I was going to hell with a VIP ticket. [Detention hearings] shocked me to the point that I said 'my God, what have I been doing for so long?'. ... I don't like to use these terms 'punitivist' and 'garantist', but if I'm to use them, I'd say I've got my label changed from 'punitivist' to 'garantist'.

I then asked him how detention hearings made him change his behaviour. He argues that seeing defendants up close, having a closer contact with them, changed him:

It's the contact with a reality which I wasn't aware of. The judge, when we receive a pretrial detainee in the courtroom for the hearing and trial, we receive a 'pasteurised' detainee—the detainee who's wearing flip-flops, uniform—their khaki pants and white t-shirt—and who had their head shaved. He's already impregnated with the system that takes him out of the reality in where or how he was arrested. The detention hearing basically gives you back life as it is, since the guy is brought to your courtroom exactly in the way he was arrested. ... There's a significant change. It heightens your sensitivity.

Judge Francisco then narrated a de-alienation process, that, owing to its details, I transcribe:

Whether you like it or not, the judge has a social burden on [their] back that comes from [their] experience—in pubs, football, the streets, your family. Why? Because everyone sits at your table and says, 'damn, criminality is crazy; my goodness, this is absurd'. Whether you like it or not, you carry that burden ... If you take something pasteurised, maybe even unconsciously you're a little more... I won't even say conservative. Tougher! You're tougher. However, when you have this burden but you see the other side, you see that the judge or the judicial decision may work as a lifeline for the human being sat there ... I think there's an increase in the judge's responsibility in custody hearings.

His socioeconomic background, socialisation, education, training, and the institutional practices he is daily involved in, all combined to a one-sided, elitist, and de-sensitised judicial activity. As he illustrates, the closer and immediate contact with the arrested person helps, even if in a small fraction, the judge see beyond its myopic reality, in which an organised bank robber, a wretch who steals to eat, and a wrongfully arrested person are all the same: the pasteurised detainee, presumed guilty, equally dangerous, and deserving of years of closed-prison imprisonment. Similar is the process for those judges that get to know the shocking prison reality and are exposed to its inhumane conditions. These narratives corroborate the fact that judges, when take on the job, are usually detached from the reality they are involved in and help reproducing. Their training and preparation do not involve getting to know the reality of the criminal justice as it is and is limited to distorted and reifying views.

However, exposure alone does not guarantee change. It is one thing to claim that the majority of judges has not been inside a prison and, when they eventually go, they are shocked by a hitherto unknown reality. It is another thing to claim that the exposure to this ruthless reality is enough to consistently turn judges milder. Judge Vanessa recalled showing youth detention footage to colleagues. Despite initial shock, many continued their ordinary harsh sentencing practices. She rebuts what she considers a naïve hope that by being exposed to

harsh realities, judges will step back from their harsh decision-making. She reflected: ‘many judges go to prisons. But they still believe that’s what prisoners deserve’. She then exposes the fact that while some judges may be more punitive owing to misconceptions—as if they do not know what they are doing—other judges are consciously punitive—they do it knowing what they are doing.

Another caveat relates to an intentional state of alienation. As Judge Claudio pointed out, some judges consciously avoid confronting prison realities:

Speaking very frankly with you, Luiz, no judge is naïve. They’re not naïve. If they don’t know [about the prison reality], it’s because they don’t wanna know. Why don’t judges go to prison? Because they don’t wanna know it. They know it, but they don’t wanna be confronted with that reality ... They don’t wanna know that when they sentence someone, the punishment goes much beyond the sentence. It may go as far as death, because it’ll involve leptospirosis, tuberculosis, Hansen’s disease, overcrowding; it’ll involve sleeping on the floor among rats and cockroaches; and it’ll involve gangs and death. If they go to a prison, they’ll know about it. But they don’t want to. That’s why I say: they know, but they don’t wanna know.

This takes us to a situation somehow close to Eichmann in Jerusalem (Arendt, 1994[1963]). Not knowing the reality—or the consequences of their acts—makes it easier for some judges to perform as per institutional expectations. This is the materialisation of a ‘sheer thoughtlessness’ by the ambitious bureaucrat. Ultimately, diverting from institutional conformity poses different risks to judges—which is precisely the matter of the next chapter.

Ultimately, understanding the *concurseiros*’ pathway sheds light on the punitive consensus within the Brazilian judiciary. Judges are civil service seekers who eventually succeed. They are typically upper-middle-class individuals seeking financial stability and a comfortable life, and who happen to find these in the judiciary. They are prepared through alienating educational processes that emphasise conformity over critical thought. They are

prepared not to be guardians of fundamental rights, but to succeed in *concursum*. Their worldview normally reflects their walks of life, which makes them hold strong classist perspectives. They are detached from the reality in many ways—they do not know those who they typically sentence, nor do they know the places to where those sentenced by them are sent. These one-sided, desensitised views are in turn manifested in the way they understand crime, justice, law, and the judiciary. Ultimately, judicial recruitment and the pathway of civil service seekers amount to a judiciary body where a punitive consensus prevail. For some judges, judicial punitiveness is a product of ignorance and conformity to institutional standards. For others, it is a reflection of personal beliefs and a product of conscious choice. As a result, the judiciary is predominantly made up of reactionary, punitivists judges, and conservative, bureaucrats judges.

Conclusion

In this chapter, I have examined how a punitive consensus is reproduced within the Brazilian judiciary. Rather than focusing on isolated or minor factors—such as whether a judge works in a city or a rural area, or whether they are early- or late-career—I have looked at deeper and more structural dynamics that shape the judiciary as a whole. Central to this analysis are two key filters at play in the judicial recruitment process: a bureaucratic filter and a class filter.

As I have shown, the structure of entrance examinations for the judiciary privileges candidates with a bureaucratic profile—those prepared to reproduce prevailing positions and understandings of a conservative, and at times reactionary, institution. At the same time, the process includes discretionary stages, such as oral exams, where decisions are unsupervised and unappealable, allowing space for hidden biases related to class, race, and gender.

Anticipating the bureaucratic filter is the class filter. The emergence of *concurseiro*—a social category shaped by post-redemocratisation transformations—is directly linked to this filter. *Concurseiros* are typically upper-middle-class individuals seeking financial stability and status, and who find them in the judiciary or other civil service careers. Their paths are often marked by classist perceptions, a presumed intellectual superiority, and a state of alienation—whether stemming from life experiences, or from the preparation process itself.

Together, these two filters have produced a judiciary marked by punitive consensus. This consensus encompasses shared worldviews and beliefs about law, justice, crime, punishment, and the role of the judge. These include the beliefs that impunity drives rising crime; that Brazil is not experiencing mass incarceration, but rather mass decarceration; and that, in the face of soft politicians, lenient legislation with excessive rights, and inefficient crime control agencies, judges must step in to fight crime and deliver effective punishment—often by making adjustments and compensating for the failures of other institutions. The punitive normality in judicial decision-making, detailed in the previous chapters, flows directly from this consensus, where judges come to act as robed vigilantes.

Throughout this chapter, I have argued that judicial punitiveness reflects both personal beliefs for some judges and institutional conformity for others. It would be reductive, however, to claim that the Brazilian judiciary is composed solely of punitivist and bureaucrat judges, or even that recruitment dynamics alone ensure complete institutional submission among those judges who are not essentially punitivists. Consensus is not the only mechanism through which punitiveness is promoted, nor are punitivists and bureaucrats the only profile of existing judges in Brazil. In the next chapter, I turn to a complementary dynamic that has shaped

judicial punitiveness: the role of coercion. This shift allows for a more comprehensive understanding of judicial punitiveness and the judiciary in Brazil.

Chapter Nine

When consensus fails

Coercion to neutralise garantist judges and secure institutional conformity

‘The fight for human rights is a hard and tormenting everyday struggle in our lives. If you can’t handle taking a beating, if you’re not thick-skinned, you won’t survive’. These words from Judge Claudio portray the challenging and precarious position of garantist judges in Brazil today.

In the previous chapter, I have shown the existence of a punitive consensus and how it is reproduced within the judiciary—mainly through the recruitment of civil-service seekers, who are mostly punitivists and bureaucrats. Yet, the production of a punitive judiciary is not achieved through consensus alone. When consensus fails, coercive mechanisms step in to shape judicial punitiveness and reinforce conformity.

Coercive practices are not new. In Brazil’s authoritarian past, they were overt, direct, and often off-the-record. Judges lacked the institutional safeguards they now possess—such as tenure, non-transferability, and wage protections. Many were subordinated to local oligarchs or military regimes, working as a direct extension of their power. As Retired Appellate Judge Oswaldo describes, the judiciary operated under *cabresto*¹³ logic, where judges

¹³ Stemming from the expression *cabresto votes*, employed to refer to electoral relations under rural *coronelismo*, as presented in Chapter Four.

followed informal commands from political or judicial elites—'do this' or 'don't do that'—without recourse or resistance.

The democratic transition and the 1988 Constitution aimed to end this era and promote judicial independence. The enlargement of the judiciary, the reintroduction and expansion of judicial guarantees, and a new ethos against authoritarianism posed challenges for the reproduction of those old-school coercive practices. The rise of judicial organisations such as *Judges for Democracy* and *Alternative Law* in the early 1990s signalled a new profile of judges—those willing to challenge institutional pressures and resist old forms of control.

Yet despite these formal advances, coercion did not disappear—it evolved. Today's coercive mechanisms operate more subtly, through institutional and legal loopholes. Practices such as reassigning judges, disciplinary repression, criminal investigations, and coordinated media crusades represent a contemporary arsenal aimed at neutralising garantist judges—those who challenge the punitive normality—and securing institutional conformity. Though no longer imposed by telephone calls or explicit off-the-records messages, coercive pressures are still deeply embedded in judicial structures and remain crucial in reproducing judicial punitiveness. Ultimately, these mechanisms ensure that the punitive normality is upheld, even when not all judges align with it willingly.

This chapter analyses how these evolved coercive practices function in the post-authoritarian, rule-of-law era. It is divided into four sections, based on four major coercive mechanisms. The first section analyses the practice of 'changing the pieces on the board'—the ability of judicial leadership to reassign judges, strategically removing from the criminal division those who do not conform to institutional standards. The second explores disciplinary repression: how garantist judges are targeted through disciplinary proceedings, mostly but

not only under claims of partiality or ideological bias. If disciplinary action fails to bring a judge in line, a third—more extreme—tool may be used: criminal investigation, wherein judges who protect the rights of suspects, defendants, and prisoners are themselves treated as criminal suspects. Finally, I examine how collaborative crusades—led by prosecutors, police, and journalists—publicly discredit garantist judges and foster public outrage. These coercive dynamics serve not only to punish individual judges but to send a deterrent message to the judiciary as a whole: do not dare to be a garantist. In doing so, these practices reinforce a punitive judicial culture. They suppress liberal, rights-based decision-making grounded in due process and fundamental safeguards and promote instead a logic where punishment becomes the end that justifies any means, including a systematic violation of rights and safeguards.

Changing the pieces on the board: relocating garantist judges

Although non-transferability is enshrined in the Federal Constitution as a core tenet of judicial independence and the rule of law, it is not always upheld in practice. Beyond legitimate exceptions—such as promotions or removals upon request—the institutional design of the Brazilian judiciary includes roles that are freely designated, creating opportunities for subtle but effective coercion. These positions include career-stage roles, such as Substitute and Auxiliary Judges, as well as function-specific appointments, such as judges assigned to the investigative phase of criminal proceedings or to the supervision of prisoners. In both cases, the principle of non-transferability is essentially bypassed. However, besides these direct breaches, there are situations that more indirectly call into question this core tenet—particularly situations during the process of career advancement. As my interviewees explained, loopholes in the judiciary’s institutional framework allow coercive practices to be

deployed in ways that shape judicial behaviour. The message is implicit but unmistakable: adapt to the institutional standard or be reassigned.

One interviewee described this dynamic as the power to *'mudar as peças no tabuleiro'*—literally, 'to change the pieces on the board'. The metaphor evokes a deliberate rearrangement of elements to serve strategic interests. In this case, the pieces are judges; the board is the judiciary and its various divisions; and the interest is preserving the institutional standard—the punitive normality—which becomes threatened by garantist, rights-oriented decision-making. Within this system, judges are repositioned to neutralise or undermine their disruptive potential.

Free designation of Substitute and Auxiliary Judges

After succeeding in a public entrance examination, candidates become first-instance judges. During their initial two-year probationary period, they serve as Substitute Judges (*Juiz Substituto*). These positions are not fixed. As the title suggests, Substitute Judges typically fill in temporarily for regular judges (*Juiz de Direito*) who are on leave, though they may also work alongside a Presiding Judge (*Juiz Titular*) if an additional position is required temporarily. Their placement is dictated by the operational needs of the Court of Justice to which they are attached. While Substitute Judges can express preferences regarding court divisions (e.g., criminal, family, civil) or judicial districts, their actual designation is at the discretion of the President Judge of the Court of Justice (*Presidente do Tribunal*, hereinafter President Judge). There are no formal criteria guiding these appointments, and the process lacks transparency. As Judge Pedro explained:

These choices are ‘cabinet decisions’. They’re not publicly justified... The Judge Director of a courthouse receives requests from other judges—‘appoint judge X here, judge Y there’—and that’s how it goes. There’s no need to issue an administrative act’.

Although the opening of a vacancy (e.g., due to a judge's annual leave) must be justified, the decision on who fills it—and why—is entirely discretionary. Consequently, not only can a Substitute Judge be designated without formal justification, but they can also be removed without explanation, even when no structural or operational change has occurred.

Judge Pedro’s personal account highlights how this discretionary power can shape judicial paths—and profiles:

At the beginning of my career, I wanted to work in the Criminal Division. As a Substitute Judge, I pursued assignments in Criminal Courts, and for a while, I was working in criminal courts in [district name omitted]. Then suddenly I was reassigned elsewhere, and another colleague took my place. At the time, I didn’t question it, I didn’t even realise it. But later I asked myself: ‘Why was I replaced?’ I was fulfilling my duties—working fine—and it wasn’t because my position was no longer needed. I started wondering whether it was tied to my judicial profile—always bonded to *garantismo*. I don’t have concrete proof, but the logic of it makes sense. If public administration is supposed to follow the principle of impersonality, why was a specific decision made to remove me and put someone else in my place? There must’ve been a reason, right? Later in my career something similar happened again—more overtly—and that made me revisit this early episode with new eyes.

This story reveals how the combination of movable positions and free designation poses a serious risk to judicial independence. Substitute Judges occupy a structurally vulnerable position, where several informal dynamics can influence whether they are designated to preferred divisions. Being well-connected with senior judges may facilitate favourable placements. Adhering to established legal interpretations may help maintain them. Conversely, in the Criminal Division, judging in ways that challenge the punitive normality can lead to quiet reassignment. As Appellate Judge Antonio explained, this combination of mobility and discretion fosters submission, discouraging profiles associated with *garantismo*

and promoting conformity with institutional expectations—so that the punitive normality is encouraged.

Freely-designated roles extend beyond the probationary stage. After this period, first-instance judges follow a tiered classification system—Initial, Intermediate, and Final Entry—each tied to the size and status of judicial districts. Initial- and Final-Entry Judges enjoy full protection under the principle of non-transferability. But the Intermediate-Entry stage introduces a structural grey zone. Judges promoted to Intermediate Entry may relocate to medium-sized districts or remain in smaller, initial ones—either way, they cannot be transferred without consent. However, in some states such as São Paulo, Pernambuco, and Ceará, Intermediate-Entry Judges may request designation in Final-Entry districts, notably state capitals. If approved, they serve as Auxiliary Judges, working under Presiding Judges. Like Substitute Judges, Auxiliary Judges do not hold a permanent post. Their assignments—within the district they have chosen—are discretionary and unregulated, determined by the Court President or a Courthouse Director under vague criteria such as ‘institutional needs’ or ‘administrative convenience’. The key distinction between Substitute and Auxiliary Judges concerning their free designation lies in territorial scope. While Substitute Judges can be assigned to any division or district, Auxiliary Judges are geographically fixed, but equally subject to internal reassignment within that district at any time.

In 2005, the Judges for Democracy Association (AJD) submitted a formal representation to the CNJ, stating that under this situation:

There are no guarantees for the judge to exercise jurisdiction freely, independently, and impartially if they depend on consenting, pleasing, or being subordinated to administrative decisions.¹⁴

The AJD specifically warned that ‘in the Criminal Division, the effects of this flexibility are even more serious and evident’. Ultimately, removing a *garantist* judge from a criminal court means preserving the punitive normality—not through an open, direct prohibition, but through institutional choreography.

Many of my interviewees reported being removed from the Criminal Division after failing to align with institutional expectations—whether by resisting informal requests or simply by following a *garantist* decision-making. One such example was shared by Appellate Judge Antonio, who recounted:

I know of a case where the Court President called a judge and said: ‘look, I’d like you to listen to so-and-so with great care’. I didn’t know what his interest was. The judge refused, and he was relocated—removed from his court. He was an Auxiliary Judge and was sent elsewhere. There are several cases like this.

This reflects a coercive dynamic where a judge in a powerful institutional role seeks to subordinate a more vulnerable colleague in order to fulfil undisclosed interests. The episode resembles a modern form of *cabresto* coercion—one that while no longer the standard or even common, has not completely vanished.

More concerning, however, is how these mechanisms operate not only to influence isolated rulings in specific circumstances, but to reshape judicial profiles more broadly. Among several interviewees who described being removed from the Criminal Division due to their *garantist* orientation, the case of Judge Pedro stands out. He acknowledged that, as an Auxiliary Judge, some level of rotation was expected. But even as time passed, he struggled

¹⁴ Available at <https://ajd.org.br/noticias/792-16preservacao-do-juiz-natural>.

to find consistent placement in criminal courts. When he finally secured a position, he was reported to the Court's Inspectorate by a group of prosecutors displeased with his rulings, particularly during *plantões criminais*—when judges decide on urgent matters such as detention hearings and habeas corpus petitions. Shortly after, Judge Pedro received an email informing him that, by order of the Court's Inspector and following the prosecutors' complaint, he would no longer be designated to criminal courts and was barred from *plantões criminais*. Although the complaint was later dismissed without becoming a disciplinary proceeding, he was not reassigned to criminal matters.

Judge Pedro then challenged this decision at the CNJ, which eventually ruled in his favour, ordering the TJSP to restore his designation and to implement impersonal, rule-based criteria for assigning Auxiliary Judges. However, Judge Pedro foresaw a legal loophole: simply reauthorising his return would not ensure it happened. The Court could still claim that, although he was not prohibited from serving in a criminal court, it had no obligation to designate him there, given the discretionary nature of such decisions. TJSP appealed to the Supreme Court, which granted a preliminary injunction suspending the CNJ's order. Over a decade later, the case remains unresolved. In the meantime, Auxiliary and Substitute Judges continue to be designated—and redesignated—through discretionary and unregulated administrative decisions. As a result, judicial independence remains fragile. Judges in freely-designated roles know that if they do not align with institutional expectations, they can—and likely will—be removed. In this way, discretion becomes discipline, and administrative flexibility becomes a powerful tool of coercion.

Judiciary as a bathtub: opening the tap and closing the drain

Beyond Substitute and Auxiliary Judges, the institutional design of several state justice systems gives freely-designated positions greater influence over incarceration patterns and prison population dynamics. PD Matheus describes TJSP as a bathtub, where the tap and drain are controlled by the judicial elite—those in the most powerful and influential positions within the court.¹⁵ The Federal Constitution permits State Courts of Justice to create specialised courts as they deem necessary. Among those created by the TJSP are the DIPO (*Departamento Estadual de Inquéritos Policiais*, or Police Inquiries Department) and the DEECRIM (*Departamento Estadual de Execuções Criminais*, or Correction Department). In short, DIPO Judges oversee police investigations and all judicial proceedings prior to the filing of formal charges by the prosecution—including detention hearings. Correction Judges, in the other end, supervise the execution of sentences, handling all post-conviction matters such as prison regime progression, furloughs, early release, and sentence suspension. This structure is what makes PD Matheus’s metaphor so evocative: the tap—who enters the prison system—is controlled by DIPO Judges; the drain—who is released—is controlled by Correction Judges. Crucially, both roles are freely designated and, in turn, controlled by the judicial elite: DIPO Judges are appointed by the Court’s Inspector and Correction Judges by the Superior Council of the Judiciary. Neither position is protected by the principle of non-transferability, meaning that any judge occupying these roles can be removed at any time, for any reason—or for none at all. This lack of security undermines judicial independence and fosters submission to institutional expectations.

A recent episode of large-scale ‘manipulation of the board pieces’ within the TJSP illustrates how judicial redesignations can be strategically deployed to shape outcomes under

¹⁵ These are the Court President, Vice-President, Inspector, the Decano Judge and the other members of the Superior Council of the Judiciary: the Presidents of the Public Law, Private Law, and Criminal Law divisions.

the guise of administering justice. In 2018, the TJSP took the unprecedented step of replacing all 13 DIPO Judges at once—including the Presiding Judge and all twelve Auxiliary Judges. According to my interviewees, under the leadership of DIPO then-Presiding Judge Antonio Patiño, detention hearings had been yielding positive outcomes since their introduction in São Paulo in 2015. ‘Positive’ in this context meant that the hearings were fulfilling their constitutional role: rigorously examining the legality of arrests and the necessity of pre-trial detention. At the time, 53% of flagrante delicto arrests became pre-trial detention (MJ, 2016: 25), largely thanks to what PD Matheus described as:

Reasonably sensible, thoughtful judges... who actually listened to [defence] arguments, who didn’t give in to the panic of detaining people accused of drug trafficking ‘just because drug trafficking is serious and that’s it’.

Judge Antonio Patiño was subsequently removed from DIPO by the TJSP Inspector, who appointed Judge Patrícia Alvares Cruz in his place. Her record was widely known: she had famously sentenced a woman to closed prison for attempting to steal a bottle of shampoo and conditioner in the early 2000s, and later did the same to a man who stole four cans of tuna. Her profile is unmistakably punitivist.

Even before her appointment, legal professionals and researchers raised concerns about what this shift meant. Some warned of the ‘death of detention hearings’ (Anastácio, 2017; see also Blanes et al., 2017), predicting that the TJSP’s goal was to neutralise the hearings’ capacity to revoke unnecessary or illegal detentions. As shown in the previous chapter, many judges consider detention hearings as mechanisms that promote impunity and mass decarceration. Judge Patrícia Cruz reinforced this view, publicly stating that the true aim of detention hearings is ‘to verify whether the detainee has suffered mistreatment. I have no doubt about that’ (Grillo, 2018). By narrowing their function to checking for mistreatment—

ignoring the role of assessing pre-trial detention necessity—her approach effectively downplayed the hearings’ emancipatory potential. She has also argued that detainees’ rights must be balanced with ‘another constitutional right: society’s right to have public safety guaranteed’ (Pauluze, 2019). This framing aligns closely with a punitive institutional agenda. As anticipated, the rate of flagrante delicto arrests converted into pretrial detention indeed rose sharply after her appointment (IDDD, 2019).

PD Matheus, who worked in DIPO courts during this period, described the transformation:

Every suspect of drug trafficking sent to jail—no matter the amount. All the judges issuing exactly the same decisions, with the same wording, because she [DIPO Presiding Judge Patrícia Cruz] picked up judges at the beginning of their careers who strictly followed her instructions: ‘don’t release drug trafficking suspects, even if they’re first-time offenders or carrying small quantities’; ‘don’t release robbery suspects under any circumstances’; ‘don’t release anyone with a prior criminal record’.

I interviewed one of these DIPO Judges who were replaced. He spoke about the episode with great care and restraint, offering no direct criticism of her or her decision-making style. Still, over the course of our conversation, he eventually acknowledged those changes were aimed at neutralising the results achieved by the previous DIPO team. But he tried to justify it:

But it’s not wrong, Luiz. If you’re the band conductor and the bass drum doesn’t sound right, you change the guy playing the bass drum. Personally, it upset us, because I believe we were generating real social gains. But I can’t say this [replacement] was completely wrong—for God’s sake.

His effort to justify the change as a managerial decision—rather than a political or ideological one—reveals the internalisation of institutional discipline, even among those who may quietly disagree with it. For PD Matheus, however, the episode was far less ambiguous: ‘it was clearly a disguised punishment. “You’re releasing too many people? Then you’re out”’. In the end,

the judicial elite used their discretionary power to replace dissenting judges and ensure the reproduction of the punitive normality. They rearranged the pieces on the board—and in so doing, they opened the tap of mass incarceration.

The context in which Correction Judges operate is not significantly different. According to PD Matheus, many of these judges systematically issue unlawful decisions that intentionally worsen inmates' legal situations. 'They do whatever they want', he said. Reported practices include requiring criminogenic assessments as a condition for any legal benefit, and ordering regressions to harsher prison regimes for the most trivial reasons—all contributing to longer and more punitive periods of incarceration. These claims, grounded in his daily professional experience, are fully supported by empirical research, as briefly mentioned in Chapter Two. Notably, as PD Matheus argues, these actions allow Correction Judges to exercise near-total control over the decisions of trial judges. While Chapters Six and Seven have portrayed the harsh legal standards of Criminal Court Judges, Correction Judges retain the power to override any exceptional deviation from the punitive normality—for instance, by ordering regression to a more restrictive prison regime. According to PD Matheus, this punitive standard is not coincidental. It stems from the pervasive threat of removal faced by Correction Judges, whose freely-designated status leaves them vulnerable to institutional pressure. As Judge Pedro put it, there is a shared understanding among DIPO, Correction, and other freely-designated judges: 'sooner or later, they can remove me from here'. Ultimately, it is not only the tap but also the drain of Brazil's criminal justice system that remains easily manipulated by judicial elites. Ensuring that the punitive normality persists, more people are incarcerated, and fewer are released.

Forbidden paths: blocking opportunities in promotional career stages

So far, I have examined how judges can be directly redesignated when their decision-making fails to align with institutional expectations. While these interventions target those in freely-designated roles, one might assume that judges in permanent posts are largely protected from this type of coercion. But the judiciary's career promotion system introduces a quieter, more indirect form of manipulation—one that ultimately affects every judge before they become an appellate judge.

Promotions in the judiciary follow the entry-category system and are based on two criteria: merit and seniority. However, a critical—and often overlooked—detail is that promotions depend on position availability. For example, an Intermediate-Entry Judge eligible to move into a Final-Entry position may request a post in a criminal court in the state capital. But the Court of Justice can simply respond that no such position is available—offering a civil or family court post instead. Several of my interviewees, from different states and career stages, reported experiencing this exact situation. Retired Judge Marcia recalled seeking designations in criminal courts throughout her career. When finally promoted to Presiding Judge—only achieved on seniority—the only post offered to her was in a Family Court. She attributed this to a conflict with the Court of Justice: 'they thought I was too liberal'. She added:

Even if I had refused the promotion, it wouldn't have changed much. My prior position was at the discretion of the Court—they could send me wherever they wanted. And they clearly weren't going to assign me to the criminal courts anymore.

Though she described this experience as ‘a constraint, but nothing too serious’, Retired Judge Marcia eventually resigned and returned to criminal division through another legal career—‘So I went back to the area I liked, right?’.

Her story is far from unique, though. Appellate Judge Antonio shared a similar experience. Early in his career, he described himself as a tougher judge—a judge who aligned with institutional expectations. Being tough ‘seemed normal’, and ‘doing the normal felt safer’, he acknowledged. But over time, he changed. He began making decisions based on what he considered just, rather than what was expected. When he became eligible for promotion to Appellate Judge, the Court told him there was no opening in the Criminal Division. He recalls: ‘it wasn’t said so explicitly, but the message was clear: “there’s no spot for you in Criminal”’. This subtle form of denial achieves the same effect as overt reassignment: it prevents judges from occupying roles where their decisions could challenge the punitive normality. Judges understand this message clearly. Judge José told me that colleagues often question his decisions: ‘they ask me why I insist on ruling this way if it could jeopardise my chances of promotion’. By the time I write this chapter, two of my interviewees—both garantist judges with long careers in criminal courts—were promoted to Appellate Judge. Neither now sits in a criminal court.

This section has shown how the institutional design of the judiciary enables significant manipulation over judges’ professional trajectories and activity. In some cases, this means freely designating and removing judges from courts and divisions—particularly those that directly influence incarceration trends. In others, it means blocking career advancement opportunities, ensuring that judges are not offered posts in their preferred divisions, especially criminal courts. Both practices disproportionately affect garantist judges. Through

these mechanisms, the judiciary protects its institutional decision-making pattern. Judges who escape the homogeneity enforced through entrance examinations, and who do not consensually reproduce the expected standards, are coerced into alignment with the punitive normality. If they refuse, they are either removed from the Criminal Division or silently denied access to it at the point of promotion. Until a judge finally reaches an Appellate position, they remain under a persistent and pervasive threat of exclusion from their chosen field. As Appellate Judge Antonio concludes it, ‘it’s very easy to become submissive at 50 years old. Or continue to be’.

Disciplinary repression: an ace up the Court’s sleeve

Coercive practices aimed at shaping judicial decision-making do not end with the redesignation of judges. Another powerful tool in the judiciary’s arsenal is the use of Disciplinary Administrative Procedures (*Procedimentos Administrativos Disciplinares*, hereinafter PADs or disciplinary proceedings). Across multiple state courts in Brazil, PADs have become a key mechanism for undermining *garantismo* and enforcing institutional conformity. In this section, I examine how PADs operate as a coercive strategy. I illustrate how they have been deployed against garantist judges, identify the patterns behind their use, and analyse their broader effects—which once again extend far beyond any individual judge. As I show, PADs function not just as a form of punishment, but as a coercive warning to the judiciary at large: adhere to the institutional line, or risk being targeted.

Two recent disciplinary cases brought by the TJSP against garantist judges received widespread attention in Brazil’s legal community. In 2015, then-Substitute Appellate Judge Kenarik Boujikian was reported by fellow Appellate Judge Amaro Thomé—who sat on the

same appellate panel. Then-Substitute Appellate Judge Boujikian had issued release warrants for detainees held in pretrial detention longer than the sentences they were appealing. Appellate Judge Thomé filed a complaint accusing her of acting recklessly and violating the principle of collegiality. This case also reinforces earlier points about redesignation: Appellate Judge Thomé had previously asked the TJSP President to remove then-Substitute Appellate Judge Boujikian from his appellate panel, mentioning her failure to follow the panel's consolidated understandings (Kehdi, 2016). Known for her garantist approach and human rights advocacy, Boujikian was a founding member of AJD and had previously faced PADs and redesignation requests. Although she was eventually censured by TJSP, the CNJ overturned the punishment, with some CNJ Counsellors explicitly criticising TJSP for punishing a judge based on her legal interpretation—calling it a serious violation of judicial independence (Kehdi, 2016). Boujikian has since retired.

Less than a year after Boujikian's case, TJSP censured another AJD-affiliated judge, Roberto Luiz Corcioli Filho, for decisions allegedly driven by 'ideological reasons—curiously linked to *garantismo*' (Acórdão 95.822-2016). His PAD bundled three separate complaints: a group of 24 prosecutors, including the Prosecution Office's Inspector, accused him of being impartial and imprudent—'a judge driven by an ideology against the penal system and in favourable to decarceration and acquittals'; a complaint from the São Paulo State Secretary of Public Security regarding his release of detainees arrested in flagrante delicto; and a case forwarded by the TJSP Vice-President involving an acquittal handed down by Judge Corcioli Filho. The prosecutors submitted a detailed dossier—including court rulings, academic publications, blog posts, and even his speech at a Senate hearing on marijuana regulation. The TJSP concluded that Corcioli Filho had caused public insecurity and undermined institutional credibility by 'frequently releasing juvenile offenders and criminals'. Out of 25 appellate

judges, 20 voted for censure; three supported suspension—a harsher punishment; and two dissented in favour of acquittal. Among the appellate judges who voted for a harsher punishment was the then-Court Inspector, who was eventually elected Court President. Judge Corcioli Filho appealed the decision, and the CNJ again overturned the punishment. Like Boujikian, this was not his first PAD. He had also been redesignated—removed from the Criminal Division and reassigned as an Auxiliary Judge in the Family Division.

Having presented these two notable cases, I now explain the process of a PAD, including its institution, who judges it, potential penalties, its scope of application, and its overall effects. As illustrated by the aforementioned cases, the first step in instituting a PAD is the filing of a *representação* (report or complaint) against a judge with the Court's Inspectorate. Anyone can file a complaint. In the two mentioned cases, complaints were filed by police officers, prosecutors, and even judges. According to my interviewees, prosecutors are the most frequent complainants, using this mechanism as a stronger complement to appeals when dealing with judges who deviate from the punitive normality. The Court Inspector—an Appellate Judge elected by peers—notifies the reported judge and requests information about the situation. After receiving this information, the Inspector assesses whether the complaint warrants further investigation or dismissal. If the complaint indicates a possible breach of the judge's duties under the Organic Law of the National Judiciary (*Lei Complementar n. 35/79*) or the Code of Ethics of the National Judiciary (*Resolução n. 60/2008*), it is forwarded to the Court's Special Body¹⁶ for deeper analysis. The reported judge is given fifteen days to present a preliminary defence, after which the Special Body decides

¹⁶ The Federal Constitution allows State Courts of Justice with more than 25 Appellate Judges to establish a Special Body, composed of 11 to 25 members, to exercise administrative and jurisdictional powers otherwise held by the Court Plenary. Constitutional Amendment No. 45 of 2004 mandates that half of the Special Body's members be elected, with the other half comprising the most senior Appellate Judges.

whether to dismiss the case or institute a PAD. If a PAD is opened, the process follows standard legal procedures: both parties are heard, witnesses may be called, a disciplinary hearing may occur, and closing statements are made. The Special Body then issues a ruling, which can be appealed to the CNJ through a Disciplinary Review. All decisions, including dismissals or penalties, must be communicated to the CNJ Inspectorate, which may initiate a Disciplinary Review at its discretion.

Disciplinary actions against judges must stem from breaches of functional duties. However, the cases presented earlier challenge this assumption. In both, the CNJ concluded that no functional duty was violated, but the judges were nonetheless punished by the TJSP for the essence of their decisions, undermining judicial independence. Disciplinary actions against garantist judges are not rare. While the CNJ has overturned some penalties and criticised the TJSP, CNJ itself has also upheld harsher penalties. For instance, in the case of Judge Edevaldo de Medeiros, accused by the Prosecution Office of delaying cases and issuing biased decisions favouring poor defendants, the Federal Court's Inspectorate issued a warning. The CNJ later instituted, *ex officio*, a Disciplinary Review and imposed a temporary suspension, claiming his decisions violated functional duties, owing to his garantist decision-making and 'radical and extremist leniency' (Higídio, 2024). In practice, the application of the letter of the law, when going against consolidated punitive understandings, might be considered a breach of impartiality—therefore, a violation of functional duties.

Disciplinary actions against garantist judges are not exclusive to the TJSP. They occur across different state courts. Almost all of my AJD judge interviewees (ten out of fourteen) have had at least one PAD filed against them. To maintain anonymity, I avoid revealing specific details such as the state court or even interviewee pseudonyms in this section. Nevertheless,

judges from each of Brazil's macro-regions represented in my dataset have faced PADs. Four AJD judges from the Southeast and one from the North reported multiple PADs. A judge from the South sarcastically remarked: 'I'm already a postdoc on this', after several PADs were filed against him. There are also cases from regions not covered in my dataset, such as the Federal District, where Judge Frederico Ernesto Cardoso Maciel had a PAD opened after acquitting a defendant charged with drug trafficking, arguing the criminalisation of THC was unconstitutional. Disciplinary repression is thus a widespread practice across Brazilian state courts.

Selectivity and vulnerability are central to how PADs function. The cases presented so far show how PADs serve as a coercive tool against garantist judges who challenge institutional conformity and the punitive normality. PADs filed against Judges Corcioli Filho, Cardoso Maciel, and Medeiros were all explicit mechanisms of coercion. They were all considered 'ideological judges' who allow personal values to influence their decision-making, creating obstacles to what is perceived as 'justice' within the prevailing punitive consensus—convictions and incarceration. These sorts of PAD openly against rights-based, garantist decision-making have been filed against some of my interviewees: Judge Vanessa, who replaced a prison sentence with an alternative penalty for a first-time drug offender, and Retired Appellate Judge Oswaldo, who acquitted a defendant for drug use, arguing that such conduct did not configure a crime. Not always, however, PADs are explicitly grounded in supposed 'breaches of impartiality' by judges considered 'ideological' and 'against the criminal justice'.

PADs also target garantist judges indirectly. For instance, Retired Appellate Boujikian was officially punished for negligence and violating the principle of collegiality, though the real

reason was the contents of her decision: to release inmates. Among other emblematic cases, the disciplinary punishment of Judge Livingston José Machado reveals how repression against garantist judges can be more subtly disguised. Judge Machado first issued release warrants for 16 prisoners held unlawfully in a facility the Prosecution Office had itself sought to close—decisions later suspended by an appellate judge. Weeks later, he faced another crisis in carceral facilities: 148 inmates packed into four police lockups, each designed to hold just four. Thirty-nine of them had already been convicted and were awaiting prison transfer for over four years. Machado again issued release warrants, which were once more suspended by his Court of Justice. Before issuing these warrants, he had repeatedly warned authorities of the inhumane conditions: inmates sleeping standing up or tied to cell-bars like bats, disease outbreaks, maltreatment, and just 32 square centimetres of floor space per person (Silva, 2005; Comissão Pastoral de Direitos Humanos, 2005). Despite this, he was accused of disobedience for defying appellate decisions. According to Machado, he was removed from his court one day after being notified by the TJMG Inspector. Nevertheless, he claims to be asked to present a defence only months later. The TJMG punished him with compulsory redesignation to the Civil Division. Judge Machado refused, and was eventually forcibly retired (Vasconcelos, 2009). Just as Judges Corcioli Filho and Medeiros, Judges Boujikian and Machado were essentially punished for breaking with the punitive normality and releasing inmates. Their punishments, however, were not openly justified as breaches of impartiality by ideological judges, but disguised as violations of other functional duties.

Sometimes, not even releases or acquittals are needed to trigger disciplinary repression. Occasionally, any sort of judicial decision that recognises suspects, defendants, or inmates as subjects of law are considered threats to the punitive normality. Judge Silvia Estela Gigena was reported to the TJSP Inspectorate after offering food to six starving suspects during

a detention hearing and ordering them uncuffed while they ate. In 2017, TJSP suspended her, later imposing compulsory redesignation for violating security protocol (Rodrigues, 2019). Her appeal was rejected by the CNJ. Similarly, one of my interviewees—an AJD judge from the South—faced a PAD and a criminal investigation after lending his phone—set to airplane mode and locked—to inmates so they could photograph hazardous post-fire conditions in their wing—he argues that around 70 inmates were in that wing, so removing them all from there would have created a massive prison management disruption. He then used the photos to open an investigation and call the fire department. Despite acting transparently and in the presence of prison staff, he was punished for this behaviour. These cases demonstrate that treating inmates with dignity and respect—without even releasing or acquitting them—can be enough to trigger disciplinary retaliation against garantist judges.

Disciplinary proceedings are not only triggered by garantist decisions, but also by judges' institutional vulnerability. Critical criminology has long shown how penal selectivity occurs based on vulnerabilities (Zaffaroni et al., 2015; Baratta, 1980). Poor and racialised groups are overrepresented in the criminal justice system not due to higher criminality, but due to overcontrol and selective enforcement. In the judiciary, this selectivity manifests through decision-making styles, not social backgrounds. Garantist judges are far more likely to face PADs for minor infractions that would go unnoticed in the case of their punitivist peers. Retired Judge Boujikian faced a PAD over allegedly low productivity—a common issue across the judiciary. Similarly, one of my AJD interviewees from the Northeast faced a PAD after a case became time-barred under his watch—another situation that is not extraordinary, though it does not normally generates PADs.

Some cases demonstrate even more glaring selectivity by vulnerability. Four AJD judges—including two I interviewed—were targeted with PADs for participating in a public protest against the impeachment of President Dilma Rousseff. There were all accused of engaging in partisan activity. Meanwhile, another interviewee raised the point that no PADs were filed against the roughly 200 judges, including Rio de Janeiro’s judicial elite, who took part in a public demonstration in support of then-judge Sérgio Moro and the Car Wash operation (TJRJ, 2016; Vilella, 2016). That event featured judges in robes, included the Court’s highest figures—such as the Court President and Vice-President, the Court Inspector and all his Auxiliary Judges—and was rather promoted on Court’s official website. At the same time, another AJD-affiliated interviewee faced a PAD over a social media post criticising illegalities in the Car Wash operation. He described how CNJ staff used to travel from Brasília to his state only to inspect his court, actively seeking minor infractions. No other judge in his district, he claims, has faced similar scrutiny. This pattern confirms the selective nature of PADs: garantist judges are not always punished for what they do, but for who they are, and what their position represents within an institution defined by a punitive consensus. One AJD-affiliated interviewee put it bluntly:

Me and a few other judges in the criminal section are considered aberrations. When a judge here in Rio gets punished, it’s for something serious—like selling decisions, favouring their spouse’s law firm, and these sorts of things.

This statement reveals the other side of the coin. While judges garantist judges are punished for ‘not punishing enough’, no judge is punished for punishing in excess. PADs are opened in only two situations: either against garantist judges, or in exceptional cases of serious misconduct. Though PAD records are confidential, preventing large-scale analysis, none of my interviewees—whether AJD members or not—knew of a single judge who had ever been

investigated or subjected to disciplinary proceedings for ‘punishing too much’. Many actually laughed when I asked. Judge Claudio emphatically argued:

There’s never been. Here, [in his state], no judge has ever had a PAD opened for punishing too much, or for handing down long sentences. If it happened, I’d know—we talk to each other in the entire judiciary, so no, there isn’t.

Judge Gabriel shared a telling illustration of how judges are not considered ideological if they follow a punitivist line. In a habeas corpus case, Appellate Judge José Damião Pinheiro Machado Cogan denied a request for bail waiver due to poverty and, without any party requesting it, ordered pretrial detention—a *reformatio in peius* that is procedurally illegal. But no PAD was ever opened against this decision embedded in a punitivist ideology. Appellate Judge Cogan has actually held different positions of power and influence within TJSP, including in novice judges’ training and as a Special Body member. His institutional protection and ideological alignment shielded him from scrutiny, and no breach of functional duties was ever investigated. Retired Judge Marcia reflected on this double standard: ‘we never hear of punitivist judges being pressured by court leadership. But liberal judges are. Then it’s easier, more convenient for your career to be punitive’. Another interviewee described the reality even more starkly:

There’s only one path to avoid problems, travel to Disney with your family, enjoy your end-of-year holidays. Be a c*nt. Just send people to prison. I know inmates who died waiting for regime progression that should’ve been granted. Some may have spent weeks in prison when they were eligible for release—I’ve never been punished for that. But I’ve been punished for releasing inmates. It’s obvious that you can only incarcerate. So you just need to be a c*nt, send everyone to prison. You incarcerate, you get promoted, you go to Disney with your family, you get a good rep in the gossip columns. You get to be the ‘excellent judge’. Nobody wants headaches, do you know what I mean?

Having a PAD opened can have serious consequences, even if it does not result in a formal punishment. Sanctions may range from a written warning or censure to compulsory

redesignation, suspension, or even forced retirement or dismissal. Nevertheless, an eventual punishment is not necessarily needed for a PAD to successfully play its coercive role. As some of the cases discussed here, PADs may be dismissed or eventually overturned by the CNJ. Yet their coercive effect remains powerful. Many judges told me the PAD process itself was more damaging than any formal penalty. One of the most common and significant consequences is the production of anxiety and prolonged uncertainty. Judges who had their disciplinary sanctions overturned by the CNJ nonetheless reported a lack of institutional backing to exercise judicial independence, notably in the Criminal Division. They also highlighted a sense of reliance on a volatile CNJ, whose rotating composition means unpredictable outcomes—and indeed not always supporting judicial independence, as illustrated in some of the cases mentioned above.

As Judge Vanessa put it, ‘the time a disciplinary trial takes is a time of great distress. It’s discouraging’. That time can last years. Judge Roberto Corcioli Filho shared full access to his proceedings: the complaint was filed in May 2016; the PAD was opened in March 2017; he was censured in August 2018; and CNJ overturned the sanction in February 2021. Nearly five years passed under the weight of an accusation—two of which he spent waiting for the unjust punishment to be reversed. Judge Luís Carlos Valois, another well-known AJD member and human rights advocate, faced a PAD instituted by the CNJ that lasted seven years (2017–2024), before finally being cleared (Couto, 2024). On social media, he wrote: ‘It took a while. A proceeding is already punishment just for being a proceeding. But innocence came out’.

Disciplinary proceedings drain not only time, but energy and emotional well-being. As Judge Pedro described, it becomes an ‘arduous struggle’ requiring endless behind-the-scene,

preparation, and mobilisation of different forces, institutions, and networks. Some interviewees reported depression, panic attacks, and long-term health issues.

This waiting period may bring several other consequences beyond anxiety and stress. For judges in freely-designated positions, even a mere complaint can justify reassignment—as it did for Judge Pedro and Retired Appellate Judge Sonia. In these cases, the PAD serves as a pretext for institutional repositioning. While awaiting the disciplinary trial, a judge may be provisionally removed from their designation, even if holding a fixed, permanent position. If allowed to remain in office, they are under threat. Judge Claudio told me one of his PADs took a year to be dismissed, during which time he was repeatedly warned: ‘be careful! Look what’s happening to you. Look what we’ve got here’. In this context, just being under investigation becomes a tool of control and coercion. Judges know—and are at times explicitly made aware—that continuing to rule from a garantist perspective goes against institutional expectations—and may influence the outcome of a pending PAD.

As a result, many judges end up choosing one of two paths: either they retreat—abandoning a garantist approach in favour of the institutionally promoted and consolidated punitive normality—or they request to be transferred out of the Criminal Division. Adapting to institutional expectations, even unspoken ones, becomes a survival strategy—especially when considering the motivations and aspirations that brought many judges into the profession in the first place, as seen in the *concurseiros* section. Even the most courageous judges committed to fundamental rights reach a point where they feel they can go no further. In another part of this thesis, I had quoted a shortened response of one of my interviewees—who has responded to several PADs—which I now transcribe fully:

Luiz, if you follow the law, nobody could be incarcerated in Brazil. Our Prison Law says what prisons should be. The prison of reality is one thing; the prison

of the law is another ... Every imprisonment is illegal In Brazil. When I say this in lectures, people ask: “You’re a Correction Judge! Why don’t you release them?”. Because if I do, I’ll be the one going to prison. And I don’t want to be imprisoned. See how it is? Even me, who know the (prison) reality, I do things that I think if there have ever a Nuremberg Trials in Brazil, I must become a defendant’.

This is not hyperbole. It almost reflects the case of Judge Machado, who was forcibly retired after releasing prisoners from inhumane conditions, and other judges subjected to criminal investigations for treating inmates with dignity. In the end, most judges adjust. Some abandon their liberal decision-making altogether. Others compromise more strategically—just enough to preserve their position.

Another response to disciplinary coercion is to leave the Criminal Division upon request. After facing multiple PADs and enduring what he described as ‘terrible personal exhaustion’, Judge Corcioli Filho told me he ‘couldn’t bear the sight of the Criminal Division—not even if it were painted gold’. He is one among several judges who requested reassignment to another area. When I interviewed Judge Luiz Carlos Valois, he too was considering a transfer. He spoke of the fear of being falsely accused and the toll the persecution had taken on him. Three years after interviewing him, while writing this chapter, I learned that he had indeed left his Correction Court and was designated to a Civil Court at his own request. On social media, he explained: ‘Defending human rights in the context of judicial supervision of inmates is even dangerous in Brazil. My family was suffering because I was suffering’.

In this context of garantist judges evading Criminal Division, an observation from my research design stood up. While conducting my court-file analysis (2011–2020), I had planned to follow up by reaching out to judges whose decisions suggested a more liberal orientation—those who issued fewer convictions or resisted excessive punitiveness. But when I searched for the handful of them, I discovered that most had already left the Criminal Division. While I

cannot confirm that each of them did so due to direct coercion, my interviews strongly suggests that at least an indirect but pervasive disciplinary coercion has led some garantist judges—or even those who do not blindly reproduce the punitive normality—to remove themselves pre-emptively.

This observation brings me to a final, crucial dimension of PADs: beyond disciplining individual judges, they shape the whole judiciary, narrowing its ideological diversity and entrenching the punitive normality. Just as PADs carry collateral effects that make formal sanctions almost incidental, their deterrent impact reaches far beyond those who are actually punished. One interviewee—not affiliated with AJD nor self-identified as garantist—recalled being threatened by prosecutors for releasing pretrial detainees during detention hearings. The aim was not to punish him formally, but to shape his decision-making, making him think twice before challenging the punitive normality. For many judges, no explicit threat is even necessary. As Appellate Judge Antonio observed, the most powerful effect of PADs is their exemplarity: ‘You see a judge being punished for something, so you think twice before doing the same’. Several judges I interviewed showed concern that their own punishments served to intimidate others. As Retired Appellate Judge Oswaldo explained: ‘I got a warning, but the idea was to show younger judges: “Don’t follow that path”’. Retired Appellate Judge Sonia added:

Many colleagues said, “If this happened to you, imagine what can happen to someone just starting out”. So there’s this pressure, which sometimes isn’t direct. To me, it was. But others felt [the coercion from her case] too, for sure.

Essentially, the mere possibility of disciplinary repression often works as efficiently as repression itself. Many judges who could have a more liberal decision-making anticipate any

adversities and adhere to institutional conformity, making it unnecessary to go through disciplinary proceedings firsthand to change their behaviour.

Even judges responsible for ruling on PADs have acknowledged this dynamic. In one case, a TJRJ Special Body judge justified dismissing a PAD against four judges by noting that ‘the exposure had already served as an example to other judges’ and ‘worked as a sort of punishment to those being judged too’ (Souza, 2016). This chilling effect is especially clear in the testimony of one interviewee, a former Public Defender turned judge. He originally pursued the judiciary believing it would give him greater power to put his legal training into practice. Yet just a few years into his career, he told me his career dream was to transfer to a Civil or Family Court, far from criminal matters. Though specialised in Criminology and Criminal Law, he explained:

There’s so much pressure just to do what is obviously correct, the most basic stuff... It’s absurd. You sentence someone to open prison for a non-violent drug offense, or nullify evidence obtained illegally, and suddenly you’re dealing with different levels of pressure. Nobody wants that in their everyday life. People want to work with quality of life, with their families and so on, and not have to worry with that. Worrying about doing your job properly shouldn’t be a risk. It’s a joke, doesn’t make any sense. You don’t have this sort of problem in a Civil or Family court. The losing party is always a bit upset and so on, but there’s no such imputation to the judge like “ah, he has connections with criminals”.

By the time I write this chapter, that judge has resigned.

Overall, disciplinary proceedings are an exceptionally effective mechanism of coercion. Their side effects are often more impactful than any formal punishment. Judges facing it firsthand may be compulsorily redesignated or temporarily suspended for the long-lasting period of investigation and trial. They may feel threatened with a ‘card upon the Court’s sleeve’ and adjust their decision-making to meet institutional expectations—to preserve their designation, their job, or to avoid any other severe consequences of facing a PAD. After

experiencing an exhaustive, unpleasant disciplinary persecution, many request transfer to another division—to preserve their mental health, escape constant scrutiny, and have a more peaceful life. More than having individual effects, PADs are a deterrent weapon: you may punish too much, but never too little. Every judge knows this is an unescapable outcome for those breaking with the punitive normality. Most adhere to institutional conformity before experiencing the adversities brought by a garantist decision-making. Ultimately, as Judge Claudio concludes, disciplinary proceedings are a ‘method of pressure’, and disciplinary repression is ‘an attempt to castrate the judge through [institutional] instruments of power’.

When disciplinary repression is not enough: criminalising garantist judges

A pattern identified by my more senior interviewees is the intensification of persecution against garantist judges. During Brazil’s military dictatorship, the threat was direct and omnipresent—torture and forced disappearances were routine, functional safeguards were suspended, and even Supreme Court Justices were dismissed. There was nowhere to run. With the transition to democracy and the promulgation of the 1988 Federal Constitution, some judges placed their trust in the rule of law as a shield against institutional repression. In this new context, a handful of judges not only maintained their garantist commitment, but also made these mechanisms of persecution visible—sharing their experiences with PADs and institutional coercion publicly. They hoped, they said, to alert fellow judges and human rights organisations to the dangers at play. When reflecting on how judges respond to these pressures, one interviewee shared:

From my experience and from what I’ve seen in others, there are only a few paths: you either retreat and get frustrated, leave your division or the judiciary altogether—or you confront it. I chose to confront it.

This statement reaffirms earlier themes—conformity and exit—but also introduces a third, more exceptional path: to keep fighting. Yet for those who do, the consequences are harsher still. For this judge, and for three other interviewees who held firm in their garantist stance, coercion did not stop at the disciplinary level. Each of them became the target of criminal investigations.

In Brazil, where ‘a good criminal is a dead criminal’ (FBSP, 2017), a ‘good judge’ is one who incarcerates. For certain segments of society, sending a suspect to prison signals bravery and integrity—proof that the judge is neither afraid of gangs nor corrupted. In contrast, a judge who resists punitive normality becomes suspect: not just of weakness, but of criminal collusion. ‘The judge who complies with prison law is accused of being friends with criminals’, protests Appellate Judge João. One AJD-affiliated interviewee faced criminal investigation after prison gang members were caught on tape referring to him respectfully—saying things like, ‘if His Honour said it, we believe it’. This was simply the result of humane and ethical treatment, a reaction every Correction Judge I interviewed described as common. Still, it led to a police raid on his home and the seizure of his laptop and phone—held for two years. Another AJD member was temporarily removed from office after being accused of selling a decision that replaced pretrial detention with a precautionary measure. In both cases, diverging from the punitive line—and resisting prior coercion—resulted not just in disciplinary consequences, but criminalisation. To challenge institutional standards and earlier coercive mechanisms is to risk being cast as a criminal.

As with PADs, criminal conviction and legal punishment are redundant. None of the four judges I interviewed were found guilty. Most investigations were closed before charges were filed. Nevertheless, the investigation itself is coercive. The fear is no longer of suspension

or removal—it's of imprisonment. Seen as opponents of state repression or as obstructing police work, garantist judges live under the threat of being framed. One interviewee said:

It took almost four years for them to close the investigation. I was afraid they'd forge something on my computer. I'm afraid of the police all the time. ... After all, I wasn't even indicted. Wasn't even questioned. It was just to create noise—media noise.

Social damage here far outweighs that of a disciplinary proceeding. Accusations of helping gangs or selling decisions are devastating for a judge's reputation. 'That kind of allegations is the worst thing for a judge. It demoralises you', protested one of my interviewees. Indeed, their ethics and integrity end up questioned. Remaining garantist under such suspicion feeds a vicious cycle: refusing to blindly incarcerate becomes yet another reason to suspect corruption. The stigma leaks into their personal lives, amplified by public exposure. Several judges told me, in painful detail, that they eventually became ill from the stress.

Limited space prevents a deeper analysis of criminal investigations and charges as coercive mechanisms. The key point is this: as some judges resist other forms of pressure and retain their garantist stance, persecution has intensified. Today, garantist judges are no longer just institutionally repressed—they are often literally treated as criminal suspects. Compared to PADs, criminal investigations mark a further escalation. Their consequences are more severe, more visible, and more personally devastating—from the threat of imprisonment to widespread social stigma. In this context, associating judges who uphold rights of suspects, defendants, and convicts with criminality has become a powerful new weapon—another in the judiciary's heavy arsenal to enforce conformity to the punitive normality.

Blaming news and a mediatic crusade against garantist judges: a collusion between prosecutors, police officers, and the media

So far, I have focused on coercive mechanisms activated from within the judiciary or by criminal justice agencies. But there are also powerful external pressures. In this section, I examine how the media has helped create a threatening and hostile environment for garantist judges.

As discussed in earlier chapters, much of Brazil's critical criminological tradition has focused on penal populism as a key driver of mass incarceration. Although media dynamics do influence judicial behaviour, the story is more complex than judges simply seeking public support. As several of my interviewees explained, some judges adopt punitive positions not for legitimacy, but to avoid retaliation—personally and professionally. This reflects the same logic seen in other coercive mechanisms: a defensive adaptation. Here, I explore how police officers and prosecutors collaborate with journalists to target garantist judges—turning the media into an extension of the punitive apparatus, and creating an atmosphere of intimidation that stretches far beyond the courtroom.

The first thing to note is that 'ordinary' decisions—the ones that feed mass incarceration—rarely attract media attention. Sending poor suspects to prison for drug or property crimes does not earn a judge public recognition—even though this is often a condition for. At the same time, judges who follow the punitive normality typically have little to fear from media exposure. As one interviewee—who is not an AJD member—put it: 'Media? Honestly, I've never worried about how my decisions would be received. Maybe that happens to some judges, but I've never handled a case big enough for that kind of pressure'. Among AJD judges, the perception is different. Several interviewees described how the media

is strategically weaponised—especially by police chiefs and prosecutors—to target garantist judges. Tactics include: publishing a judge’s full name following a decision considered ‘too lenient’; exposing case details before a decision is handed down; and launching sustained crusades against judges who are perceived as disruptive to the punitive normality.

Judge Luiz explains the rationale:

Nowadays, it’s easy for people—rather than using legal appeals—to use the media as a kind of appeal. This happens more and more. Prosecutors appeal, but they also go to the media, so the judge is harassed.

This account reveals the most common media-based mechanism of coercion used against garantist judges. The strategy is straightforward: a prosecutor or police chief, often with direct access to local or sensationalist media (such as Record, as several interviewees noted), contacts a journalist whenever a judge hands down a ruling that challenges the punitive normality—such as releasing or acquitting a suspect in a drug or robbery case. The decision is publicised, and the judge’s full name is exposed. As Judge Vanessa explained: ‘My full name was in the press. The prosecution made a point of it: “Judge [name] released so-and-so, arrested yesterday with such and such”’. Judge Luiz described a similar experience after he denied several pretrial detention requests: ‘The police chief went on a local TV show—very popular here—waving my decision around, giving a whole punitive speech’. The goal is clear: to blame the judge for rising crime, imply corruption, or portray them as siding with criminals.

This strategy is especially visible when a released prisoner reoffends. Judge Luiz recounted one case in which he granted regime progression with electronic monitoring—a legal right the prisoner had earned. Days later, that man was involved in a robbery that led to a police officer’s death. The media backlash was immediate, and again, Judge Luiz’s full name was splashed across headlines. His account on the aftermath of this case is strong:

What came out in the press the next day? Who was blamed for the officer's death? Me. I became the sole cause of that tragedy. Whether the prisoner had the right didn't matter. My name was printed in bold and italics. So we garantist judges have increasingly suffered media attacks.

Beyond this strategic use of the media against single episodes, some judges face more sustained campaigns—strategic 'crusades' orchestrated by prosecutors and police chiefs, alongside journalists, against those seen as persistently disruptive. Judge Claudio reported that prosecutors arriving in his jurisdiction had been told: "A crusade is needed against [him]—not just through legal channels, but in the media". And it happened. Strongly.' Two other interviewees experienced similar situations. Judge Vanessa recounted that during her eight months handling detention hearings, prosecutors arranged systematic media coverage of her release decisions. Eventually, a statement was released accusing her of 'systematically releasing armed robbers, killers, rapists, and the most dangerous youths of Rio'. Another judge, who requested anonymity, faced an even more aggressive campaign. After releasing a suspect accused of stealing a pregnant woman's handbag, the prosecutor filed an appeal and arranged an ordinary 'blaming news'. Two months later, a follow-up piece was published under the headline: 'Judge who released pregnant woman's aggressor had released other violent criminals'. It included a full dossier—covering the judge's past rulings, previous jurisdictions, and even personal life, including social media posts. These media crusades go far beyond shaming. They represent intensified, targeted coercion, designed to break a judge's resistance when public blaming alone proves ineffective.

A third media tactic targets cases before they are decided. Judge Luiz, while presiding over custody hearings, told me that news of arrests he was about to review would already be published: 'The news is already pinging on your phone'. Even Prosecutor Paulo condemned the strategy:

A prosecutor files a request, then informs the press. The goal is to create a climate—either of comfort or pressure—so that after the story runs, the judge feels pushed to grant the request, no matter how arbitrary.

This often occurs when the legal basis is weak—say, a drug seizure with procedural violations, or a flimsy homicide charge. By mobilising the media early, prosecutors or police attempt to box judges into punitive rulings, not through direct blame, but by pre-emptively shaping public expectation. In these situations, judges are not blamed, but the coercive environment created serves to threaten them. Why that threat is effective is what I now explain.

As PD Matheus explains: ‘Retaliation [from media attacks] is usually very violent, and judges end up not holding the line. They’re neutralised’. These media leaks are designed to create a hostile, unsafe environment. News coverage is strategically sensationalised. Headlines read: ‘Judge releases robbery suspects less than 24 hours after their arrest’; ‘“There’s no impunity”, claims judge who freed rape suspect’; ‘Judge criticised police and released detainees caught with 133kg of drugs’.¹⁷ These stories omit key legal facts: that arrests were unlawful; precautionary measures were imposed; or that the suspect met all criteria for release. Regardless, the result is public harassment and vilification. Judge Vanessa told me she received messages wishing she and her family would be raped. Judge Luiz, after being attacked on live TV for denying pretrial detention, was contacted by the Court’s Intelligence Department about two credible threats. They advised him to take his family and leave the country—at his own expense, as there was no protection policy at the time. Though public reaction is not always uniform, this exposure mobilises violent fringe actors, including

¹⁷ Available at: <https://jornaldesergipe.com.br/2016/09/juiz-solta-sete-pessoas-acusadas-de-roubo-fois-pagaram-fianca-e-os-demais-nao-pagaram.html>;
<https://gauchazh.clicrbs.com.br/seguranca/noticia/2014/10/nao-se-pode-falar-em-impunidade-diz-juiz-que-mandou-soltar-suspeito-de-estupro-cj5vquzpe0q4bxbj065mttn6x.html>;
<https://veja.abril.com.br/coluna/maquiavel/juiz-critica-a-pm-solta-presos-com-133-kg-de-droga-e-vira-debate-no-tj-sp>

off-duty and retired police officers. As Judge Andre told me: ‘Between us, Luiz, when you see a crime against a public authority—be it from the Judiciary, Executive, or Legislative—there’s usually a security agent behind it’. Thus, besides harassment, these exposures generate real threats to the safety of exposed judges.

In addition to insults and threats, judges face accusations of complicity with criminals or corruption, often linked to claims of rising criminality. These allegations extend into judges' personal and social lives, affecting their families. As mentioned earlier, judges in Brazil are among the top 1% earners, live in affluent neighbourhoods, attend elite clubs, and send their children to private schools. Their daily environments are often classist, where the role of a judge is conflated with social cleansing, viewing the poor as inherently criminal. Many judges pursue their careers for economic stability and social status, making any negative media attention, like being labelled a judge who ‘releases criminals’, a serious threat to these goals. As Judge Carlos noted, adhering to the punitive normality and sending everyone to prison protects their social standing, ensuring they remain portrayed as honourable in the media rather than as outcasts.

Earlier, I referred to this coercive dynamic as operating ‘outside the judiciary’. While much of this is driven by police chiefs, prosecutors, and journalists, the judiciary plays a more passive role. In principle, judges in a democratic state should protect fundamental rights, even when their decisions are unpopular. However, Brazil’s judicial recruitment system favours bureaucrats over independent, courageous judges. Yet an institutional response to media crusades could mitigate their coercive impact. As Judge Pedro suggests, media crusades against judges would be less effective if courts publicly defended judicial independence. For example, when judges' high salaries are exposed, Courts of Justice quickly issue responses to

protect them. Similarly, after Judge Patrícia Alvares Cruz faced backlash for her appointment as Head of DIPO, the TJSP Inspector issued a public note in her defence. However, this institutional support is lacking when media targets garantist decisions and judges. Judge Pedro argues courts should issue simple, clear statements defending the rule of law and judicial independence, helping judges make legal decisions without fear of public backlash.

More importantly, courts should support judges through actions that promote judicial independence, not just public statements. While garantist judges are wrongly blamed for public security issues when all they are doing is simply applying the letter of the law, such as granting prison regime progressions or alternative pretrial measures, they are rarely held accountable for injustices stemming from excessive punitiveness. Judges' names are seldom exposed when they make decisions leading to excessive incarceration or death in custody. Cases like Judge Cruz's and Appellate Judge Cogan's are rare. In Judge Cruz's case, her decision only had repercussions because the woman who she imprisoned was attacked and lost the vision in one eye in prison. Otherwise, her decision would have been just another ordinary situation, just like several of those I have analysed in Chapters Five and Six. Nonetheless, both judges have been institutionally supported. Judge Cruz retained her position—arguably for her punitivist profile. Appellate Judge Cogan is a former elected President of the Criminal Division. Contrarily, more than not being institutionally supported, garantist judges are rather institutionally harassed and disciplined, as shown in all previous sections.

In the absence of institutional support, media crusades against garantist judges have become a powerful mechanism to shape judicial punitiveness. Many garantist judges, unable to cope with the hostile environment that extends to their families, eventually adjust their decisions. Judges who are not inherently punitive learn from the treatment of garantist judges,

with the media's deterrent effect influencing their behaviour. Ultimately, judges conform to the punitive normality not to gain public acclaim, but to avoid media attention altogether. It becomes a survival strategy, where following institutional expectations and adhering to the punitive normality help avoid easily preventable attacks.

Conclusion

This chapter has examined how coercive dynamics amount to a punitive judiciary in Brazil. Even for judges who overcome the filters of entrance examinations that typically lead to a punitive consensus, coercive measures still undermine garantist decision-making and promote institutional conformity, perpetuating the punitive normality. Four major coercive dynamics were analysed. The first, rearranging the pieces on the board, involves judicial elites' discretion to remove judges who deviate from the punitive normality, often by reassigning them to other divisions. While this mainly affects judges in certain career stages or specialised courts, all judges are at risk, as promotions depend on judicial leadership's decisions. Judicial elites also control the 'tap' and 'drain' of the judiciary, affecting incarceration trends by designating DIPO and Correction Judges.

Disciplinary repression is another coercive tool. Garantist judges are often punished for ideological bias and institutional vulnerability. While punishing too much is tolerated, not punishing enough is a problem. Besides formal sanctions, PADs have intrinsic detrimental effects. The uncertainty surrounding disciplinary proceedings causes significant anxiety and mental health issues. If not temporarily suspended until a PAD decision is made, the court makes the point of reminding judges of the ace up their sleeve: if judges do not retreat and adhere to the institutional conformity, they may eventually be punished. Rather than

retreating, many have opted for requesting transfer, after facing a hard daily struggle. Those that have resisted and not given in to disciplinary repression are now dealing with a stronger coercive practice: criminal investigations. Judges who have respected the rights of suspects, defendants, and convicts have now become suspects themselves—suspects of demoralising practices such as selling decisions and favouring prison gangs. The threat of punishment is no longer losing one's job, but being imprisoned. In this context, a garantist decision-making—seen as complacent with criminals—feeds back into the suspicions of being involved in criminal business.

Finally, media has been used, particularly by prosecutors and police officers, as a platform to expose garantist judges and blame them for rising criminality, when not raising suspicions on them being 'friends with criminals'. Different strategies have been used to harass and threaten judges in different ways and levels. Just as with criminal investigations, these blamings for a supposed increasing criminality and insinuations of complicity with criminals reverberate more broadly in judges' personal and social life, and splash over into family matters. I have shown that despite these media crusades not being actively promoted at the institutional level, there is a passive but significant role played by the judiciary: the lack of institutional protection.

Ultimately, coercive practices are a key factor in shaping a punitive judiciary. While not all judges are inherently punitive, those who resist the punitive normality face significant consequences, forcing them to adjust their decisions or leave the Criminal Division. The price to pay for being a garantist judge is almost unbearable. By repressing a garantist decision-making through institutional and non-institutional practices, the way to judicial punitiveness and mass incarceration is paved.

Conclusion

This thesis began with a puzzle: how did Brazil, a country undergoing re-democratisation and social inclusion, become home to one of the world's largest prison populations, having had imprisonment rates of Nordic countries until 1990? Why did incarceration rates remain stable during military dictatorship, but then rise under democracy, and escalate further under left-wing governments committed to social welfare and inclusion? The answers, as this thesis has demonstrated, lie in a dual process: the expansion of state power into historically neglected zones of Brazilian society, and the emergence of a protagonist judiciary operating under unreformed institutional logics.

This research has shown that Brazil's mass incarceration is not a product of penal populism or neoliberalism, but rather the result of deep, historically sedimented processes—shaped by peripheral and dependent state formation, structural inequality, and authoritarian legacies. Mass incarceration in Brazil must be understood as both a consequence of the state's increased capacity to govern formerly neglected populations, and of the judiciary's empowerment and expansion since the transition to democracy, in a process that left it unreformed, and enabled the reproduction of an institutionally promoted punitive consensus.

The thesis has unfolded in four main parts that build upon one another and reveal the historical roots and contemporary dynamics that have enabled mass incarceration to be produced and reproduced in Brazil. This thesis analysed the development of punishment, society and the state throughout history, identifying how the first major increase in incarceration rates corresponded to the period when informal and hidden state punishments

were being replaced by official state punishment. For most of Brazilian history, state justice had played a marginal role. Chapter Four shows how social and production relations favoured a prevailing informal social control, in which domestic and private punitive practices were predominant. In a slaveholding society, domestic punishment served as the most effective mechanism for disciplining marginal populations and reproducing the dominant order. The abolition of slavery did not result in significant structural changes. Brazil remained predominantly rural until the 1970s. For most of this time, society was centred on huge concentrations of land, socioeconomic inequality, and dependence. In that context, notably for dominant classes, domestic forms of punishment remained effective. For the poor, private forms of punishment were the only available mechanism of justice.

As industrialisation and urbanisation intensified, prevailing domestic and private punitive practices were partially replaced. In urban peripheries, the poor remained left on their own, so private punitive practices remained in place, along with other informal, non-state punishment. In urban centres, however, the state penal apparatus—particularly the police—started gaining some prominence. It was in the period of industrialisation and urbanisation fostered by the civil-military dictatorship that the penal state apparatus was enlarged and became a more central mechanism of control and governance. However, those state punitive practices were mostly forms of hidden state punishment, such as unregulated police detention, extraofficial killings, and outsourced extraofficial punishment. Greater levels of repression demanded by an emergent urban social order with increasing exploitation were translated into authoritarianism, usually manifested in forms other than imprisonment, so that rates of imprisonment did not experience a more significant increase.

The transition to democracy and the new Federal Constitution put an end to all forms of unregulated police detention. It did not, however, dismantle the state penal apparatus, but rather further expanded it while relying on its control and regulation under the rule of law. Brazilian punitiveness, camouflaged by domestic, informal, and hidden state punishment until the late 1980s, finally took shape as official state punishment. With a greater capacity to incorporate previously marginalised sectors of the population within the state's governance and control—and doing so through legal, official means—imprisonment rates started to increase significantly. The thesis explains in detail how this transition from domestic to official state punishment, following changes in the structural and institutional domains, accounts for the first significant increase in incarceration rates in the context of re-democratisation.

The thesis also shows, however, that the empowerment and expansion of the judiciary was not followed by meaningful reforms and democratisation. The institution, despite not necessarily being central, had for most of its history operated as an extension of political and economic power—used in favour of elite interests when other institutions failed. It was then promoted to a protagonist role: the guardians of liberal democracy. The judiciary institution had always operated under an authoritarian logic, with reactionary traits and an inquisitorial culture. That institution, then expanded, was trusted to control and regulate a further enlarged state penal apparatus. In practice—as illustrated by my court-file analysis—rather than protecting and promoting fundamental rights and legal safeguards central to due process and liberal democracy, it has not only endorsed and legitimised the systematic abuses of police and prosecution, but has itself systematically violated those rights and safeguards. This institution has systematically inflated convictions and punishments, operating under a punitive normality. It has also promoted counter-reforms, finding ways—whether through

discretionary spaces or sheer arbitrariness—to neutralise legislative changes and precedents perceived as potentially decarcerating. In so doing, mass incarceration further intensified.

This thesis has also shown how this punitive normality is made possible. On the one hand, judicial recruitment in Brazil—notably its bureaucratic and class filters—ensures the selection of candidates ready to reproduce institutional patterns, often carrying classist and alienated worldviews on crime, justice, punishment, and the judiciary’s own role. This secures a prevailing punitive consensus within the judiciary, an unreformed reactionary institution. On the other hand, when consensus fails—or recruitment mechanisms do not fully succeed—coercion comes into play. Institutional and non-institutional mechanisms of coercion are enforced, so that judges who do not reproduce the punitive normality are neutralised or removed from the criminal division. These mechanisms go beyond individual repression: they serve as a pervasive message to all judges, disciplining the judiciary as a whole and ensuring institutional conformity. In this context, even if not always consensually, judicial punitiveness prevails—and so does the punitive normality.

Notably, several patterns and trends analysed in this thesis have been observed in other peripheral states. At various points, I attribute aspects of Brazilian penalty to its peripheral and dependent status. It is therefore reasonable to ask whether this account is a narrowly local story or intends to be a broader theory of punishment in peripheral states. Guided by a critical realist philosophy, this thesis holds that any sociohistorical formation must be analysed in relation to the dynamics and elements that constitute it—meaning the object of study is inherently situated. Precisely because this analysis begins from Brazil’s specific sociohistorical formation, many of the patterns and trends identified stem from its peripherality. This, however, does not imply every peripheral setting will display the same

dynamics—after all, I have also acknowledged that there are different forms and degrees of being peripheral. While many patterns, trends, and features discussed here may resonate with other peripheral—or even core—countries, outcomes and their causes vary. Just as the same element can trigger different outcomes, different elements can also trigger the same outcome. As open systems, societies are ultimately shaped by structural conditions, local histories, institutional trajectories, political conjunctures, and human agency.

Precisely because of this openness, the main contribution of this thesis lies less in offering a general theory than in its approach to understanding mass incarceration. Committed to explaining reality on its own terms, it avoids subordinating peripheral realities to ready-made Northern theories. At the same time, it does not outright reject theoretical frameworks originally developed elsewhere but engages with them critically. The thesis also bridges structural analysis with an agency-sensitive lens, accounting for both the historical and material conditions shaping penal institutions and practices, and for the concrete actions of judges who operate within—and reproduce—those structures. Rather than attributing mass incarceration to either impersonal macro-level forces or to intentional individual attitudes, the thesis shows how structural features—such as the nature and development of the peripheral state—interact with everyday judicial practices and subjectivities. The analysis also emphasises the interconnectedness of the global order, recognising that local punishment is shaped not only by a colonial past but also by a dependent present. In addition to political economy, history, and law, the thesis draws on sociology, development studies, international relations, geography, and journalism. By articulating structure and agency, tracing mediations between global and local dynamics, and adopting a transdisciplinary perspective, the thesis offers a dynamic and multi-dimensional way of explaining penal power.

The irrevocable situatedness of the research does not, however, limit its contributions to broader criminological debates. The Brazilian case reveals the importance of elements often neglected in Northern literature, such as the lasting influence of slavery on punitive practices and institutions, the predominance of non-state punitive practices in rural areas and marginalised urban spaces, and the role of globalised relations—from colonialism to dependency—in shaping punishment, society, and the state. It also advances the theorisation of peripheral punishment by identifying patterns such as domestic, informal, and hidden state punishment, unpacking their subcategories and contexts, and revealing the duality of the peripheral state, where authoritarianism coexists with abandonment, articulated by its demands and possibilities. In doing so, it adds another nuance to more dominant conceptualisations of the state in criminological debates by complementing typologies of economic policy (neoliberal/welfare) and political regime (authoritarian/democratic) with its dependent condition.

This thesis also centres the judiciary as a key actor in the penal state, contrary to dominant frameworks that have largely overlooked the role of judges. In Northern scholarship, mass incarceration has often been explained through the actions of legislators, executives, or prosecutors. By contrast, this research repositions the judiciary as a central player in the reproduction of mass incarceration in Brazil, showing how judicial practices, subjectivities, and institutional structures converge to inflate punishment. It also demonstrates why historically grounded analysis is essential to avoid superficial parallels and inaccurate generalisations. For example, unlike Brazil, the re-democratisation processes in Chile and Argentina involved more substantial judicial reforms, purges, and legislative changes that curtailed judicial power in the penal field, making judges less likely to have played a similar role in the reproduction of mass incarceration there. Likewise, although the Brazilian

judiciary shares certain traits with Western European counterparts—such as insulated institutional design, and bureaucrat and class-based recruitment filters—its decision-making pattern differ markedly: rather than serving as guardians of rights and acting as a protective filter against harsher punishment, Brazilian judges embody the very opposite, routinely violating core rights and operating within a pervasive punitive normality.

The thesis also develops a more nuanced theorisation of judicial punitiveness. In terms of causes, it does not attribute punitive tendencies to minor or individual extrajudicial variables, nor to an abstract or merely descriptive institutional culture. Instead, it uncovers the institutional and structural mechanisms through which the punitive normality is embedded and reproduced in judicial practice. At the same time, it does not portray the judiciary as monolithic, but shows how dissenting judges are marginalised, disciplined, and neutralised. In defining what constitutes judicial punitiveness, the thesis goes beyond more established measures such as conviction rates or sentence length, conceiving it instead as cumulative and multi-layered: unfolding across different decision-making stages and forms, sometimes subtly through discretion, sometimes openly through arbitrariness, and both more passively by endorsing excesses of other penal actors, and more actively by committing its own.

The implications of these findings and analyses therefore extend beyond Brazil. By identifying and revealing dynamics neglected and absent in Northern literature, and proposing new categories for understanding punishment in the periphery, this thesis also challenges dominant theories, premises, categories, and methods in the field. Against materialist assumptions, incarceration can rise even as poverty, inequality, and unemployment decline. Against culturalist views, authoritarian experiences do not necessarily

alter popular sensibilities or delegitimize state violence. Against institutionalist perspectives, judicial punitiveness can persist within an insulated judiciary despite a re-democratising process that reinstates key judicial safeguards. Against normative expectations, formal judicial independence is not always effectively achieved, and external judicial independence does not necessarily produce a more rights-protective judiciary. Even the use of incarceration rates as a proxy for punitiveness, rooted in a state-centric view, is shown to be not only limited but misleading. The thesis therefore invites scholars to rethink the relationship between democracy and punishment, reconsider how judicial roles are configured in emerging democracies, acknowledge the limits of liberal legalism, and recognise the distinct logics of penal development and governance in peripheral and post-authoritarian states.

While parallels are more easily drawn with other peripheral countries, the thesis also holds relevance for core countries. The Global North has been facing crises of political, social, economic, and ethnic dimensions, and witnessing escalation in conflict, tension, and violence of different forms. Some have then wondered whether ‘the south ... is the direction to which point the signposts of history unfolding’ (Comaroff and Comaroff, 2006b: 40). Moreover, several scholars have shown that techniques and justifications for punishment and control once applied in the periphery often migrate back to the core (Cesaire, 1955/2000; Foucault, 1976/2020; Agozino, 2003; Godoy, 2006). Understanding peripheral realities, with their histories of inequality, repression, and weak democratic consolidation, can therefore illuminate emerging penal trends in the core.

Inevitably, this study has limitations. It focuses primarily on first-instance judges in criminal courts and does not offer a fully comparative regional analysis within Brazil, though distinct intra-country trends are acknowledged and discussed elsewhere (see Giamberardino

and Dal Santo, 2024). It also concentrates on the judiciary rather than providing a comprehensive account of prosecutors and police—though their roles appear in the dynamics of coercion, media-driven pressure, and shared punitiveness that inflate convictions. Even so, the empirical findings and theoretical contributions offered here can inform future research at both the regional (intra-state) and cross-national levels, extending beyond Brazil to other peripheral and dependent contexts.

Nevertheless, the central claim stands: mass incarceration in Brazil has not emerged despite democratisation and judicial independence, but through them—under specific historical, institutional, and structural conditions. It is the product of both state expansion and the rise of a protagonist judiciary, operating in an institutional landscape marked by authoritarian continuity, structural inequality, and elite reproduction. By showing how penal power is exercised in the periphery—now often cloaked in legality and formal democracy—this thesis sheds light not only on Brazil’s incarceration trends, but also on the broader relationship between punishment, state power, capitalism, and the reproduction of social order in the peripheries. Mass incarceration in Brazil was not a deviation from democratic consolidation, but a constitutive element of it, shaped by the very ways state authority, governance, judicial protagonism, and class domination were reconfigured in post-authoritarian Brazil.

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List of interviewees

Retired Appellate Judge Sonia, interviewed on 5 May 2021

Prosecutor Fábio, interviewed on 5 May 2021

Judge Gabriel, interviewed on 7 May 2021

Public Defender Lucas, interviewed on 8 May 2021

Appellate Judge Antonio, interviewed on 10 May 2021

Judge Luiz, interviewed on 11 May 2021

Prosecutor Paulo, interviewed on 11 May 2021

Judge Vanessa, interviewed on 12 May 2021

Judge Claudio, interviewed on 14 May 2021

Judge Carlos, interviewed on 15 May 2021

Judge Pedro, interviewed on 18 May 2021

Public Defender Matheus, interviewed on 21 May 2021

Retired Appellate Judge Benedito, interviewed on 6 October 2021

Public Defender Rodrigo, interviewed on 8 October 2021

Judge Andre, interviewed on 15 October 2021

Retired Appellate Judge Oswaldo, interviewed on 18 October 2021

Judge José, interviewed on 18 October 2021

Public Defender Caio, interviewed on 23 October 2021

Barrister Douglas, interviewed on 9 November 2021

Retired Judge Marcia, interviewed on 11 November 2021

Public Defender Marcus, interviewed on 11 November 2021

Appellate Judge João, interviewed on 16 November 2021

Barrister Bruno, interviewed on 30 November 2021

Judge Francisco, interviewed on 25 January 2022

Judge Ricardo, interviewed on 25 January 2022

Appellate Judge Jorge, interviewed on 28 January 2022

Judge Julio, interviewed on 28 January 2022

Judge Sergio, interviewed on 1 February 2022