ANOTHER SYSTEM IS POSSIBLE

REFORMING BRAZILIAN JUSTICE

Edited by Conor Foley

with a preface by
José Eduardo Martins Cardozo
Minister of Justice

INTERNATIONAL BAR ASSOCIATION
the global voice of the legal profession®

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PREFACE

While there are many legitimate criticisms to be made of the Brazilian justice system, there is also much that we can be proud of, particularly when compared with other countries at similar levels of economic, social and political development. Indeed, such is the current mood of optimism, many have concluded that Brazil may finally be arriving at the bright future which was always ahead of us. But we should never forget the scale of the challenges that confronted us along the way and those that we still face.

Brazil has bucked a global trend, reducing social inequality while, in virtually every other major country in the world over the last decade, it has been rising. Successful government initiatives have also had an astonishing impact in lowering rates of absolute poverty and violent crime. However, there is no reason for complacency in the wake of such successes given how high all three have been historically, and the blight that they have inflicted on our society and so many people's lives.

The transition from dictatorship to democracy, which occurred within the collective memory of most Brazilians, posed profound and multi-faceted challenges to our system of governance and justice. We have experienced what we see many other countries going through today – particularly in sub-Saharan Africa and the Middle East. One lesson learnt from the transition is that judicial reform is a concern for everyone and not just the judiciary or executive. The continuing social and economic development of Brazil would not have been possible without strengthening the ability of the judiciary to function in accord with the needs of its citizenry.

This book tells the story of the 'silent revolution' within the Brazilian justice system. It brings together a range of actors, both national and international, and draws upon a rich variety of experiences. It does not seek to minimise the many problems that still confront us – particularly the conditions in many of our prisons, the slowness and inaccessibility of judicial processes, and the continuing weakness of our system of public defence – but, in highlighting what we have achieved and what still needs to be done, it tries to do two things.

First of all, the book demonstrates that many of our most successful national programmes started out locally, either in a community or through voluntary efforts, before being scaled-up to national level. Brazilians are proud of their creative ingenuity and the number of 'community justice' initiatives that have developed in recent years is truly impressive. By providing a brief snap-shot of some of them the book intends to inspire more.

Secondly, we believe that some of the experiences described in this book may have an international relevance. Our government does not try to conceal the scale of its challenge in living up to the commitments contained within the international human rights conventions that Brazil has ratified. These are, and should be universal in their scope, but each country strives to implement them within its own social, economic, political and historical specificity. Our experiences of justice sector reform may be of direct relevance to other countries facing similar challenges.

We offer our experiences as a contribution to debate, hoping to learn from others in turn. Too often international organisations promote justice sector reform projects which have been developed in

the global north and pre-packaged for export, as if they were the only models on offer. A dialogue within the global south is urgently needed, based on mutual respect and reciprocity, from which new paradigms can arise.

José Eduardo Cardozo
Ministro de Estado da Justiça

PRESENTATION

The Secretariat of Judicial Reform (SRJ) is responsible for "formulating, promoting, supervising and coordinating the process of reforming the administration of justice to promote dialogue between the legislative, executive and judiciary." Its creation in 2003 represented the beginning of a reform process that was enshrined with the enactment of Constitutional Amendment 45/2004, which established the National Council of Justice and promoted great advances in the modernization and democratization of the Brazilian courts. The Secretariat's main task is to articulate SRJ institutional cooperation among government agencies and guide the actions of public policies that can qualify adjudication, within constitutionally defined limits.

The debate on judicial reform is extensive and the SJR understands that judicial reform is a concern for everyone and not just the judiciary or executive. It is not possible to think of the development of a country, of reducing poverty and inequality or strengthening democracy without a judiciary functioning in accordance with the needs of its citizenry.

The SJR has played a leading role in the reform of the justice system in Brazil – working amongst public defenders, courts and public prosecutors – and has led the coordination and the replication of good practices, including the strengthening of Public Defenders Offices and other projects to increase access to justice and support the modernization of the administration of justice in Brazil.

The main focus of the department is to increase access to justice within four pillars: the actions of citizenship through service networks of information about rights and citizenship training of agents to assist in guiding everyday community; strengthening of the Public Defenders Office to expand the service of full and free legal assistance; rapprochement between justice and local communities and other experiences, increased use of alternative dispute resolution such as mediation and arbitration, the creation of Community Justice Programmes and the 'House of Human Rights' establishing partnerships with the education system, especially through academic and vocational courses in law and training of judges, prosecutors and public defenders and with promoting the inclusion of specific subjects in the curriculum.

I welcome the publication of this book that aims to contribute to the promotion of access to justice in Brazil and to international experience in the democratization of justice. Knowledge will make sure we avoid mistakes and will help us correct them. Almost ten years after the creation of SRJ, now is a good moment for analysis and discussion of best practices that strengthen access to justice in Brazil. This book can help bring that debate to a wider audience.

Flávio Crocce Caetano
Secretary of Judicial Reform

FOREWORD

Established in 1995, the International Bar Association's Human Rights Institute (IBAHRI) works to advance human rights and the rule of law across the globe and has undertaken a variety of projects to build capacity, lobby for change and highlight issues of concern to the public, the media and the legal community. In recent years, the IBAHRI has trained judges and lawyers from Colombia to East Timor, conducted fact-finding missions to Syria, Venezuela and Zimbabwe and developed bar associations in Afghanistan and Swaziland.

Since the launch of its first report on Brazil in 2009, which looked at the challenges facing the criminal justice system, the IBAHRI has had the pleasure of working in collaboration with a wide range of actors in the Brazilian justice sector. For example, in 2010 the IBAHRI teamed up with Instituto Innovare to award a special access to justice prize, and in 2011 worked in partnership with several federal and state justice institutions to implement a series of combating torture trainings for judges, prosecutors, public defenders and lawyers. Although the issues facing the Brazilian criminal justice system are complex, it is clear that there is a very real dynamism and commitment within the government and civil society to solve the problems that exist. It is also clear that there is significant interest amongst the international community as to how Brazilians, using the creative ingenuity for which they are so famous, have worked to address these challenges.

It is therefore a particular honour for the IBAHRI to present, together with the Brazilian Ministry of Justice, this book, which not only highlights some of the challenges in the Brazilian criminal justice system but importantly presents potential solutions. We hope that it will make a valuable contribution to the debates on penal reform amongst the Brazilian legal community and beyond.

Justice Richard Goldstone
IBAHRI Honorary President

BIOGRAPHIES OF CONTRIBUTORS

Pierpaolo Cruz Bottini is a professor of Criminal Law at the University of São Paulo Law School, and a member of the National Criminal and Penitentiary Policies Council of the Brazilian Federal Department of Justice. With both Masters and Doctorate degrees in Criminal Law from the University of São Paulo Law School, he headed the Office for the Reform of the Judicial System at the Department of Justice in 2005 and 2006, and the Office for the Modernization of Justice in 2003 and 2004. He is regional coordinator of the Brazilian Institute of Criminal Science.

Felipe Donoso is Head of the International Committee of the Red Cross (ICRC) Regional Delegation in Argentina, Chile, Brazil, Paraguay and Uruguay. In 2009 he initiated the design and implementation of the ICRC Pilot Project in Rio de Janeiro which aims to provide a multi-disciplinary response to major humanitarian crises caused by armed violence in urban settings. He has undertaken numerous field missions for the ICRC in countries affected by armed conflict and humanitarian emergencies (Angola, Burundi, RDC, India Cashemere, Kenya, Mozambique, Peru, Sudan), for many of which he acted as Head of Mission and Head of Delegation (Haiti, South Sudan and the Philippines). During his various assignments he has been exposed to a wide range of issues with relevance to the protection of detainees against violations and abuses. He graduated from the Department of Political Science at the University of Geneva.

Luke Dowdney MBE is the founder and director of Fight for Peace International (FFP), **www.fightforpeace.net**. He has a Masters degree in Social Anthropology from the University of Edinburgh. He is author of *Children of the Drug Trade: a case study of children in organised armed violence* and *Neither War nor Peace*. Luke won the British Universities Light-Middleweight boxing championship in 1995 and has coached youth boxers in Brazil at FFP since 2000. In 2004 he was awarded an MBE for 'services to the prevention of child exploitation and violence in Brazil'. He is also an Ashoka Fellow and social entrepreneur. In April 2007 Luke won the prestigious 'Sport for Good Award' at the Laureus World Sports Awards. In 2008 he was invited to be an Ambassador for Beyond Sport and in 2009 he was made a Young Global Leader by the Schwab Foundation for Social Entrepreneurship. In May 2011 he launched Luta Limited, **www.luta.co.uk**, a new fightwear and lifestyle clothing range, which will give half of its distributed profits to FFP.

Márcia Adriana Fernandes is a criminal lawyer at the Centre of Judicial Practice at the Faculty of Law, Ibmec, Rio de Janeiro, and a Researcher at the Association for Penal Reform. She has a Masters in Penal Science and Criminology from the University Candido Mendes, Rio de Janeiro and a postgraduate qualification in Law and Psychoanalysis. She has also undertaken training in Human Rights from the University of Pablo de Olavide in Spain.

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Conor Foley has worked for United Nations Department of Peacekeeping Operations (UN DPKO), UN High Commissioner for Refugees (UNHCR), UN-Habitat and Amnesty International, amongst others, in over 20 conflict and post-conflict zones, including Albania, Armenia, Azerbaijan, Colombia, Cote d'Ivoire, Democratic Republic of Congo, East Timor, Indonesia, Liberia, Macedonia, Malawi, Mozambique, Serbia, South Sudan, Sri Lanka, Tajikistan, Uganda and Zimbabwe. He spent a year as a Protection Officer for UNHCR in Kosovo and set up and managed a network of legal aid centres in Afghanistan. He has conducted evaluations of the government of Afghanistan's National Judicial Reform Programme, a needs assessment for the Malawian judiciary and a study of the European Instrument for Democracy and Human Rights in Angola. He has also run training programmes for the Organization for Security and Co-operation in Europe (OSCE)'s legal department in Bosnia-Herzegovina, and the EU ceasefire monitoring mission to Georgia. He is a Research Fellow at the Human Rights Law Centre, University of Nottingham (UK), and a Visiting Fellow at the University of Essex (UK). His latest book *The Thin Blue Line: how humanitarianism went to war* was published by Verso in 2010.

Gláucia Falsarella Foley is a Judge in the Special Criminal Court of Taguatinga and Coordinator of the Community Justice Program of the Tribunal de Justiça do Distrito Federal e dos Territórios (TJDFT). This project was awarded a prize by Instituto Innovare in 2005 and has since been used as a model for the development of a national policy by the Ministry of Justice. She has a LLM from the University of Brasília and has conducted research as visiting scholar with the Human Rights Centre at the University of Essex (UK), and with the Institute for Legal Studies at the University of Wisconsin, Madison (US). She is the author of *Community Justice for an emancipatory justice*.

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Carlos Weis is a Public Defender in São Paulo and is currently Coordinator of the Citizenship and Human Rights Division of the São Paulo Public Defender's Office. He has a LLM from the University of São Paulo and is author of the book *Contemporary Human Rights*, as well as numerous legal articles. He was member of the National Council for Criminal and Penitentiary Policy of the Ministry of Justice (2002–2008).

Alex Wilks is a UK-qualified lawyer and Senior Programme Lawyer at the International Bar Association's Human Rights Institute (IBAHRI) in London. He was previously a legal adviser on human rights issues in the House of Lords. Between 2007 and 2008 he was the IBAHRI's Legal Specialist in Kabul where he worked to establish Afghanistan's first ever national bar association. He is currently responsible for projects in Latin America, as well as East Timor, Libya and Sri Lanka. He manages human rights training for parliamentarians as well as the IBA Task Force on Terrorism. He has an LLM in International Human Rights Law from the University of Essex (UK).

INTRODUCTION

Reforming Brazilian Justice: a new Model for International Cooperation and Development

Much has been written about the problems of the Brazilian criminal justice system. This book is about solutions. These are not theoretical solutions to be proposed for the future, in an abstract or idealised world, but the actual ones currently being implemented throughout the country. It is written to support the contention by Professor Joaquim Falcão that a 'silent revolution' is taking place in the Brazilian justice system; a revolution that is driving forward reforms simultaneously across a range of different sectors and in a wide variety of different ways.

The book brings together many diverse actors in the revolutionary process. Some are working from inside the system as judges, public prosecutors and defenders and some from outside in civil society organisations, campaign groups and research centres. Some are working in prisons, and other places of detention; some are working in the communities most blighted by violent crime. Some are striving to reform the legal framework, while others face the challenges of implementing new laws. Some are Brazilians, working for national institutions, while others work for external organisations concerned with Brazilian justice from an international perspective.

The diversity of this group is both its strength and its weakness. As is discussed further below, the innovations currently taking place are breaking the existing paradigm about justice sector reform in Brazil. However, there is a danger that if each initiative is viewed in isolation from one another, their collective significance will be underestimated and their corresponding impact reduced. Forging genuine partnerships to support the reform process at a national and international level is a massive challenge. It is hoped that this book can make a small contribution to the task.

What happens to the justice system in Brazil is of international concern. Brazil has the world's fourth highest prison population and the numbers are growing rapidly. This conforms to a general trend of increasing prison numbers globally. The crisis in Brazil's criminal justice system should serve as a frightening warning to many other countries about the need for reform. The examples of good practice also have international relevance.

The argument in favour of penal reform can be simply put. It costs money to keep people locked up and money spent on prisons cannot be spent on developing alternative programmes that have been shown to be more effective in reducing crime. Imprisoning people for relatively minor offences is, therefore, counterproductive because it is more likely to turn them into repeat offenders than non-custodial sentences. There are strong utilitarian reasons for trying to reduce the number of people that are sent to prison and to use imprisonment only as a last resort for the most serious of crimes.

However, there is often strong public pressure for 'tough' penal policies in societies that suffer from high levels of violent crime. Democratic governments cannot afford to ignore public opinion or the feelings of their electorates. High profile and particularly shocking crimes often lead to calls for new criminal laws or a toughening of existing ones. A wide range of social factors, such as high levels of poverty, homelessness and unemployment, can have an obvious impact on crime rates. People living on the margins of society, without jobs or legal addresses, may be more likely to commit crimes and are also less likely to get bail from pre-trial detention. High recidivism rates among ex-prisoners may lead to a self-perpetuating upward cycle. Attitudes towards drug use, both by the users themselves and how wider society treats the problem, is likely to have an effect. The sentencing policies of individual judges may also be partly influenced by wider societal attitudes.

Prison numbers might also increase because better policing leads to more criminals being caught, and a more efficient prosecution service and judicial system increases conviction rates. A crackdown on crimes that were previously tolerated – for example, corruption or violence against women – could lead to an increase in the number of people being sent to prison. Building more prisons, to relieve overcrowding, may also lead to judges handing out more custodial sentences because they know that there are places available to send defendants.

In other words, penal policy is influenced by a range of political, social, economic and cultural factors and criminal justice reform must take account of how each combination of them has impacted in every particular society. A top-down, one-size-fits-all approach is never likely to be effective. The arguments about justice sector reform in Brazil are quite specific to the problems that the country faces, although many common factors can be found in a similar debate taking place in other countries throughout the world.

Crime and punishment in Brazil

Brazil's experiences are at the extreme end of this debate. Its prison population has more than trebled in the last 16 years and the pre-trial population has more than quadrupled.[1] As the first chapter of this book discusses, a recent national review of cases by the Conselho Nacional de Justiça – CNJ (National Council of Justice) found that over 36,000 prisoners were being detained unlawfully and over 72,000 were being held in excessively high levels of security in relation to the prison sentence that they received. This means that over 100,000 people were suffering violations of their fundamental rights to liberty and human dignity. The review also found that people were being detained in inhumane conditions, across the country, which violated Brazil's own laws and Constitution, as well as international human rights standards.

The most obvious reason for this large increase in prison numbers is that Brazil suffers from very high levels of violent crime. Fear of crime is prevalent throughout Brazilian society which was, until recently at least, coupled with extreme distrust of the criminal justice system. A global survey on safety and security carried out by the Vera Institute of Justice in 2003 found that Brazil is the country where people say that they are most afraid to walk the streets at night (followed by South Africa, Bolivia, Botswana, Zimbabwe and Colombia, in that order).[2] Conversely, Brazil had the second lowest rate of reporting crimes of robbery to the police (19 per cent compared to 37 per cent in South Africa, 45 per cent in Argentina, 59 per cent in Australia and 69 per cent in the United States), implying a level of distrust of the police that is more usually observed in countries that do not respect democratic norms. Another survey showed that 50 per cent of Brazilians state that they do not even report crimes to the police because they thought it would be a 'waste of time'.[3]

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1 Figures supplied by Conselho Nacional de Justiça, 'The Brazilian Prison System', CNJ. In 2011, there were approximately 500,000 prisoners in Brazil compared to around 150,000 in 1995.

2 *Measuring progress towards safety and justice: a global guide to the design of performance indicators across the justice sector*, Vera Institute of Justice, November 2003.

3 William C Prillaman, *Crime, Democracy, and Development in Latin America*, Centre for Strategic and International Studies, Policy Papers on the Americas, Volume XIV, Study 6, June 2003, 9.

The large increase in violent crime coincided with Brazil's transition from dictatorship to democracy. This was also accompanied by an economic crisis that led to hyper-inflation and then a deep recession which impoverished millions. Between 1980 and 1990, the real minimum wage decreased by 46 per cent and per capita income dropped 7.6 per cent in what is often referred to as the 'lost decade'. The shock of the economic crisis was magnified because it had been preceded by an equally dramatic period of growth. Between 1870 and 1980, Brazil's economy grew at a faster rate than virtually any major country in the world. During the 1950s, it was on a trajectory to overtake the United States by the end of the 20th century. In fact, such a growth rate was unsustainable and the inflationary pressures and growing public debt provided some of the background to the 1964 military coup. Economic growth resumed under the dictatorship, after a period of brutally-enforced wage-restraint, but the debts ran up during this period were to effectively bankrupt the country by 1983.[4] Between 1940 and 1980, gross domestic product (GDP) had grown 6.9 per cent annually (four per cent in capita terms). Between 1980 and 1992, it grew only 1.25 per cent per year.[5]

Brazil was also undergoing a dramatic social change, which transformed it from an overwhelmingly rural to a predominantly urban society in the space of a few decades. Between 1950 and 1980, around 20 million people moved from the countryside to the cities, one of the biggest such movements in world history.[6] Some Brazilians also became very rich and society stratified into what became the most unequal major country in the world. The proportion of income appropriated by the richest fifth of the population grew from 54 per cent in 1960 to 62 per cent in 1970, 63 per cent in 1980 and 65 per cent in 1990, while that of the poorest half dropped from 18 per cent in 1960, to 15 per cent in 1970, 14 per cent in 1980 and 12 per cent in 1990.[7] Many of the new urban poor settled in self-built shacks clustered on vacant land. These favelas lacked all basic social services and soon fell under the control of crime gangs, who staked out their territory through violence. Homicide is now the leading cause of death for persons aged 15 to 44 years of age, and the victims are overwhelmingly young, male, black or mulatto and poor.[8]

4 Francisco Vidal Luna and Herbert Klein, *Brazil since 1980* (Cambridge: Cambridge University Press, 2006), 40.

5 Teresea Caldeira, *City of walls: crime, segregation and citizenship in São Paulo* (Berkeley, CA: University of California Press, 2000), 45.

6 Michael Reid, *Forgotten continent: the battle for Latin America's soul* (New Haven, CT: Yale University Press, 2007).

7 See note 5 above, 47.

8 See note 4 above, 209–236.

Brazil did not collect official statistics on criminality for the country as a whole until the late 1990s. However, violent crime in the state of São Paulo increased as a proportion of total crime from around 20 per cent in 1980 to 30 per cent in 1984, to 36 per cent in 1996.[9] The homicide rate soared from around 15 per 100,000 in 1981 to 45 per 100,000 in 1995 and 54 per 100,000 in 2002. In Rio de Janeiro, the murder rate reached a staggering 61 per 100,000 people in 1994, although it has declined since. The homicide rate (per 100,000 people) for Brazil as a whole nearly tripled – to around 30 per 100,000 in 2002 and a total of 49,570 homicides were documented in Brazil in that year.[10]

An analysis of the involvement of children in the drug-trafficking trade carried out by Luke Dowdney in 2003 concluded that the 'extreme levels of armed violence are generating numbers of firearm-related deaths in the city of Rio de Janeiro that are comparable, if not greater, than the number of conflict-related casualties in many armed conflicts'.[11] It also noted that the 'utilization of high powered weapons and the types of armed violence caused by inter-faction disputes and confrontations between the police and factions in Rio de Janeiro' mean that 'stark similarities exist between children employed in [the city's] drug factions and "child soldiers" in almost every functional and definitive aspect'.

The increase in violent crime had a huge impact on the political discourse during the transition to democracy. Defending human rights became increasingly associated with the defence of *bandidagem*, or criminality. Politicians who were seen as 'soft on crime' – to the extent that they upheld notions such as respect for the basic rights of suspects or acted to curb excesses by the police and prison guards – were outflanked on the right by those who favoured tougher measures. As Professor Teresa Caldeira has noted:

> 'The talk of crime promotes a symbolic reorganization of a world disrupted both by the increase in crime and by a series of processes that have profoundly affected Brazilian society in the last few decades. These processes include political democratization and persistent high inflation, economic recession and the exhaustion of a model of development based on nationalism, import substitution, protectionism and state-sponsored economic development. Crime offers the imagery with which to express feelings of loss and social decay generated by these other processes and to legitimize the reaction adopted by many residents: private security to ensure isolation, enclosure and distancing from those considered dangerous.'[12]

9 See note 5 above, 119.

10 *Morbidity and Mortality Weekly Report*, Homicide Trends and Characteristics – Brazil, 1980–2002, 5 March 2004. Figures cited from Brazil's Ministry of Health. See also, Rodrigo Ghiringhelli de Azevedo, 'Criminal justice and public security in Brazil: causes and consequences of the public's demand for punishment' (2009) Brazilian Journal of Public Security, February/March 2009, 97, which states that the death toll in 2003 reached 51,043.

11 Luke Dowdney, *Children of the drug trade, a case study of children in organised armed violence in Rio de Janeiro* (Rio de Janeiro: 7Letras, 2003), 117.

12 See note 5 above, 2.

Brazil found itself trapped in a vicious circle where high levels of violent crime placed increasing burdens on its criminal justice system, whose flaws meant that it was unable to deal effectively with a large increase in its caseload. Prisons became increasingly overcrowded and the conditions in them ever more inhumane. Prison rebellions were brutally suppressed, such as the one at Carandiru in 1991, in which 111 detainees were killed. The prisoners who survived this massacre, formed the *Primeiro Comando da Capital* – PCC (First Command of the Capital), which was to become the most powerful crime gang in São Paulo. In 2006, the PCC organised a series of rebellions and attacks, which were followed by counter-attacks and revenge killings by the police, in which around 450 people are believed to have been killed.[13] A succession of reports by international human rights organisations documented the system's failings, often recommending the creation of new laws or monitoring institutions. The Brazilian government has generally accepted both the criticisms and the need for reforms. However, as the reports of numerous international monitoring bodies made clear, in practice little seemed to change.

Some argue that this is because the Brazilian government was not serious about the need for reform and that the measures implemented were simply cosmetic and for external consumption – *para Inglês ver*, as the phrase goes.[14] This is not entirely fair. The Brazilian government has repeatedly declared itself to be in favour of limiting custodial sentences to those guilty of serious offences and has promoted the use of alternative non-custodial sentences by judges. A law passed in November 1988, for example, expanded the range of non-custodial sentences available to judges for non-violent offenders who would otherwise receive a prison sentence of less than four years.[15] It was predicted at the time that this would reduce pressure on the prison system by releasing some 20,000 prison places. However, other laws, usually enacted due to public revulsion at a particularly well-publicised crime, have imposed tougher sentences for a range of offences. Meanwhile, the continuing rise in the number of pre-trial detainees has more than cancelled out the effects that alternative sentencing could have had in reducing the overall prison population.

In the second chapter of this book, Julita Lemgruber and Marcia Fernandes provide an analysis of why so many defendants continue to be remanded in pre-trial detention, based on a research project carried out over a year-and-a-half in Rio de Janeiro. The project followed the cases of over 500 people being held in pre-trial detention in the city, accused of non-violent and relatively minor offences. Less than a third of these detainees finally received a prison sentence and so the decision to detain them without bail was clearly a violation of their right to liberty. Yet the majority of requests for bail were turned down. The project provided a selected number of these detainees with legal advice and representation and, when other variables are removed, members of this group were twice as likely to obtain bail as those represented by the Public Defender's Office. Although the project was a pilot one, conducted in one state over a limited period of time, it

13 The total number of deaths remains unknown, but the PCC are believed to have killed around 40 prison guards and police officers in the first few days and these guards and officers responded with counter-attacks on suspected PCC members, which killed hundreds of people.

14 The origin of the phrase 'for the English to see' refers to the Brazilian government's repeated promises to abolish slavery in the 19th century. Britain was Brazil's most important trading partner, creditor and source of military protection at the time and the abolitionist cause was a significant factor in British domestic policies. Britain also benefited from a preservation of the Brazilian status quo and the phrase refers to a double form of hypocrisy. The Brazilians pretended they were going to abolish slavery: the English pretended to believe them.

15 Lei 9.714/98, which amended Lei 7209/84.

appears to show systemic problems with both the decisions of the judiciary and the functioning of the Public Defender's Office.

The third chapter of the book, by Helena Romanach, José de Jesus Filho and Juana Kweitel describes the work of three Brazilian non-governmental organisations (NGOs) that have come together to form a criminal justice network. The three organisations – Pastoral Carcerária, Conectas Direitos Humanos and Sou da Paz – have very different backgrounds and mandates, but a shared commitment to penal reform, which derives from their broader work defending human rights and promoting peace and social justice. The chapter includes a brief description of some of their work individually and then discusses how they have lobbied together to achieve two important legislative reforms: Lei 12/403/2011, which provides the judiciary with more alternatives to pre-trial detention; and Lei 12.433/2011, that allows prisoners to reduce their sentences through studying.

The reform process

One reason why prison numbers are going up in Brazil is because the police have become better at catching suspected criminals. Both arrest and conviction rates have increased quite dramatically in some parts of the country. Improved police intelligence, better training and improved pay and conditions, crackdowns on corruption, a curb on police officers taking second jobs, and moves towards community-style policing have all been effective in the places where they have been attempted. In São Paulo, a new murder squad has been established, which uses computer profiling to spot patterns and to act preventively. The state has invested in: a communications network to link military and civil police information; a geographic information system, so that crimes can be tracked by area; a criminal photographs database; and computer software linking police report information with bank records, telephone records and residence details. More emphasis has also been placed on crime prevention and building links with communities, whose willingness to provide information remains one of the most effective means by which the police can improve their detection rates.

Even more dramatically, in Rio de Janeiro, the police have undertaken a 'pacification' initiative to seize back control of the city's favelas, which had previously been under the overt armed domination of its organised criminal gangs. Since 2008, the state government has adopted a three-phased approach in which designated areas are first physically occupied by the Batalhão de Operações Policiais Especiais – BOPE (Special Police Operations Battalion), and sometimes reinforced by the military; then stabilised, using essentially counter-insurgency tactics; before being consolidated through the permanent deployment of specially trained Unidades de Polícia Pacificadora – UPPs (Pacification Police Units).

Instead of conducting quick in-and-out raids that often leave neighbourhoods in ruins, the police are now entering favelas to stay. The UPPs are composed of new police recruits, who receive special training in human rights and community policing strategies. Pacified favelas are also targeted for social investment, vocational training and job creation schemes. Community Justice projects

are also being established, based on the model described below.[16] Crime and murder rates have plummeted since the start of the pacification campaign, and though its implementation has not been without problems, it is strongly supported by the city's population. Counter-insurgency specialists from Europe and the United States have been queuing up to see what lessons can be learnt that might have a wider applicability.[17]

It is obviously better for the police to arrest suspected criminals rather than to kill them. But if police detection and arrest rates go up and the courts become more effective at conducting trials, then this will put further strain on the penal system, which is already overburdened. The need for 'joined-up thinking' on this issue is one of the underlying themes of this book.

The fourth chapter describes the work of Innovare, which was launched in 2004 to identify, reward and disseminate innovative judicial practices from within the judiciary. Its stated goal is to make the Brazilian system of justice more accessible, democratic, rapid and efficient through promoting reforms from the bottom up, which it does through an annual prize-giving ceremony to innovative judicial projects. Between 2004 and 2011, Innovare has collected, evaluated and judged more than 3,000 innovative projects. This is an invaluable reference source, since even those projects that have not been selected for prizes provide an excellent source of good practices, which could be implemented in other parts of the country or scaled up into national projects. The Innovare model for encouraging innovation is borrowed from the private sector, to overhaul entrenched interests and outmoded practices. As Professor Maria Tereza Sadek of the University of São Paulo (USP) has noted, Innovare has helped to break the paradigm that the only way to reform the judiciary is through new legislation, or providing it with more resources.

The fifth chapter of the book, by Gláucia Falsarella Foley, is on one such project, Community Justice, which won an Innovare prize in 2005 and was subsequently scaled up into a national programme. It was created by the Federal District Court in Brasília in 2000, and opened centres in the satellite cities that have grown up rapidly around Brasília in recent years. These are experiencing many of the same social problems of the favelas around other Brazilian cities. The project has trained around 500 community agents, drawn from these areas, who are supported by a team of lawyers and psychosocial staff. These are able to provide advice and legal information to their neighbours and also to act as mediators in disputes. The aim is not just to try and resolve disputes peacefully, but to use them to identify the underlying needs of the community, build social capital and to advocate for change. The project is now being implemented in many other parts of Brazil, including some 'pacified' favelas in Rio de Janeiro.

Community Justice received the official support of the Ministry of Justice and the Secretary of Judicial Reform in 2006. The following year, the Ministry of Justice launched the Programa Nacional de Segurança Pública Com Cidadania – PRONASCI (National Programme of Public Security and Citizenship), which now supports many of the individual projects profiled in this book. PRONASCI has two main components: a series of structural actions to modernise the criminal justice system; and a series of local programmes, which aim to strengthen social and economic development at the local level. The former includes training and modernisation of the police forces and penitentiary

16 See also chapter five.

17 See Rob Muggah and Albert Suza Mulli, 'Rio Tries Counterinsurgency' (2012), Current History, February 2012.

system to increase their professionalism and reduce the level of corruption (including measures relating to trafficking and organised crime), reforming the penal process, building new penitentiaries for young adults, and developing prison programmes to aid the social and economic reintegration of prisoners on release. The latter includes local programmes targeting the 11 metropolitan areas with the highest crime rates, the most deprived areas in those cities and young people in particular.

For the period 2007–2011, a total of around R$6,700 billion (US$3,232 billion) was invested in PRONASCI. The overall goals of the programme benefited around 3.5 million staff working in the criminal justice system, as well as young people and their families. PRONASCI represents a significant shift in public safety policies and social policies in Brazil, providing a mechanism for the federal government to work with state and municipal governments, and civil society. States and municipalities can apply for funding for specific projects but they must establish an integrated management office that ensures the integration of local partners and services. PRONASCI aims to rebuild relations between the police and the communities (especially young people) through human rights workshops that help to build trust, respect for rights and the law, and establish a culture of peace.

The results of these cumulative efforts appear to have been significant. After years of rapidly rising, crime as a whole in Brazil appears to have either fallen, or at least remained static, in recent years.[18] Murder rates in São Paulo and Rio de Janeiro, Brazil's two principal cities, have dropped dramatically. A range of factors in addition to the ones mentioned above are likely to have contributed to this fall.[19] Recent years have seen a rise in living standards for the population as a whole, as a result of a long period of stable economic growth, a rise in the minimum wage and the implementation of a large-scale cash transfer programme to poorer Brazilians known as *Bolsa Familia* (Family Purse). Brazil has become a more equal society, bucking a global trend towards greater inequality, and the numbers living in both absolute and relative poverty have declined. Birth rates are falling, which will also impact on crime levels through demographic changes according to the experiences of other countries, and so there are some good reasons for optimism that Brazil can achieve a long-term reduction in its crime rate.

While celebrating these successes to date, it would be wrong to underestimate the scale of the tasks still facing the process of Brazilian justice reform. One of the biggest of these remains to ensure that the guarantee contained in Brazil's Constitution of 1988 that 'the State has to provide full and free legal assistance to whoever proves not to have sufficient funds' becomes a reality. There are only just over 4,000 public defenders in the whole of Brazil, compared to 12,000 public prosecutors and almost 16,000 judges. The office remains significantly under-resourced, although there has been some progress in recent years. Chapter six of this book, by Carlos Weis, describes the founding of the Public Defender's Office in São Paulo, which was only created in 2006 after a significant campaign by Brazilian civil society. The newness of this office and its roots in this popular campaign have given the institution some unique characteristics, which could serve as a model both for other Public Defender's Offices within Brazil and for other countries with similar legal systems.

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18 Julio Jacobo Waiselfisz, *Mapa da Violência dos municípios Brasileiros*, Organização dos Estados Ibero-Americanos para a Educação, a Ciência e a Cultura, OEI, Fevereiro de 2007.

19 'Mapa da Violência dos Municípios Brasileiros mostra queda dos assassinatos desde 2004' *O Globo* (Rio de Janeiro, 29 January 2008).

A good example knows no frontiers

As discussed above, there can sometimes be a tension between those working on justice issues within an international legal framework and those struggling to apply these universal principles within a particular political, social, economic and cultural specificity. Governments often respond to criticisms of their human rights record from the latter by accusing them of 'meddling', or claiming that they do not understand the context in which the violations occur or the 'realities' of that particular country. Proponents of universal legal standards are accused of naivety, liberal vanguardism and even 'human rights imperialism', for attempting to impose standards developed in wealthy countries on poorer ones.

Such criticisms often come from the right of the political spectrum, but similar charges are increasingly levied by the left as well. For example, Professor Boaventura de Sousa Santos, of the University of Coimbra, has noted that international human rights and humanitarian laws were primarily drafted by Western political leaders and the supporters of these movements remain overwhelmingly middle class, liberal and Western in their social backgrounds, yet the focus of their activity is often in the economically oppressed global South. He argues that:

> 'A counter-hegemonic human rights discourse and practice have been developing, non-Western conceptions of human rights have been proposed, cross-cultural dialogues of human rights have been organised. The central task of an emancipatory politics of our time, in this domain, consists of transforming the conceptualization of and practice of human rights from a globalised localism into a cosmopolitan project.'[20]

It is not necessary to accept either charge in its entirety to acknowledge that a broader discussion is needed on the way in which the human rights discourse is adapting itself to changing global realities. Human rights organisations did traditionally seek to insulate themselves from political pressure or perceptions of political bias, even at the cost of appearing remote and aloof. Amnesty International, for example, established at the height of the Cold War, based itself in London, ensured that its researchers were not nationals of the country they were monitoring and forbade its sections from campaigning on human rights violations in their own countries. It relied upon a public 'document and denounce' approach to reporting, which was an effective tactic against governments that denied or sought to cover up abuses, but failed to provide many opportunities for constructive engagement with reformists.

Both Amnesty International and Human Rights Watch are currently in the process of establishing a permanent presence in Brazil because they recognise that becoming truly global organisations is essential to their credibility. As Salil Shetty, Amnesty's new Secretary General recently declared, 'We need a more vibrant presence in India, Brazil and Africa so that it is the people there who are doing the research and the campaigning and not people sitting in London.'[21] This is part of a broader trend by international organisations in reassessing how they relate to emerging powers in the global South. The debates about human rights, universalism, indivisibility and interdependence

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20 Boaventura de Sousa Santos, 'Toward a Multicultural conception of human rights' in Berta Hernandez Truyol (Ed), *Moral Imperialism: a Critical Anthology* (New York: New York University Press, 2002).

21 'Salil Shetty: Amnesty International's new voice in the fight against injustice' the *Observer* (London, 15 August 2010).

are increasingly located in discussions of how to address the injustices caused by the imbalances of wealth and power in the world today. At the same time, the experiences of international organisations can help to spread good practices both to and from the global South.

The seventh chapter of this book, by Felipe Donoso, describes the work of the International Committee of the Red Cross in Brazil (ICRC). The ICRC has been working to reduce the impact of armed violence on the population in Rio de Janeiro in seven of the city's neighbourhoods since 2008. Most of this work is carried out in cooperation with the national authorities, public institutions, the Brazilian Red Cross and local NGOs. The project includes monitoring places of detention and the chapter outlines the particular approach that the ICRC adopts towards such visits. The findings of its visits remain confidential and this enables it to engage in a constructive dialogue with the authorities. These procedures have served as a model for several international and national mechanisms that were subsequently established, in particular the European Committee for the Prevention of Torture (CPT), and may be of relevance to the Brazilian authorities as it seeks to strengthen its own monitoring mechanisms.

The eighth chapter of the book, by Alex Wilks, describes the work of the International Bar Association (IBA) in Brazil. The IBA, through its Human Rights Institute, has conducted missions to countries across the world documenting violations and commenting publicly on issues of concern. It also has a capacity-building project, through training, seminars and the production of publications. It is widely assumed that a well-trained legal profession and a judiciary conversant in international human rights law can better protect human rights and hold the state to account. However, there is surprisingly little empirical evidence or qualitative data that training judges actually has a concrete impact. This chapter discusses the preliminary results of the IBA's work in Brazil, placing it within an international context.

The ninth chapter, by Luke Dowdney, looks at the relationship between national and international projects from an entirely different perspective. Luta pela Paz was established in a small gym in the Complexo da Maré, a favela, in Rio de Janeiro in 2000. It targets youth at risk, including those involved in and affected by crime and violence, and those not in school or employment. It offers sports, educational and support services, and a series of personal development classes to provide alternatives to violence, gang membership and drug trafficking, or to help them leave gangs. It has trained over 7,000 young people and produced two Brazilian national champions as well as members of its Olympic boxing team. A spin-off sportswear clothing company has also developed alongside the project. The project developed in Brazil has created a similar centre based in London and its experiences are increasingly being used to train other projects that are developing across the world. Like the *mutirões* described in the first chapter of this book, the Community Justice project described in the fifth chapter and the thousands of others described elsewhere, it is a successful Brazilian innovation that is already being implemented elsewhere.

The tenth chapter of the book, by Pierpaolo Bottini, sets out a positive agenda for legal reform of the Brazilian justice sector, based on his experience as one of the first Secretaries for Judicial Reform. This describes some of the important legislative challenges facing the government, the successes to date and the challenges that lie ahead. The last ten years have seen dramatic changes within the Brazilian justice sector and the full significance of these reforms is still developing. This concluding chapter places these developments within an overall context.

Brazil's experiences of justice reform are of international as well as national relevance. It is an emerging economic power, with increasing influence in the debates on international relations and a rapidly developing programme of international assistance. There are, for example, more Brazilian diplomats in Africa than British ones. Brazil is currently helping African countries boost their agriculture yields and setting up poverty reduction projects based on its own domestic experiences. Brazil now provides development assistance to 65 countries, and its financial aid has grown threefold in the last seven years.[22] It is now one of the ten largest donors to the United Nations World Food Programme. This model of South-South cooperation has been effective because it breaks with the paternalistic assumptions of the North-South model. It is also easier to adapt a project developed somewhere like Brazil to another developing country, than to take a model from the global North and expect it to work in the very different conditions of the global South.

Justice sector reform has traditionally been one of the most difficult topics to tackle for those involved in international development. It is notoriously problematic to impose rule of law projects on developing countries from the outside, but without an effective justice system all other reforms to tackle poverty tend to become mere palliatives. Brazil has embarked on this challenge itself through the series of initiatives described in this book. The revolution unfolding is a silent one, but must also be a permanent process since the challenges involved are continuous. Hopefully, by documenting some of the experiences and lessons learned, this book can help to consolidate its gains.

22 *Reliefweb*, 'Brazil, Emerging South-South Donor', 1 March 2012, **http://reliefweb.int/node/480025** accessed March 2012.

CHAPTER ONE

The Mutirão Carcerário

Conor Foley

Introduction

The Mutirão Carcerário was created by the Conselho Nacional de Justiça – CNJ (National Council of Justice), in August 2008. It was initially established as an ad hoc initiative to review a backlog of cases that had built up within Rio de Janeiro's Varas de Execução Penal (Courts of Criminal Execution). It has since developed into the most far-reaching review of the effectiveness of the Brazilian criminal justice and penal systems and the oversight mechanisms charged with monitoring them.

Over the course of three-and-a-half years, the *mutirões* have been systematically reviewing the cases of sentenced and pre-trial prisoners in Brazil to ensure that these are in conformity with Brazil's criminal justice laws.[1] Their work has resulted in the release of tens of thousands of people who were being unlawfully detained and has also exposed and corrected numerous other flaws in sentencing practices, which have directly benefited tens of thousands more who were being held in inappropriate security conditions.

The scope of Mutirão Carcerário has also broadened to include a comprehensive examination of prison conditions in Brazil.[2] The reports produced have identified numerous shortcomings in the system but also positive recommendations for improvement, including a strengthening of the implementation of social programmes to help protect prisoners' rights and promote their rehabilitation and social integration on their release from prison.

The reports provide a huge amount of original and authoritative data about the conditions in which prisoners are being held Brazil, which can help to inform and strengthen the discussion about constructive reform. This chapter provides an overview of the work of the Mutirão Carcerário and also discusses how it could be strengthened.

An overview of the main institutions in Brazil's criminal justice system

For those not familiar with the Brazilian criminal justice system, some explanation of the basic laws and institutions is necessary to place the work of the Mutirão Carcerário in context.

Each of Brazil's states organises its own criminal justice system, although this must adhere to the same laws and basic constitutional principles, most of which are laid down in the Código de Processo Penal – CPP (Criminal Procedure Code). Brazilian penal policy is governed by the Lei de Execução Penal – LEP (Law on Penal Execution), but the country does not have a centralised prison authority with executive powers and the administration of prisons is also primarily carried out at state level. The two federal agencies concerned with prison policy are located within the Ministry of Justice: the Departamento Penitenciário (Penitentiary Department or DEPEN) and the Conselho Nacional de Política Criminal e Penitenciária (National Council on Criminal and Penitentiary

1 *Mutirão* literally translates as 'the help that members of a family give to one another'.

2 The term 'prison' here is being used to include all places of detention.

Policy). The former is primarily charged with practical matters such as the funding of new prison construction, while the latter focuses on guiding policy.

The formal protections provided to human rights in the Brazilian criminal justice system are considerable. On paper at least they are among the most progressive in the world. The CPP and the LEP both draw on international human rights standards as do Brazil's prison rules, Regras Mínimas para o Tratamento do Preso no Brasil (Minimum Rules of the Treatment of Prisoners in Brazil), which are based on the UN Standard Minimum Rules.[3] They contain numerous provisions mandating individualised treatment, protecting inmates' substantive and procedural rights, and guaranteeing them adequate food, medical, legal, educational, social, religious and material assistance, as well as contact with the outside world, education, work and other rights.[4]

A fundamental concept on which Brazil's penal legislation is based is that all prisoners should be treated as individuals and their sentence should reflect their particular circumstances, with the ultimate aim being their rehabilitation and reintegration into society.[5] The laws state that the main purpose of imprisonment should be re-socialisation and rehabilitation, rather than punishment.[6] They also encourage judges to use alternative sanctions, such as fines, community service and suspended sentences as often as possible.[7] If a prisoner is sentenced to a term of imprisonment, the sentencing judge should also consider the security level within which it should be served. Brazilian law states that a prison sentence should be regarded as a dynamic process, not simply a fixed term of years.[8] The judge should, therefore, continually monitor the prisoner's case, adjusting the terms of sentence according to the prisoner's conduct. Normally, a prisoner who begins a sentence in a closed prison should be transferred to a semi-open facility after a certain period and from there, to an open facility, and finally to release into society. Judges are required to rule on requests for prison transfers – often from closed to semi-open facilities – and also to regularly evaluate whether prisoners should be granted furloughs, early releases or the conversion of one type of sentence to another.[9]

Detainees whose sentences have to be served in a closed regime shall be held in prison (*penitenciária*).[10] Those whose sentences have to be served in an open regime are to be held in a *casa de albergado* (sheltered house). Sentences to a semi-open regime must be served in industrial or agricultural colonies.[11] These different penal institutions may be accommodated in one single prison complex, but detainees should be separated within these according to their legal status (awaiting

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3 Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

4 LEP, Article 43.

5 Penal Code, Article 59.

6 See, for example, José Henrique Pierangeli; Eugenio Raul Zaffaroni, *Manual de Direito Penal Brasileiro - Parte Geral - Vol 1 - 9ª Ed 2011* -, Revista Dos Tribunais, 2011; and Rogério Greco, *Código Penal Comentado*, Impetus, 2010.

7 For example, Lei No 12.403 da Prisão, das Medidas Cautelares e da Liberdade Provisória, 4 May 2011.

8 LEP, Articles 110 and 112 and Penal Code Article 33, §2°.

9 LEP, Article 66.

10 LEP, Article 87.

11 LEP, Article 91.

trial or convicted detainees) and the nature of the regime to which they have been sentenced (open/semi-open or closed regime). The Brazilian Constitution requires that 'the prison sentence shall be served in separate establishments, according to the nature of the offence, the age and the sex of the convict'.[12] The Minimum Rules state that prisoners belonging to different categories should be housed in different prisons or its sections according to personal characteristics such as sex, age, legal status, length of sentence, enforcement regime and specific treatment – given the principle of individualisation of punishment.[13] Women, juveniles and the elderly should be held separately from adult men in institutions appropriate to their personal situation.[14]

The law specifies a prisoner's route through the penal system in considerable detail. After sentencing, a prisoner should spend his or her first weeks or months in an observation centre, where a corps of trained personnel can conduct interviews and carry out personality and criminological exams to assess his or her behaviour and attitudes in order to select the most appropriate penal facility to reform that particular individual. In practice, however, Brazil's prisons lack both the staff and infrastructure to comply with the law. Many states do not have open facilities or anything like the number of low security units to cope with the number of sentenced prisoners – who overwhelmingly serve out their entire sentences in high security facilities instead. Brazil does not even have enough spaces in prison to accommodate all of its prisoners, despite the massive overcrowding that exists, and so many convicted prisoners remain for years in police lockups instead.

Brazil's prison population is around 500,000 people,[15] of whom around 280,000 are sentenced prisoners and 230,000 are being held in pre-trial custody. The number of prisoners in Brazil is increasing rapidly and the proportion of pre-trial detainees is also growing.[16] Between 2003 and 2007, the number of prisoners in pre-trial detention rose from 67,549 to 127,562; an increase of 89 per cent (compared to an increase of 37 per cent in the general prison population).[17] This has overwhelmed the capacity of the already overcrowded Brazilian penal system. According to DEPEN, in June 2008 the number of people being incarcerated exceeded the design capacity of Brazil's prisons by 40 per cent, and the number of prisoners was increasing by approximately 3,000 per month.[18]

The LEP specifies that every state should establish a local *Conselho Penitenciário* (prison council) and a *Conselho da Comunidade* (community council). The prison councils are responsible for

12 Constitution of Brazil, Article 5 (XLVIII).

13 Regras Mínimas para o Tratamento do Preso no Brasil, Article 7.

14 Penal Code, Article 37; LEP, Article 82 §1°.

15 Information for the year 2011 from the Conselho Nacional de Justiça **www.cnj.jus.br**, accessed January 2012.

16 According to a Brazilian government report submitted to a UN Human Rights Review body in March 2008, the prison population was 420,000, of whom around 122,000 were being held in pre-trial detention. See *National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil, Working Group on the Universal Periodic Review, First session, Geneva, 7-18 April 2008*, A/HRC/WG.6/1/BRA/1, 7 March 2008, para 61. According to a Ministry of Justice report the same year, the total number was 440,000. See Ministry of Justice/DEPEN, INFOPEN at **http://portal.mj.gov.br/data/Pages/MJD574E9CEITEMIDC37B2AE94C6840068B1624D28407509CPTBRNN.htm** accessed January 2012. Since the total number is estimated to be rising at a rate of about 3,000 a month, these figures are all broadly consistent.

17 Ministry of Justice, DEPEN, InfoPen, Consolidated Data 2008.

18 See *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Mission to Brazil*, A/HRC/11/2/Add.2 future, 28 August 2008, paragraph 42.

providing recommendations to the judges about whether individual prisoners should be paroled, pardoned or have their sentences commuted and whether and when they should be moved to lower levels of security. They must also present more general reports to the National Council on Criminal and Penitentiary Policy. The duties of the community councils should include visiting every penal institution, interviewing prisoners and presenting monthly reports to both the prison council and penal execution judges.[19] Judges are now required to establish *Conselhos da Comunidade* in their judicial divisions.[20] A few states have also established prison ombudsmen positions and a federal ombudsman position was created in 2004.

Judges also have a role in monitoring prison conditions, carrying out inspections and interdicting prison administrations that are in breach of the prison rules or sentencing law. Penal execution judges[21] and public prosecutors[22] must inspect penitentiaries on a monthly basis to verify that the LEP provisions are being respected. However, in practice such visits are rare and in many states, many of the monitoring mechanisms do not exist or, if they exist, do not function effectively. The judiciary is also overwhelmed by its workload and Brazil's Supreme Court has been described as the 'most overburdened in the world'.[23] This has led to a huge backlog of pending cases and means that trials are often subject to considerable delays.

The CNJ was itself created by a Constitutional Amendment in July 2004 as an oversight mechanism of the judiciary, and its significance is discussed further in chapter ten of this book.[24] It consists of 15 members appointed by the President of the Republic and approved by the Senate, of which nine will be federal and state judges; the remaining six members will be made up of representatives from *Ministério Público* (the Ministry of Public Prosecutors), the *Ordem dos Advogados do Brasil* – OAB (Brazilian Bar Association) and wider civil society. The President of the CNJ is also the President of the Supremo Tribunal Federal – STF (Federal Supreme Court) and so the Presidency of the CNJ changed in April 2010, when Minister Gilmar Mendes ended his term as President of the STF to be replaced by Minister Cezar Peluso, who, in turn was replaced by Minister Carlos Ayres Britto in April 2012.

The first mutirões: August 2008 – April 2010

Mutirão Carcerário was established by CNJ Ordinance No 383/08 and its implementation coordinated in partnership with Rio de Janeiro's State Court. A Working Group on Criminal Enforcement was established by the CNJ in April 2009 by Decree No 513/09. In December 2009, Lei 12.106 transformed this into a formal department – Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas – DMF (Department to Monitor and Inspect the Penal System and the System of Executing Socio-educational Measures).

19 LEP, Article 70.

20 Resolução Conselho Nacional de Justiça No 96, de 27 de outubro de 2009.

21 LEP, Article 66 (VII).

22 LEP, Article 6.

23 'When less is more', *The Economist*, 21 May 2009.

24 Constitutional Amendment 45 to the Constitution of Brazil Article 103B.

Among the functions of the department is to monitor and inspect all prisons in the country and to verify that socio-educational measures are being implemented by the appropriate authorities.[25]

Coordinated by a small team within the DMF based in Brasília, the *mutirões* are assembled on a state-by-state basis. They bring together judges, public prosecutors, public defenders, lawyers (through the Brazilian Bar Association) and members of the prison administration staff, to re-examine the caseload of all pre-trial and convicted prisoners on a systematic basis. The scope of the initiative has grown considerably since its introduction, both in the number of cases that it has been able to examine and also in its proposals for reforms within the penal system. The first *mutirões* were implemented during President Gilmar Mendes' term of office by Judge Erivaldo Ribeiro dos Santos. The second *mutirões* were implemented under President Cezar Peluso by Judges Luciano Losekann and Márcio André Kepler Fraga. As is discussed below, there are some differences in the way in which the projects were implemented and so the following account divides them into two phases so that lessons can be learnt from each experience. It should, however, be emphasised that the CNJ resolutions referred to above have ensured a legal continuity throughout the life of the project, which has now become a permanent part of the work of the CNJ.

The creation of the Mutirão Carcerário was prompted by a realisation that the Brazilian penal system was in crisis, caused by an ever growing caseload that neither the judiciary nor the prison authorities were able to cope with. Its stated aim was to work its way through all of Brazil's 27 states, prioritising the most serious problems. The *mutirões* were logistically difficult to organise because they require the assembly of groups of judges, prosecutors, defenders and other lawyers, who have to be released from their other duties, in a particular state for a period of time. The work is by its nature disruptive and some judges also resented having their initial decisions reviewed by others in this way, arguing that they distorted the work of the judiciary and interfered with their independence. Other critics argued that, by their very nature, the *mutirões* could only ever be a stopgap solution to the underlying problem, which required more fundamental reform. At the same time, the initiative revealed the extent of the crisis within the Brazilian criminal justice and penal systems.

In its first 11 months, between August 2008 and June 2009, Mutirão Carcerário examined 15,655 cases. It found that 3,364 pre-trial and convicted prisoners were being illegally detained, either because they had served their sentences, taking into account rights of remission, or they had served longer in pre-trial custody than they could expect to have received in a sentence, given the offence that they were charged with. A further 4,954 prisoners were entitled to be moved to lower levels of security for similar reasons. In November 2009, the CNJ announced that, after examining 83,803 cases, the mutirões had freed 16,466 people who had been imprisoned irregularly.[26] A further 27,644 were found to be being held at inappropriate security levels. The *mutirões* found hundreds of people who had spent far longer in pre-trial detention than they could have expected to serve as sentenced prisoners.

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25 CNJ website: **www.cnj.jus.br/sobre-o-cnj/presidencia/presidencia2/atas/313-quem-e-quem/quem-e-quem-dmf/13406-departamento-de-monitoramento-e-fiscalizacao-do-sistema-carcerario-e-do-sistema-de-execucao-de-medidas-socioeducativas-dmf** accessed January 2012.

26 *Dados atualizado do mutirão carcerário*, CNJ, 5 November 2009.

In the case of pre-trial detainees, the *mutirões* found that some judges appeared to be refusing to respect the presumption of innocence that is enshrined in Brazil's Constitution and laws – and to be remanding people in custody on legally spurious grounds. This, combined with the chronic slowness with which trials take place and the frequency with which they are interrupted, meant that many defendants were either spending longer in detention or on remand than the prison sentences that they could expect to receive if convicted, if indeed they received a prison sentence at all. For example, one man had spent 11 years on remand and the *mutirões* found many people who had spent five or six years in pre-trial detention. Others were being remanded in custody for extremely minor offences such as shoplifting, which do not actually carry a prison sentence.[27] In Piauí, almost 80 per cent of the prison population was made up of pre-trial detainees, so only two out of every ten prisoners had actually received a prison sentence.[28]

In the case of convicted prisoners, the problems mainly seem to have been bureaucratic delays, inertia and inefficiency. Inaccurate and out-of-date records and a lack of adequate databases and computer software meant that both the judiciary and the penal authorities were unable to keep effective track of the prisons within their jurisdiction, while a lack of coordination between them meant that they were often unable to agree even on how many prisoners were being held.

Prisoners were becoming lost in the system. They were not receiving the sort of progression over the course of their sentences that is envisaged in Brazilian law, through lower forms of security to prepare them for eventual release. The *mutirões* also noted that many penal establishments were failing to provide them with the educational courses, training and work-release programmes that the law specifies. Although Brazilian law states that the main purpose of imprisonment should be re-socialisation and rehabilitation, this was clearly not being reflected in practice and little effort appeared to have been made to reduce the high rates of recidivism among ex-prisoners.

In December 2009, the *mutirões* were awarded a special prize by the Innovare Institute for promoting innovation in the field of justice. It was clear that what had started as a stopgap solution needed to be integrated into a programme of long-term penal reform.

Overview of a crisis

In April 2010, Gilmar Mendes, then President of Brazil's Supreme Court and the CNJ, announced that the *mutirões* had examined 111,000 cases in the previous year and a half, which had resulted in the release of 20,700 prisoners from detention and 34,000 more prisoners from benefiting from reductions in security levels.[29] He also noted that while LEP specifies that all convicted prisoners should have access to work and basic education courses, recent research showed that in one state in 2008, only 24 per cent had access to work and 17 per cent had access to basic educational courses. He noted that the study also showed that prisoners who had received work experience or education courses in prison were significantly less likely to reoffend.[30]

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27 See Interview carried out with Erivaldo dos Santos (2012) 66 'IBA Global Insight' 51.

28 *Ibid*.

29 Presidente Gilmar Mendes - Mutirões carcerários, uma aula de Brasil, Sexta, 23 de Abril de 2010 **www.cnj.jus.br/images/programas/justica-criminal/artigo-presidente-gilmar-mendes.pdf** accessed January 2012.

30 *Ibid*.

Minister Mendes stated that prison numbers were growing by over seven per cent a year, while investment in new prisons was falling way behind, creating an ever greater gap between capacity and demand. Prisons were becoming more and more overcrowded, unhealthy and dangerous places 'infested by rats feeding on accumulated rubbish', while the courts of criminal justice and the Public Defender's Office lacked the technical capacity to oversee the system. He noted that prison overcrowding would be even worse if the authorities were ever able to enforce the thousands of outstanding prison sentences on people who had taken advantage of the system's inefficiencies to abscond. He said there was a 'paradox' in the system that, through its inefficiency, was imprisoning thousands of people who were legally innocent while permitting thousands of others who had been found legally guilty to evade justice entirely.[31] 'The CNJ must work to reverse this abomination', he concluded.

The *mutirões* had uncovered a systemic failure at the heart of Brazilian penal policy. In the first phase of the project it found that almost 20 per cent of prisoners in Brazil were being detained illegally. A further third were being held in conditions inappropriate to the sentence that they had received, considering the amount of time that they had served. In other words, around half of the total prison population was being detained inappropriately. Almost all were being denied the basic humane conditions of detention that Brazilian law specifies they have a right to. This was illegality on a massive scale within the very system charged with upholding respect for the law.

Brazil's prison population has trebled in the last two decades and the pre-trial population has more than quadrupled.[32] Part of the reason why prison numbers have risen so dramatically is because a large number of people are being imprisoned illegally or being denied their entitlements to release, or progression to lower forms of security. This has contributed to the chronic overcrowding within the system, which has exceeded the capacity of staff to control them and allowed many to fall under the effective control of criminal gangs.

Imprisoning people is expensive and the money spent on building and maintaining prisons is often diverted from alternative programmes, which may be more effective at reducing crime in the long term. While imprisonment aims to incapacitate offenders, by ensuring that they are unable to commit crimes while they are actually in prison, the vast majority of prisoners will be released eventually and so the supposed gains of this policy are only short term. Even this gain may be illusory in Brazil, as there is considerable evidence that the leadership of the main Brazilian crime gangs are based within the prisons and coordinate the activities of their followers outside using illegally smuggled mobile phones. The gangs also recruit inside the prisons – so sending more people to prison for petty crimes simply provides them with more members.

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31 *Ibid*.

32 See *One in Five: The crisis in Brazil's prisons and criminal justice system*, International Bar Association, February 2010, quoting figures issued by the CNJ and the Ministry of Justice.

Prison overcrowding also increases the negative effects of imprisonment, endangering the lives of both prisoners and prison staff, and making it harder to implement programmes aimed at helping the rehabilitation and resettlement of former prisoners. This, in turn, makes it more likely that they will reoffend in the future, creating a vicious cycle that puts more pressure on the overall prison population. Lack of resources also means that prisons are unable to provide the basic minimum humane conditions of detention required by Brazilian law and which are widely recognised as essential if prisons are to become places of rehabilitation and re-socialisation rather than training grounds for future criminality. The high recidivism rates among ex-prisoners has contributed to Brazil's already dramatic crime rates, which has increased the popularity of tougher law and order approaches that longer prison terms offer in relation to alternative sentences. This in turn increases prison numbers even further beyond the capacity of the penal and criminal justice systems.

The second phase: April 2010 – December 2011

In April 2010, the Mutirão Carcerário was reconstituted when Minister Cezar Peluso assumed the Presidency of the STF and CNJ and appointed Judges Luciano Losekann and Márcio André Kepler Fraga as its coordinators. This provided continuity for the project, which continued to be supported by a small team of staff within the CNJ's DMP.

The work of the *mutirões* was expanded as each state was required to prepare written reports on their work, which are formally submitted to the CNJ for approval. The reports contain detailed statistics about prison numbers in each state, as well as accounts of prison conditions based on inspections carried out by the legal teams. In addition to re-examining the case files of every prisoner in the state, the *mutirões* are also required to report on whether the courts are experiencing excessive backlogs or delays in processing cases and how their efficiency can be increased. The inspections of places of detention include reports on how security and safety could be improved for staff and prisoners alike, and on whether conditions are in conformity with the standards set down in Brazil's laws and Constitution. The reports provide realistic and transparent appraisals of the actual conditions in places of detention and the effectiveness of the Courts of Criminal Execution in supervising them.

There is currently little accurate authoritative data that can be consistently used across the Brazilian penal system. In some states, different state bodies even use different methodologies for counting prison numbers within the state. For example, in Pernambuco, the prison authorities informed the *mutirão* that there were a total of 24,000 prisoners in the state, yet the *mutirão* only found 22,400 prisoners and concluded the additional numbers came from double counting.[33] In the *mutirão* carried out in Paraíba in 2011, the investigating team was informed by the Secretary for Penal Administration that there was no up-to-date list of prisoners being held in the state.[34]

The lack of reliable data makes it difficult to analyse all other related problems such as overcrowding, what proportion of prisoners are being provided with work and educational opportunities, and the

33 Relatório, Mutirão Carcerário, Pernambuco – 2011, CNJ, 16 November 2011.

34 Mutirão Carcerário do Estado da Paraíba, CNJ, 25 February 2011, 17.

adequacy of health services based on ratios to the number of prisoners. The reports of the *mutirões* therefore provide a very important authoritative reference source on the Brazilian penal system, which can lead to far more monitoring and provide a basis for more objective decision-making about the allocation of scarce resources.

The *mutirões* also provide a holistic approach to tackling the problems that they encounter, bringing together both the various justice institutions and the penal administration and security authorities. By publishing their reports and recommendations publicly, they also take on an advocacy function and provide the basis for engagement in civil society. In Alagoas, for example, the *mutirões* organised workshops to discuss their initial reports and the recommendations of these were included in the final version of the report.[35] The report of the *mutirão* in Paraná also noted that one of the benefits of the process had been what it referred to as the 'pre-*mutirão* effect', where judges and the public authorities made a particular effort to get their cases in order in the knowledge that these were about to be externally scrutinised. [36]

In São Paulo, the work of the *mutirão* was supported by lawyers from the Instituto de Defesa do Direito de Defesa – IDDD (Institute for Defence of the Right to Defence) a criminal justice non-governmental organisation (NGO) and many of the reports produced elsewhere recommend forging closer links with Pastoral Carcerária (Pastoral care of Prisoners), university law faculties and other civil society organisations. The process is, therefore, helping to strengthen links between the official justice institutions and wider Brazilian society around a common reform agenda.

Prison conditions and the *mutirões*

Other reports have been published on Brazilian prison conditions, such as those produced by occasional Parliamentary Commissions of Inquiry (CPIs), NGOs such as Amnesty International and monitoring bodies such as the United Nations (UN) and Organization of American States (OAS). However, none of these matches the comprehensiveness and detail of those produced by the Mutirão Carcerário. It is also significant that these reports cannot be dismissed as politically motivated or subject to bias or outside interference, since they have been produced by judges themselves who are legally responsible for monitoring compliance.

Most of the reports include photographs of particular prisons and police lock-ups to show the physical conditions in which prisoners are accommodated and are also based on interviews in which specific complaints of the prisoners are noted. Some of the photos and descriptions are quite harrowing. The report on Maranhão, for example, contains a photo of the decapitated heads of two prisoners, murdered during a prison riot – and notes that 43 prisoners had been killed in inter-prisoner violence in the previous year.[37]
The reports often also include details of contraband seized during searches, details of prison riots, escapes and deaths of inmates and some allegations of unprofessional behaviour against

35 Mutirão Carcerário de Alagoas, CNJ, no date, 25.

36 Mutirão Carcerário do Estado do Paraná, CNJ, 21 June 2010, 141.

37 Mutirão Carcerário de Maranhã, CNJ, 2011, 65–6.

the staff responsible for administering places of detention. Most contain complaints about the quality of food, lack of healthcare, overall conditions and the long delays in the processing of their cases. Many states have nowhere near the number of beds and mattresses to cater for all of their prisoners and so many have to sleep on concrete floors. The *mutirão* for Rio Grande do Norte quoted a member of the *Conselho da Comunidade* saying that some of the prison establishments in the state were not fit to hold wild animals in.[38] The *mutirão* for Rio Grande do Sul noted that almost all prisons in the metropolitan region were dominated by organised crime factions.[39] The *mutirão* for Minas Gerais noted that not a single prison was fulfilling its responsibility to separate convicted prisoners from those held in pre-trial detention.[40] Many reports called for the immediate closure of specific prisons.

The reports confirm many of the general problems that are already very well known, such as the overcrowding and deplorable conditions of many places of detention, lack of sufficient staff, the absence of medical facilities, educational activities or recreational spaces, the weakness of the Public Defender's Office, and the continuing huge backlog facing the courts in dealing with cases. However, the fact that these are public reports produced by judges gives them a special significance. For example, the *mutirão* for Alagoas summarised conditions in the state in the following, fairly typical terms:

> 'Prison buildings are in a poor state of repair and inappropriate for housing inmates in almost all units of the state
> All prisons are overcrowded
> There are few places of study provided
> There is a large deficit of places
> Many prisons contain dark cells, which are poorly ventilated, producing a very unhealthy environment
> Access to medical, dental and psychological facilities is restricted to a few prisons and provision is completely inadequate
> There are not enough prison staff to provide internal security, or sufficient police to provide external security
> Only a few prisons provide opportunity for external work
> There is a very high percentage of pre-trial detainees among the overall prison population.' [41]

In Amazonas, a number of prisoners took the opportunity of the visit to complain to members of the *mutirão* that they had been tortured and suffered other forms of violence. Some spoke about this openly in front of the guards, while others requested private interviews to make complaints. One stated on video that he had been tortured on the direct orders of the Director of the Penitentiary System after he had protested about the state of the trucks in which prisoners were being transported.[42] However, it appears that most interviews with prisoners took place in

38 Mutirão Carcerário de Rio Grande do Norte, 7 January 2011, 281.

39 Mutirão Carcerário de Rio Grande do Sul, 14 March 2011 – 15 April 2011, 12.

40 Mutirão Carcerário de Minas Gerais, 16 August – 8 October 2010, 15.

41 Mutirão Carcerário de Alagoas, CNJ, no date, 25.

42 Mutirão Carcerário de Amazonas, CNJ, no date, 35.

public view of the prison guards and police and little attempt was made to interview prisoners privately, so many are likely to have been intimidated out of making complaints. This is clearly a serious problem and future visits should address it. It may be useful to learn from the standard methodology for visits used by the International Committee of the Red Cross (ICRC) described in chapter seven of this book.

It is obvious from reading the reports that many of these places of detention are not used to receiving inspection visits, and that the judges taking part in the *mutirões* are not used to conducting such visits, although this is a formal responsibility of the judiciary in their areas of authority. Some of the reports also provide a good overview of the work of other bodies charged with monitoring places of detention – such as the Prison Councils, Community Councils, the Public Prosecutor's Office and Public Defender's Office – which could help to build up a picture of the effectiveness of the present system of prison monitoring. The *mutirão* for Rio Grande do Sul, for example, contained several proposals for how the Superintendent within the Secretary for Public Security responsible for prison monitoring could be strengthened and made more efficient.[43] The *mutirão* for Maranhão noted that most prisons visited had no records of inspections carried out by the Public Prosecutor, or had only previously been visited at the time of the last *mutirão* in the state.[44]

The practical recommendations for the judiciary include: the introduction of computer software so that judges can calculate a prisoner's progress through his or her prison sentence; the creation of new Courts of Criminal Execution; the use of video hearings with defendants to speed up the conduct of trials; and the automatic appending of a defendant's criminal record to their case-files from the very start of any judicial proceedings. Some of these recommendations occasionally appear self-serving in that the resources requested, such as an increase in administrative staff for a particular court, would make the lives of judges easier. Nevertheless, by identifying specific reforms, such as the opening of a new court of criminal execution in a particular place or providing more resources to courts, which provide alternatives to custodial sentencing, the *mutirões* provide a good guide to where greater investment could be most usefully targeted.

Security is a major issue in many courts and prisons and this needs to be balanced with respect for prisoners' rights. The *mutirão* in Goiás, for example, called for the introduction of metal detectors in all court buildings, the creation of an internal corridor and separate lifts for the transport of prisoners, the issuing of more tasers to prison staff and the deployment of more video cameras and equipment to block the use of mobile phones in all prisons.[45] In Santa Catarina, by contrast, the *mutirão* noted that the practice of manacling prisoners by the hands and feet while they are being taken to and from court appearances 'generates enormous discomfort and embarrassment for prisoners and third parties mainly due to the noise which the chains make as they drag along the ground, particularly when prisoners are using the stairs of the building, which happens often because there are few lifts. The *mutirão* heard from lawyers that challenges to the use of such manacles are repeatedly dismissed by judges, even when there is clearly no security risk'.[46] Both sets of recommendations may be equally valid and the *mutirões* bring a much needed balance and nuance into this debate about security and human dignity.

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43 Mutirão Carcerário de Rio Grande do Sul, 14 March 2011 – 15 April 2011, 277–279.

44 Mutirão Carcerário de Maranhão, CNJ, 2011, 68.

45 Mutirão Carcerário do Goiás, CNJ, 26 September, 72, 73 and 75.

46 Mutirão Carcerário do Estado de Santa Catarina, CNJ, no date, 6.

Many of the recommendations call for better health and dental care as well as addressing the insanitary conditions that prisoners face. For example, in Rio Grande do Norte the report notes that many of the prisons had open drains containing untreated sewage, which as well as being unpleasant posed a health risk to the prisoners.[47] In Acre, it was noted that the conditions of overcrowding and lack of ventilation were aggravated by the hot and humid climate.[48] In Pará, the report includes a description of metal container cells, used at police lock-ups, in which cells measuring five metres by six metres were used to accommodate six prisoners each:

> 'The heat inside the cells is almost unbearable. Although they are not directly exposed to the sun and there is a space for ventilation between the top of the containers and the cover of the structure, it is completely inadequate… Moreover, one cannot forget that the state of Pará has a tropical climate with high humidity and this makes the situation of the detainees still more precarious… [the prisoners] remain in their cells – and stinking hot – twenty-four hours a day, receiving only meals supplied by private contractors, whose behaviour was the subject of constant complaints. The cells do not have any kind of structure to receive the prisoners, not even beds. The prisoners did not have mattresses, having to sleep on the floor, which in some places is wet and soggy… There are places, however, as the Bureau of Marituba where the overcrowding is so bad that there was not room even for all of the prisoners to lie down at the same time. A corridor of 4 metres by 1.5 metres was used as a cell to accommodate 17 people, while another cell, measuring 4 metres by 3 metres housed 20 people. The heat was so extreme that water from hoses was turned on constantly, drenching the floors. Prisoners drank from the same water. Skin problems, due to the heat, humidity and lack of sunshine, are very common and several prisoners showed us boils on their backs and legs.'[49]

There are numerous and extremely detailed recommendations about how conditions could be improved in individual places of detention in each state. Replacing one dilapidated prison with new smaller prison units, for example, is frequently suggested.

The reports also contain examples of good practices in many states, such as projects that inform prisoners of their rights and provide them with legal assistance, facilitate inspections or investigations of complaints, and help to prepare prisoners for their re-entry into society through training and work experience. There are dozens of such projects operating on a small scale throughout Brazil. Some have been created by the justice institutions (judges, public defenders and public prosecutors), while others have developed in civil society and then forged links with the courts. Some have developed links with university law departments to provide legal services or with hospitals to provide healthcare or local employers to provide training or work experience. Scaling up the most successful of these projects will be a way of spreading good practice throughout the system.

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47 Mutirão Carcerário de Rio Grande do Norte, 7 January 2001, 283.

48 Mutirão Carcerário do Acre, CNJ, July 2010, 14.

49 Mutirão Carcerário do Pará, CNJ, October 2010, no page numbers.

The *mutirões* are also tasked with monitoring the implementation of *Começar de Novo*, a special project created by the CNJ to help former prisoners find jobs. This project strengthens links between the judiciary and the state secretaries of public security, while highlighting other good practices and making suggestions for reforms. For example, the *mutirão* in Ceará recommended that the CNJ, the Minister for Sport and the State Governor sign a partnership to ensure that young offenders be employed in public work programmes in the run-up to the World Cup in 2014.[50] The reports note that *Começar de Novo* is being implemented with varying levels of commitment in different states and the visits are intended to mobilise support for it among the authorities.

The reports are not currently produced in a standard format, which makes it difficult to extrapolate information about national trends. Some are only a few pages long, while others are several hundred. The level of detail that they provide, therefore, varies quite considerably and it is difficult to use them as an indicator of where problems may be most acute. A short report with a superficial overview may inadvertently indicate that the problems in a particular state are far graver than in one where they are outlined in far greater detail, since at least in the latter case the inspection has been more credible.

Nevertheless, the *mutirões* provide a valuable picture of the principle challenges that each state faces in ensuring that Brazil's penal system begins to conform with its own laws and Constitution. They could also form the basis for discussions between the different justice and security institutions and civil society in each state about how the gap between Brazil's laws and practices can be bridged. The CNJ is producing a publication, which summarises the work of the *mutirões* across Brazil. The book contains numerous photos of current conditions in prisons and an exhibition is also being produced, which can help stimulate public debate about the need to improve prison conditions.

Comparing the two phases

The main reason for the establishment of Mutirão Carcerário was to review caseloads of people deprived of their liberty and, although it has also taken on other functions, this remains one of the principle functions of the project. One important change was introduced to the way in which the *mutirões* functioned in April 2010, when the change in the CNJ's Presidency led to a change in the coordination and organisation of the project.

During the first *mutirões*, the team of judges brought in to re-examine the cases in each state had not previously worked on these cases – although they were drawn from the same court. This was felt to offer a degree of independence and objectivity when analysing the original decisions, particularly in relation to pre-trial detainees. However, some judges objected to their decisions being scrutinised in this way. They argued that the existing system already provided sufficient oversight, through the courts of appeal, and that the CNJ was overstepping its mandate and interfering with their work. The CNJ is an administrative oversight body and not part of the criminal justice appeal process. It was, therefore, felt inappropriate for it to overturn decisions about whether or not to remand pre-trial detainees in custody. For the second *mutirões*, the re-examination of cases was carried out by the judges of their own original decisions.

50 Mutirão Carcerário do Estado do Ceará, CNJ, 10 February – 18 March 2001, 45.

In November 2011, the CNJ announced that the *mutirões* had analysed 295,069 criminal cases in 2010 and 2011, which had resulted in the release of 21,889 prisoners and the moving of 44,966 prisoners to lower levels of security or other benefits in their conditions.[51] Although this figure is very high, it is much lower than the first phase of the project. Between August 2008 and April 2010, the *mutirões* found that in almost 20 per cent – or one in five – of the cases that they examined, people were being wrongfully detained and should be freed from prison. However, this proportion dropped by more than half to nine per cent for the *mutirões* conducted in 2010 and 2011.[52] The number of prisoners being held at inappropriate security levels also dropped significantly when the first year and-a-half's figures are compared with the subsequent two. In the first year-and-a-half of their work, the *mutirões* found that in around a third of all the cases that they examined, prisoners were being held at inappropriate levels of security or denied other benefits to which they were entitled. In 2010 and 2011, this proportion had fallen to just under a sixth.[53]

It is difficult to compare the two phases exactly because the new methodology was introduced after April 2010, so some of the *mutirões* conducted in that year used the previous method of inspecting cases. As discussed above, there are also numerous problems with collecting reliable national statistics relating to prisoners in Brazil and it is likely that the proportions could change over time. The project initially prioritised examining cases where it believed the problems were most serious and so it would seem likely that the number of prisoners being freed from detention or benefiting from reductions to their security would fall over time as there would be fewer mistakes to correct. In some places, they were also re-examining caseloads that had already been scrutinised by the first *mutirão*.

However, the CNJ has also published figures comparing the two phases directly.[54] These are broadly consistent with the other published statistics and show a quite dramatic fall in the release rate. During the first phase of the project, the *mutirões* examined 121,189 cases, which led to 19,634 prisoners being freed. This amounts to just over 16 per cent of the total number of cases examined. A further 33,485 prisoners benefited by changes to their security status. In the second phase of the project, using the new methodology, the *mutirões* examined 310,077 cases, which led to 23,783 prisoners being freed, which is 7.68 per cent of the total. A further 48,308 prisoners benefited from changes to their security status, which is 15.57 per cent of the total.

The biggest difference was in releases from pre-trial detention. In the first phase of the project, the *mutirões* freed 10,656 from pre-trial detention, while in the second phase – despite examining more than twice as many cases – the *mutirões* only freed 2,856 people from pre-trial detention. The basic reason for this seems to be the change in methodology. When other judges were asked to review a decision to remand someone in pre-trial detention, they were far more likely to consider it to have been inappropriate than when the judge who made the original decision reviewed it.

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51 *Mutirão Carcerário libertou mais de 21 mil pessoas em dois anos*, 25 November 2011, **www.cnj.jus.br/noticias/cnj/17135-mutirao-carcerario-libertou-mais-de-21-mil-pessoas-em-dois-anos** accessed January 2012.

52 *Sistema de Mutirão Carcerário*, Relatório Geral, 10 January 2012, **www.cnj.jus.br/relatorio_mutirao/relatorio/relatorio_geral.wsp** accessed January 2012.

53 *Ibid*.

54 *Mutirão Carcerário* – 2010–2011, CNJ, no date. The figures cover June 2010 – November 2011.

Although Brazil's Constitution and laws specify that the presumption of innocence means imprisonment should only be used as a last resort, the criminal procedure code gives judges considerable discretionary power to imprison people. The CPP allows judges to impose 'precautionary measures' (including imprisonment) on suspects that may be decreed during police investigations or the discovery stage of criminal proceedings.[55] Preventative imprisonment can be decreed in three circumstances: to 'uphold the public or economic order'; to allow a criminal investigation to proceed without inhibition; and to guarantee the future application of criminal law.[56] These grounds are extremely wide ranging and grant huge subjective discretion to individual judges.[57]

Research suggests that judges often fail to order the release of suspects arrested in flagrante for even minor offences unless they have documents proving their identity, residence and occupation, which can be a particular problem for homeless people or those living in favelas.[58] Judges are also far less likely to grant bail to people accused of certain crimes, such as drug-trafficking, even when those arrested are holding small quantities of drugs for personal use and are not linked to criminal gangs.[59] Given the lengthy and drawn-out nature of Brazil's judicial trials, many believe that judges are sometimes influenced by public pressure for the imprisonment of people suspected of criminal activity even before they have been tried and sentenced. This is discussed in more detail in the second chapter of this book.

One analysis of the pattern of pre-trial detention in five Brazilian cities found that judges were routinely imprisoning large numbers of people who had been accused of larceny (petty theft), even though this is an extremely minor offence.[60] In some courts, over a third of those detained on this charge had spent more than 100 days in custody and many spent longer on remand than the custodial sentences that they eventually received. The study showed that the use of pre-trial detention varied significantly in different parts of the country and seemed to be related to a number of subjective factors, such as the attitude of particular judges. While in Porto Alegre, in the south, the incarceration rate for people arrested in flagrante for this crime was around 30 per cent, it was as high as 90 per cent in the northern city of Belém.
In May 2011, Brazil introduced a new law to amend the CPP to ensure that pre-trial detention is only really used as a last resort and to provide a range of alternative measures to imprisonment that judges can impose.[61] The law, which is discussed further in chapters three and ten of this book, was introduced specifically because of concern about the numbers of people being sentenced to pre-trial detention inappropriately.

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55 Código de Processo Penal 1941, Article 312.

56 *Ibid*, Article 312.

57 Rogerio Schietti Machad Cruz, *Prisão Cautelar: dramas, princípios e alternativas* (Editora Lumen Juris, 2006).

58 See chapter two.

59 *Tráfico de drogas e Constituição, Um estudo jurídico-social do tipo do art.33 da Lei de Drogas diante dos princípios constitucionais-penais*, Universidade Federal do Rio de Janeiro (UFJR) e Universidade de Brasília (UNB) Março de 2009.

60 Fabiana Costa Oliveira Barreto, *Flagrante e Prisão Provisória em casos de furto, da presunção de inocência à antecipação de pena* Instituto Brasileiro de Ciencias Criminais, 2007.

61 Lei No 12.403, de 4 de maio de 2011.

As is discussed above, the number of prisoners in Brazil is increasing rapidly and the proportion of pre-trial detainees is the fastest growing part of this increase. Other chapters of this publication show that there are significant deficiencies within the Brazilian criminal justice system, which puts defendants too poor to afford private lawyers at considerable risk of wrongful imprisonment. This is particularly the case in relation to pre-trial detention, where subjective factors, such as the attitudes of individual judges, can lead to people being unjustly deprived of their right to liberty.

Conclusion

In January 2012, the CNJ announced that since the beginning of the project, and after examining 413,236 cases, the Mutirão Carcerário had freed 36,673 prisoners and given benefits to 72,317 other prisoners.[62] This means that over 100,000 people were either being wrongfully detained or held in excessively harsh conditions in relation to the prison sentence that they received. These figures and revelations are by any standards shockingly large and, as is discussed above, they may actually understate the true scale of the problem.

The most significant danger of the Mutirão Carcerário is that it becomes a substitute for a thorough overhaul of the existing system. The *mutirões* were formed as an ad hoc response to a crisis caused by the failure of existing bodies charged with scrutiny, oversight and inspection of cases and places of detention in Brazil. The project should not be seen as an alternative to these bodies, but should rather be used to improve their performance through monitoring and oversight.

Brazil's laws and Constitution already spell out the rights to which its people are entitled. The legal system should guarantee that all people charged with a criminal offence have a right to a fair trial, including the right to adequate legal assistance and to be presumed innocent until proved guilty beyond all reasonable doubt. All people deprived of their liberty have the right to be treated with humanity and with respect for the inherent dignity of the human person. The bodies responsible for monitoring places of detention and ensuring that prison conditions are in conformity with Brazilian law should be required to do so and be adequately equipped for these tasks. The Mutirão Carcerário has shown how large the gap has become between the formal rights and safeguards that Brazil's laws and Constitution guarantee to its citizens and the shocking realities of its criminal justice and penal systems.

62 See above, note 52.

CHAPTER TWO

Legal Aid and Pre-trial Prisoners: an Experiment in the City of Rio de Janeiro

Julita Lemgruber and Marcia Fernandes

Introduction

This project examined the impact of legal aid on the lives of pre-trial prisoners in the city of Rio de Janeiro. It was funded by the Open Society Foundations and implemented by the Association for Prison Reform (ARP),[1] from January 2010 to June 2011. Its main goals were to collect information on the profiles of these pre-trial prisoners and provide legal aid for 60 of them. In actual fact, 130 pre-trial prisoners received free legal aid through the project.

The legal aid was provided by five lawyers, assisted by a social worker, between June 2010 and June 2011. A Memorandum of Understanding was signed with Rio de Janeiro's Civil Police. The inclusion criteria for the group receiving legal aid were that they must be prisoners accused of committing non-violent crimes against property (mostly stealing), or drug-trafficking where they had no affiliation to criminal gangs. These crimes were chosen because, under Brazilian law, an alternative to a prison sentence may be applied to these crimes and so these defendants should not, as a rule, be held in pre-trial detention.

When the project began, there were 2,597 pre-trial prisoners in police lock-ups in Rio de Janeiro State. In order to establish their profiles, the project interviewed 479 of these prisoners during a survey conducted at ten police lock-ups in April and May 2010. Drug trafficking was the most common accusation of the prisoners interviewed, followed by robbery. A quarter of those interviewed were receiving no legal aid. In order to evaluate the impact of legal aid provided through the project, a database was set up with information on 575 pre-trial prisoners. Among them, 130 were effectively assisted, with requests for pre-trial release presented by the project lawyers during the first 20 days after the allocation date of the warrant of arrest in flagrante delicto by the Rio de Janeiro Court of Justice. In addition to this, 148 were approached but could not receive legal aid due to a variety of reasons; and 297 constituted the control group.

For the assisted group, the lawyers presented requests for pre-trial release in order to await trial, release from prison and habeas corpus. The project managed to secure the release of 25 per cent of the assisted prisoners, compared to 16 per cent of the approached prisoners, and 21 per cent of the control group; reflecting a very minor improvement for the project.[2] Some prisoners were released through the intervention of the Public Prosecutor's Office or the judge, and when these are included the percentage of prisoners released during the first 20 days reaches some 30 per cent for assisted prisoners, compared to around 23 per cent for the approached prisoners and 23 per cent for the control group. However, once the prisoners who were paying for assistance from private lawyers are removed from the statistics, the contrast becomes considerably starker.

The project succeeded in gaining the release of 30.6 per cent of the prisoners that it was assisting during their first 20 days in custody, compared to 18 per cent of the approached prisoners receiving legal aid through the Public Defender's Office and 13.7 per cent of the control group, also receiving aid from the Public Defender's Office. This means that the project was almost twice as successful in securing the release of prisoners from pre-trial detention as the Public Defender's Office, which

1 An offspring of the Center for Studies on Public Security and Citizenship (CESeC/UCAM).

2 This rises to 38 per cent for release orders issued to assisted prisoners after the first 20 days, but this group cannot be compared with the others for various methodological reasons.

is constitutionally charged with defending the rights of those accused of a criminal offence – including the right to be presumed innocent until proven guilty. This highlights a serious failure within the Brazilian criminal justice system, which is further discussed below.

The research project also found that 30 per cent of the 575 prisoners in the database finally received non-custodial sentences, which means that they should never have been initially held in pre-trial detention. This also highlights a serious problem within the system, which is effectively violating the right to liberty of these people. Judges were significantly more likely to release people accused of non-violent crimes against property from pre-trial detention than those accused of drug trafficking (27.5 per cent compared to five per cent) and this seems to be based on societal prejudice, rather than legal grounds. In the 70 per cent of the cases that it handled, the Public Defender's Office did not even present requests for pre-trial release during the first 20 days after the allocation date of the warrant of arrest in flagrante delicto.

Setting up the project

In order to ensure the feasibility of providing legal aid for prisoners held in Civil Police lock-ups, attempts were initially made to enter into an agreement with the Rio de Janeiro State Public Defender's Office. This arrangement was never finalised, despite the efforts of the team coordinating the project. Subsequently, attempts were made to contact the higher echelons of the Civil Police, which was the entity in charge of prisoners held in police lock-ups. A contract was finally signed on 10 May 2010, on providing legal aid for these prisoners for a period of 12 months. According to the terms of this agreement, the project would assist prisoners detained in Civil Police lock-ups in the Rio de Janeiro Metropolitan Region, with the following profile: first offenders accused of non-violent crimes against property or severe threat to persons; and those accused of unaffiliated drug dealing – that is, those not identified as members of criminal organisations.[3] The Civil Police was to present a weekly list of prisoners with these characteristics, selected from each weekly intake.

It soon became clear that the Civil Police was not in a position to draw up such lists because there was simply no computerised data suitable for this purpose. The lists were either incomplete or arrived long after the candidates for assistance were arrested. Consequently, it was decided to alter the strategy. With the support of Associate Justice Sérgio Verani, at that time Deputy Justice of the Rio de Janeiro State Court of Justice, the project lawyers began to access lists of men and women arrested each day by the Civil Police. Through examining these lists, which were produced by the Court of Justice, it was possible to identify prisoners fitting the project profile. With these potential clients identified by name, contact was made with the Civil Police in order to discover the jails where they were being held.

Initially, interviews with pre-trial prisoners were clustered at the Grajaú jail, holding with the profile established by the agreement signed with the Civil Police. Subsequently, due to changes requested by the police, pre-trial prisoners with the project profile were transferred to other jails, such as Nova Iguaçu, Duque de Caxias, Pavuna and São João do Meriti. Consequently, all these jails were included

3 As defined in Article 33, paragraph 4, of Law No 11,343 dated 2006.

among those visited by the project lawyers. The only jail that was never visited by our lawyers was in São Gonçalo, whose inmates were being assisted by lawyers from the Human Rights Defender's Institute, a non-governmental organisation (NGO), also supported by Open Society Foundations. For cost and time reasons, the assistance provided by the project lawyers was limited to prisoners whose cases were being heard by criminal courts in the Rio de Janeiro Municipality. Similarly, the possibility of assisting women was also dropped because all the female prisoners held in custody by the Civil Police were detained in jails remote from the state capital.

As this project focused on obtaining releases allowing prisoners to await trial in freedom, it was decided that the lawyers should file these requests for the largest possible number of clients, instead of following up on cases through to judgment. Moreover, as the profile selected for this project consisted of the prisoners who would be sentenced to alternative penalties or curtailment of their rights rather than imprisonment, if found guilty, there was no justification for them remaining in jail. This decision stepped up the number of prisoners receiving legal aid through the project, thus doubling the original proposal.

After obtaining information from the Civil Police on the jail in which our potential client was held, he was contacted by one of the lawyers who presented the proposal addressed by the project. If the prisoner showed interest in receiving assistance, he was given a document to sign that appointed one of our lawyers to represent him. As a power of attorney, this document was quite clear: the responsibility of the project lawyers was limited to attempts to ensure that the prisoner could await trial in freedom. There was no commitment to provide legal aid through to the judgment of any specific prisoner. Care was taken to explain that after the intervention of our lawyers, the prisoner should appoint a private lawyer or contact the Public Defender's Office.

The definition of the strategy for ensuring that the prisoner could await trial in freedom was discussed with the legal coordinators and consultants of the project, working with three types of requests for release: awaiting trial in freedom; release from jail; and habeas corpus. Our requests for release had to be supported with documents proving that the accused had a fixed abode with lawful employment, as this is a requirement imposed by most judges. Applications for habeas corpus did not need to be supported by such documents, as the legal grounds for these requests is the unlawful status of the imprisonment. As it was already known that obtaining these documents was of vital importance for the success of provisional releases in order to await trial in freedom, a social worker was hired to contact the families of the assisted prisoners and obtain copies of documentary evidence of fixed abode and lawful employment, if any.

Methodology

The criteria that were used for any specific prisoner to be considered as a potential client and be interviewed by the project lawyers were the following:

- Perpetration of a non-violent crime against property with no severe threat to persons;
- Engagement in unaffiliated drug dealing – defendants not involved with criminal factions;
- Inclusion on the list of people arrested in flagrante delicto supplied by the Court of Justice during the Project implementation;

- Being held in Civil Police lock-ups during lawyer visits. People not found in the jails, either transferred before the arrival of the lawyers or due to mistakes on the list, are not included in the database.

There were requests from people who did not fit the project profile, such as those already jailed for more than 25 days when our lawyers visited the lock-up, but these requests were not included in either the database or the analyses. An additional criterion was the requirement of first offender status, also for crimes against property. However, difficulties in obtaining documentary confirmation of the prisoner's status as a first offender and the fact that defendants who claimed to be first offenders had in fact been sentenced on other occasions resulted in this criterion being dropped from 15 June 2010 onwards. Thus, only four per cent of the assisted cases are encompassed by the initial period when first offender status was theoretically required for both types of crimes covered by the legal aid offered through the project. These initial cases will be analysed together with the others.

On the bottom line, as shown in the following tables, the project attempted to provide services for a total of 278 people meeting the inclusion criteria between June 2010 and June 2011. The findings will be compared with the outcomes for a control group of 297 people accused of non-violent crimes against property with no severe threat to persons or unaffiliated drug dealing selected from the allocation listings during the implementation of the project, with whom the lawyers had no personal contact, in compliance with the methodological guidelines established for this project. The days of the week on which these services were rendered were selected according to random criteria, in order to guarantee equivalence between the experiment group and the control group. The types of randomisation varied over time but they all ensured equivalence between the groups.

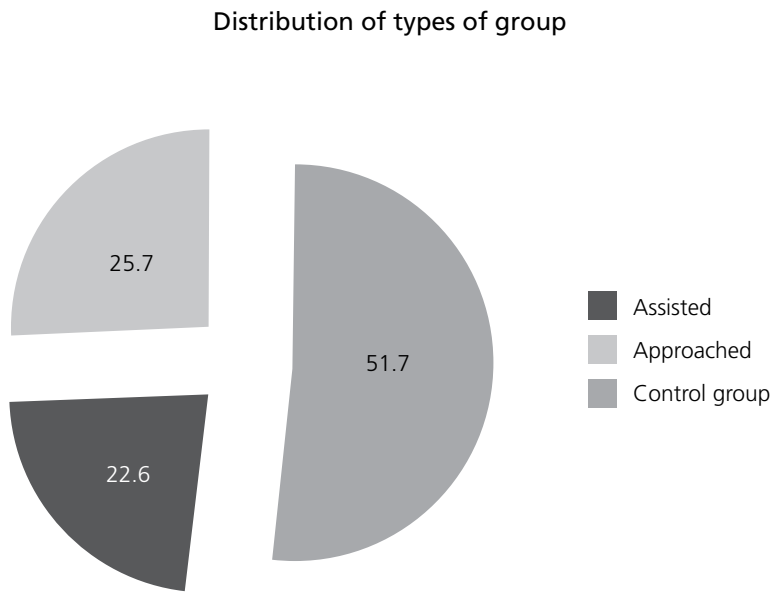
The tables analysed below are accompanied by methodological explanations that are intended to ensure an easier understanding of this data. It is important to stress that the tables are referenced to a group of prisoners considered for the purposes of analysing the effectiveness of rendering legal aid provided through this Project. Table 1 shows that the full set of 575 prisoners was divided up as follows:

- **prisoners assisted** – pre-trial prisoners whose requests for a release were drawn up by the project lawyers during the first 20 days, after the allocation date of the warrant of arrest in flagrante delicto by the Court of Justice;
- **prisoners approached** – persons with whom the lawyers came into contact at police stations but for whom it was not possible to draw up requests for release due to a number of reasons, described below;
- **control group** – pre-trial prisoners who had no contact whatsoever with the project lawyer and whose cases were monitored through the Rio de Janeiro State Court of Justice website, allowing the proceedings for each prisoner to be overseen.

Table 1 – Assisted, approached prisoners and control group

Types of prisoner groups	Frequency	%
Assisted	130	22.6
Approached	148	25.7
Control group	297	51.7
Total	**575**	**100**

Graph 1 – Assisted, approached prisoners and control group



The lawyers interviewed 278 prisoners, presenting 130 requests for release in order to await trial in freedom. A further 148 prisoners were approached but it was not possible to draw up these requests for the reasons shown in Table 2. Finally, 297 prisoners were allocated to the control group.

Table 2 – General status of prisoners in the project

General status of prisoners	Frequency	%
Assisted	130	22.6
Approached / had private lawyer	46	8
Approached / assisted by the Public Defender's Office	81	14
Approached / had no documents	1	0.2
Approached / family did not bring the documents	5	0.9
Approached / released through Court Order	1	0.2
Approached / allocation of the prisoner	2	0.3
Approached / no request in 20 days	12	2.1
Control group	297	51.7
Total	**575**	**100**

As shown in Table 2 above, among the 278 (130 assisted + 148 approached) persons that the Project attempted to assist, it was possible to present requests for release for only 130 prisoners, within a period of 20 days, reaching around one half of our potential clients. The other 148 were not assisted for a variety of reasons, listed below in order of importance:

- the prisoner already had a private lawyer;
- the Public Defender's Office had already taken steps in the case – special hearing held already;
- the prisoner did not have the documents needed to request release in order to await trial in freedom;
- the prisoner's family did not bring the documents, blocking the feasibility of the request;
- the prisoner was released before the intervention of our team of lawyers;
- the prisoner was allocated to another court district, breaking off contact;
- our team of lawyers did not prepare the request for release within 20 days.

The 20-day deadline was selected because the definition of effective assistance provided by the Project was grounded on the submission of request for release within 20 days of the allocation date of the warrant of arrest in flagrante delicto by the Court of Justice. Although public defenders must be advised of an arrest in flagrante delicto within 24 hours, under Brazilian law, the Office is generally unable to file a request during the first few days after the arrest date. Public defenders frequently only meet the defendant at the special hearing, when he or she is notified to appear before the Court in order to hear the accusation and state whether he or she has a lawyer or will be assisted by the Public Defender's Office. Special hearings normally take place after the 20th day in prison. Until then, prisoners without private counsel have no effective defence. It was thus felt that few defendants would be assisted by effective legal aid within 20 days.

In brief, attempts were made to:

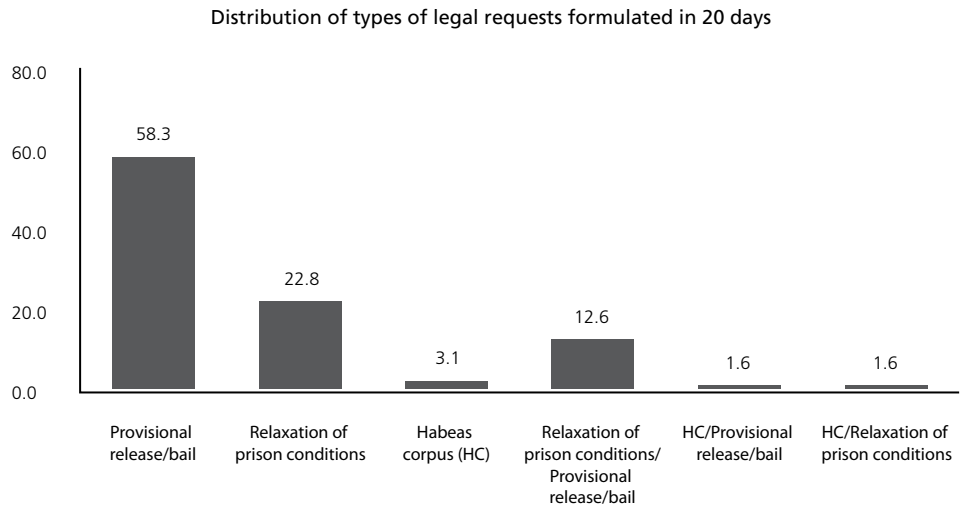
- **Shorten the length of time in prison** through the intervention of the lawyers, drawing up requests for release – allowing the accused to await trial in freedom. Without legal support, he or she would remain in jail at least until the Public Defender's Office could present the request, which would take longer.
- **Demonstrate the need to expand the work of the Public Defender's Office** in police stations, helping lessen the social and economic costs of pre-trial custody.
- **Identify current stumbling-blocks hampering the smooth progress of requests for release through the Courts.**

Table 3 below demonstrates the type of request drawn up by the project lawyers within the 20-day period. As already mentioned, the requests presented by our lawyers applied for the release of prisoners, allowing them to await trial in freedom, together with release from jail and habeas corpus in very special cases. In almost all cases, requests were prepared only when documentary proof of fixed abode and lawful employment was available, as required by most judges.

Table 3 – Types of requests presented in 20 days

Types of requests presented	**Frequency**	**%**
Release to await trial	74	12.9
Release from jail	29	5.0
Habeas corpus	4	0.7
Release from jail / Release to await trial	16	2.8
Habeas corpus / Release to await trial	2	0.3
Habeas corpus / Release from jail	2	0.3
Total requests presented	127	22
Cases lost	**Frequency**	**%**
Not applicable	435	75.7
Not noted	13	2.3
Total cases lost	**448**	**78**
Total	**575**	**100**

Graph 2 – Types of requests presented in 20 days



A comparison between the control group and the prisoners effectively assisted (requests for release in order to await trial in freedom presented) allows us to measure the efficacy of the project in providing effective assistance under ideal conditions. Comparing the group of potential clients (assisted and approached prisoners) with the control group allows the effectiveness of the project to be measured under real-life conditions in Brazil. This latter assessment is probably the most important, as it indicates the net impact of the project if it were extended to encompass all prisoners within a selected profile. In other words, even if legal aid were to be offered to all prisoners, not all of them would benefit from this, for the reasons addressed in Table 2, as shown by the prisoners approached by the project whose requests for release could not be presented.

The percentage of prisoners obtaining court orders for release within 20 days should be higher in the assisted group than in the control group. On the other hand, it is noted that court decisions on requests for release extended beyond 20 days in many of the assisted cases, although the law requires that this take place within 48 hours, as will be shown below. There was thus a possibility of waiting longer, in order to see whether the defendant would be released in response to the request presented. This possibility was discarded for two reasons:

- For the control group, the request presentation date was unknown, as the computer system shows only the date on which the court order for release was issued. Thus, in order to preserve the comparability of the assisted and approached prisoners and the control group, the dependent variable had to be whether or not a court order for release was issued within 20 days of the allocation date of the warrant of arrest in flagrante delicto, regardless of when the requests were presented.

- From the theoretical standpoint, for the reasons already explained above, the goal was to show that appropriate legal aid provided immediately after arrest could well bring forward release dates, as effective legal assistance through the Public Defender's Office occurs only after the special hearing.

Project impact

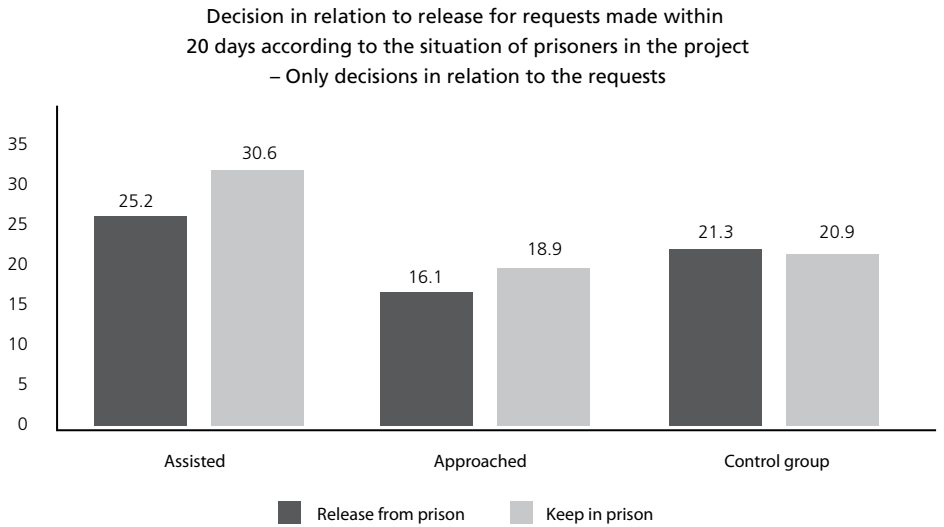
The project managed to obtain releases for 25 per cent of the prisoners it assisted through requests presented by our lawyers, compared to 16 per cent of the prisoners approached for whom it was not possible to draw up requests, and 21 per cent of the control group (see Table 4 below). On the other hand, the proportion of rejected requests is also higher among the assisted prisoners. Another serious problem is that 38.7 per cent of the assisted cases obtained no response to the requests during the first 20 days after the allocation date of the warrant of arrest in flagrante delicto in the Rio de Janeiro State Court of Justice. In brief, it may be stated that, although the legal intervention of the lawyers took place straight after the arrests, in order to shorten the duration of improper imprisonment, in most cases the judges rejected the requests, and in 38.7 per cent of the cases, the court decision on the release was handed down after the initial 20 days.

An examination of the decisions on requests for release handed down by the judges after the first 20 days shows that the proportion of assisted prisoners who were released through approval of a request presented by the defence rose to 38 per cent, but there is no comparable data for the other groups (approached prisoners and control group), as in the latter two cases, information is limited to the situation during the 20 days after the allocation of the warrant of arrest in flagrante delicto and we were unable to find out whether requests were presented with decisions handed down subsequently.

Table 4 – Responses to requests in 20 days, in terms of the status of the prisoners in the project, resulting from the submission of the request for release in order to await trial in freedom

Situation related to release at 20 days	**Status of prisoners in the project**			
	Assisted	**Approached**	**Control group**	**Total**
Release / request by the defence	28	23	61	112
	25.20%	16.10%	21.30%	20.70%
Not released / requested by the defence	34	27	60	121
	30.60%	18.90%	20.90%	22.40%
Released / at the judge's initiative	1	4	2	7
	0.90%	2.80%	0.70%	1.30%
Released / Federal Prosecutor's Office	5	7	4	16
	4.50%	4.90%	1.40%	3.00%
No release / no response	43	82	160	285
	38.70%	57.30%	55.70%	52.70%
Total	**111**	**143**	**287**	**541**
	100.00%	**100.00%**	**100.00%**	**100.00%**

Graph 3 – Responses to requests in 20 days, in terms of the status of the prisoners in the project, resulting from the submission of the request for release in order to await trial in freedom



Bearing in mind that people also obtained releases through the intervention of the Public Prosecutor's Office or the judge, the percentage of prisoners released during the first 20 days reaches some 30 per cent for assisted prisoners, compared to around 23 per cent for the approached prisoners and the control group, as shown in Table 5. In other words, in a general comparison, the project managed to increase the number of released prisoners, but only by seven per cent during the first 20 days among the persons that it directly assisted.

Table 5 – Outcomes of requests in 20 days in terms of the decision to hold the prisoner in custody or not

Summary in terms of release at 20 days	**Status of prisoners in the project**			
	Assisted	**Approached**	**Control group**	**Total**
Decision to release	34	34	67	135
	30.60%	23.80%	23.30%	25.00%
Decision to hold in custody	77	109	220	406
	69.40%	76.20%	76.70%	75.00%
Total	**111**	**143**	**287**	**541**
	100.00%	**100.00%**	**100.00%**	**100.00%**

Graph 4 – Outcomes of requests in 20 days in terms of the decision to hold the prisoner in custody or not

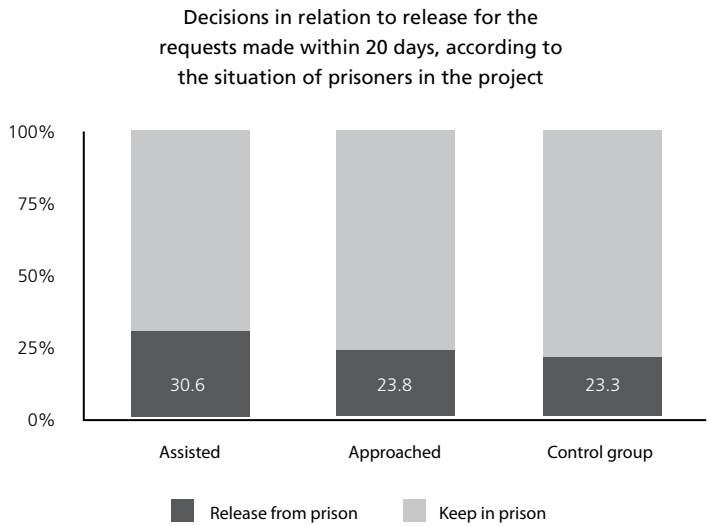
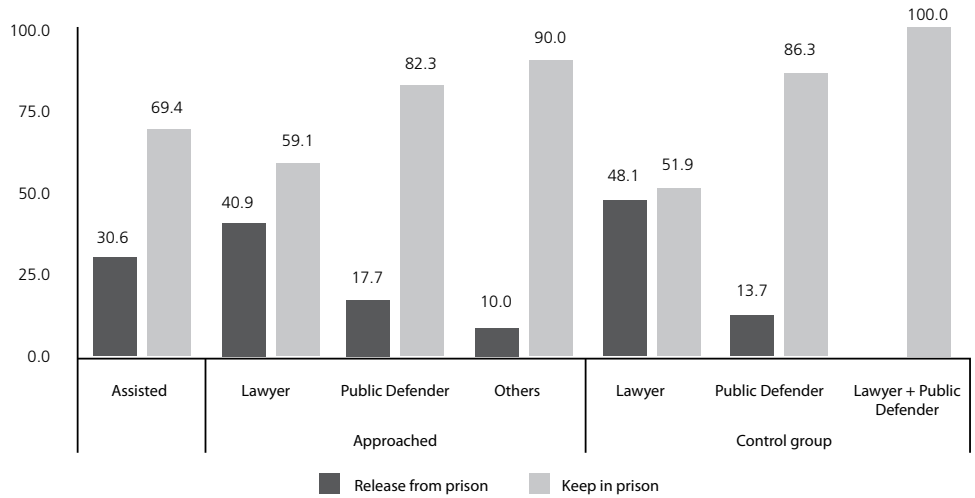


Table 6 below presents the findings on what happened with the assisted prisoners, compared to the approached prisoners and those in the control group, taking into account the intervention of private lawyers or the Public Defender's Office. Some 31 per cent of the assisted prisoners were released, compared to around 41 per cent of the approached prisoners and 48 per cent of the control group where the prisoners have private lawyers. For the approached prisoners and control group assisted by the Public Defender's Office, releases were obtained in around 18 per cent and 14 per cent of the cases respectively.

Table 6 – Status of prisoners in the project in terms of whether or not the prisoner remains in custody and intervention by the Public Defender's Office or private lawyers

Status of prisoners in the project	**Status in terms of freedom at 20 days**		
	Decision to release	**Decision to hold in custody**	**Total**
Assisted by the project	34	77	111
	30.60%	69.40%	100.00%
Approached / had private lawyer	18	26	44
	40.90%	59.10%	100.00%
Approached / assisted by the Public Defender's Office	14	65	79
	17.70%	82.30%	100.00%
Approached, but not assisted for other reasons	2	18	20
	10.00%	90.00%	100.00%
Control group with private lawyer	39	42	81
	48.10%	51.90%	100.00%
Control group assisted by the Public Defender's Office	28	177	205
	13.70%	86.30%	100.00%
Control group with private lawyer and Public Defender's Office	0	1	1
	0.00%	100.00%	100.00%
Total	**135**	**406**	**541**
	25.00%	**75.00%**	**100.00%**

Graph 5 – Status of prisoners in the project in terms of whether or not the prisoner remains in custody and intervention by the Public Defender's Office or private lawyers

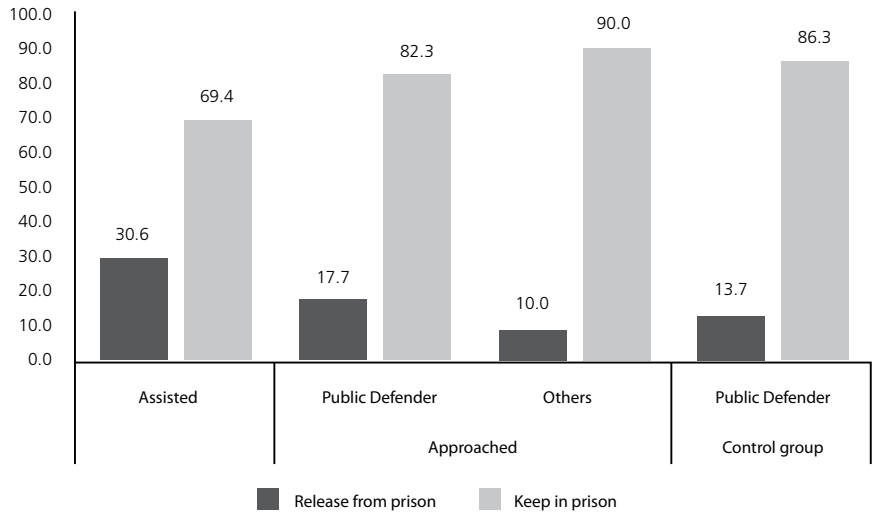


Still, in Table 6, it is noteworthy that the success of private lawyers among the approached prisoners is seven per cent less than the success of these same lawyers in the control group, which is surprising. This is a complex situation, as the legal aid offered by the project might have influenced decisions on whether or not to appoint private counsel among the approached prisoners, meaning that the situations are not necessarily independent. If we repeat the analyses of the percentage of releases, withdrawing cases represented by private lawyers, as shown in Table 7, for the approached prisoners as well as the control group, it is clear that the outcomes of the project are considerably better than those of the Public Defender's Office. In this case, the project managed to obtain releases for 30.6 per cent of its assisted prisoners, while the Public Defender's Office obtained releases for some 18 per cent of the approached prisoners and 13.7 per cent of the control group. This means that the project's lawyers were about twice as successful as the Public Defender's Office in securing the release of prisoners from pre-trial detention.

Table 7 – Status of prisoners in the project in terms of decisions on whether or not the prisoner remains in custody: comparison limited to cases without private lawyers

Status of prisoners in the project	Situation for requests presented in 20 days		
	Decision to release	Decision to hold in custody	Total
Assisted by the project	34	77	111
	30.60%	69.40%	100.00%
Approached / assisted by the Public Defender's Office	14	65	79
	17.70%	82.30%	100.00%
Approached, but not assisted for other reasons	2	18	20
	10.00%	90.00%	100.00%
Control group assisted by the Public Defender's Office	28	177	205
	13.70%	86.30%	100.00%
Total	**78**	**337**	**415**
	18.80%	**81.20%**	**100.00%**

Graph 6 – Status of prisoners in the project in terms of decisions on whether or not the prisoner remains in custody: comparison limited to cases without private lawyers

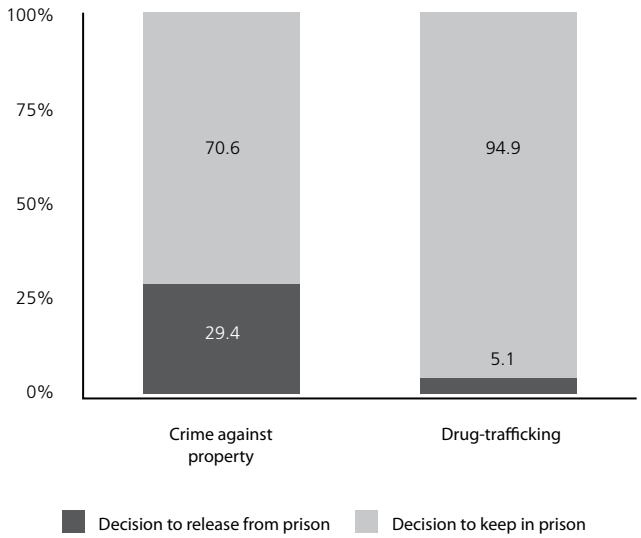


The effectiveness of the legal representation is obviously only one factor that will influence whether someone is or is not released from pre-trial detention. It is also likely to be influenced by the seriousness of the crime, the strength of the proof, the circumstances of the defendant and the opinion of the judge about whether he or she is likely to interfere with the course of justice. Table 8 below shows that the probability of obtaining a release in order to await trial in freedom is far higher for prisoners accused of non-violent crimes against property – 27.5 per cent were released by the courts. On the other hand, only five per cent of prisoners accused of drug-trafficking were able to obtain releases allowing them to await trial in freedom.

Table 8 – Comparison between the types of crimes and decisions on whether or not a prisoner is maintained in custody

Type of crime	**Situation for requests presented in 20 days**		**Frequency**	**%**
Crimes against property	Valid cases	Decision to release	130	27.5
		Decision to hold in custody	312	66
		Total	**442**	**93.4**
	Lost cases		31	6.6
	Total crimes against property		**473**	**100.0**
Drug-trafficking	Valid cases	Decision to release	5	4.9
		Decision to hold in custody	94	92.2
		Total	**99**	**97.1**
	Lost cases		3	2.9
	Total drug-trafficking		**102**	**100.0**
Total			**575**	**100.0**

Graph 7 – Comparison between the types of crimes and decisions on whether or not a prisoner is maintained in custody

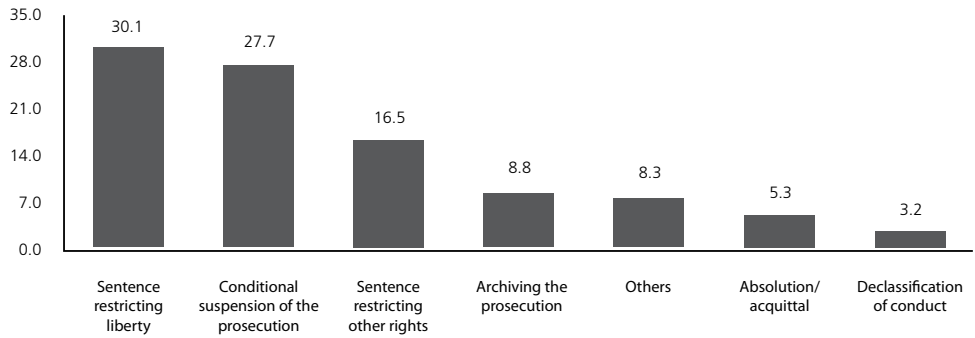


It is clear that many people are improperly held in jail as a preventive measure. As shown in Table 9, out of a total of 575 people assessed under the aegis of the project (assisted, approached and control group), whose trial outcomes are known, only 30 per cent were sentenced to imprisonment. In other words, at least two out of every three pre-trial prisoners should have awaited trial in freedom, as the final decisions did not sentence them to imprisonment, reflecting a punitive culture among judges and public prosecutors in the Rio de Janeiro State Court System.

Table 9 – Procedural status monitored through to the end of the project

Procedural status	**Frequency**	**%**
Conditional suspension of the proceedings	94	16
Penalty curtailing rights	56	9.7
Penalty curtailing freedom	102	18
Acquittal	18	3.1
Case shelved	30	5.2
Others	28	4.9
Plea bargaining	11	1.9
Total procedural status	**339**	**59**
Cases lost		
No decision	173	30
No noted	63	11
Total cases lost	**236**	**41**
Total	**575**	**100**

Graph 8 – Procedural status monitored through to the end of the project



The role of social workers

Initially, the project intended to assign six lawyers who would provide legal aid services to pre-trial prisoners held in Civil Police lock-ups. However, right at the start of these activities, it became clear that requests for release in order to await trial in freedom that were not accompanied by documentary proof of residence and employment were rarely accepted by the courts. Consequently, a social worker with experience in dealing with prisoners was brought into the project, in order to assist the lawyers in their work. This decision proved vital, because many difficulties were encountered in obtaining this personal documentation. As these documents play a key role in ensuring the success or failure of requests for release in order to await trial in freedom, it was vital for the lawyers to work seamlessly with the social worker.

When the lawyers interviewed potential assisted prisoners in the jails and obtained the powers of attorney authorising them to act on their behalf, their clients were requested to provide documentary proof of fixed abode and lawful employment. But in almost all cases, the prisoners did not have these documents to hand. At the end of each day, the lawyers gave the social worker lists of the assisted prisoners, so that she could attempt to obtain this documentation from their relatives, as required by the judges. This intervention proved crucial in helping to obtain the release of pre-trial detainees, which may be one of the reasons why the project was more successful in obtaining releases than the Public Defender's Office.

It should also be noted that the role of the social worker was extremely work-intensive. The prisoners did not always know or recall the telephone numbers of their relatives, with some recalling only the street addresses and others lacking even this information. When it was not possible to enter into telephone contact with a relative, the social worker went personally to the address given by the prisoner. This was also extremely difficult and in some cases proved impossible: some addresses did not even exist, while others were located in hillside favelas with extremely difficult access.

Once contact had been made and the need for the documents had been explained, the relative was expected to provide them. However, relatives frequently said that they were not in a position to travel to the city centre and in these cases the social worker collected the documentation personally. Most of the assisted prisoners lived in the lower-income outskirts of the city, which are hard to access; many come from single parent families headed by women. A large number are homeless, street-dwellers, crack users and sufferers from some type of mental disorder. In these cases, it was almost impossible to obtain the necessary documents and judges tended to remand these people in custody. In some cases, the mothers of young crack users refused to supply documentation to help obtain the release of their children because they believed that they would be safer in custody.

The role of the lawyers

None of the jails monitored by the project had facilities set aside for interviews with lawyers. Legal advice is provided in rooms designed for family visits, or even in cells packed with other prisoners. The improvisatory nature of these premises reflects the status of legal aid: generally absent at this stage in the proceedings, there are no specific areas set aside for defenders to meet with their clients. One lawyer working for the project noted that:

> 'The first contact with a prisoner took place in the room where visitors are seen, meaning that his attention was distracted by the sight of distressed family members seeking their relatives. The interviews took place in the family visits room, amidst all the noise and bustle of its crowds. Sometimes interviews took place at other locations in the jail, such as the search cell, for example. One of the places where prisoners were seen always smelt of the garbage truck; the visitor rooms were always packed, which sometimes hampered the interviews, which moved into the corridors.'

The difficulties encountered by the lawyers in terms of providing services in the jails were not limited to the lack of appropriate locations for interviewing the prisoners. At the start, some police officers were extremely wary but this situation gradually changed, as reported by one of these practitioners:

> 'As the months went by, we started to build up trust, and the police officers realized that we were there to show how quick and appropriate legal aid could prevent people remaining in jail who should not even have been arrested. Towards the end, we were being approached by the police officers themselves trying to clear out the jails, recommending prisoners who met the project profile.'

The widespread absence of appropriate legal aid caught the attention of the lawyers working with the project:

> 'We found many cases of prisoners who received no type of information whatsoever about their arrests, frequently quite unaware of why their freedom had been curtailed… More frequently, the Public Defender's Office met with a new client only at the hearing, more or less 30 days after the arrest. We heard about prisoners who had been held in detention for six or more years for petty thefts. The absence of special attention for equally specific cases means that the principle of full defense is being overwhelmed by the principle of full neglect.'

Finally, the importance of the constant presence of the lawyers in the jails was viewed as a determining factor for the steady progress of the project:

> 'We can assign the success of our project to the fact that the lawyers were there in the jails, interviewing the prisoners personally, hearing their versions of the facts, and showing that they had their own lawyers to protect their rights.'

Conclusions and recommendations

Two out of every three pre-trial prisoners assisted by the project were being deprived of their freedom unlawfully in that their offence did not merit a final prison sentence, which should be a serious cause for alarm among all those concerned about the Brazilian criminal justice system. This is an indictment of all of the main institutions charged with upholding justice in Brazil.

Judges are routinely demanding documentary proof of fixed abode and lawful employment before granting requests for release, thus excluding from the protection of the law people from a particular social and economic strata who, nevertheless, are entitled to the same Constitutional protections as the rest of society. The abusive and illegal use of provisional custody appears to stem from an ideological prejudice against the poor. The improper use of provisional custody is a paradox, since it requires the state, acting through the judiciary, to disregard the law in the name of the law, by inflicting punishment on people who are, or should be, considered innocent at the time. This cannot be justified under any pretext whatsoever.

Judges have the prerogative to hand down *ex officio* decisions of release orders that would allow prisoners illegally held in jail to await their trials in freedom, instead of simply forwarding case records to the prosecutors. However, throughout the entire duration of this project very few *ex officio* decisions granting release orders were noted. The State Prosecutor's Office is also failing to play its Constitutional role as the overseer of the law when arrests are clearly illegal; besides being an active presence in jails, checking incarceration conditions and addressing the illegal status of many arrests. In most cases monitored by the project, the State Prosecutor's Office tended to call for the maintenance of pre-trial imprisonment and, when challenged, it was likely to recommend the rejection of requests for release.

Finally, though, the project proved what many have long suspected: that the Public Defender's Office is failing to provide people accused of offences with an adequate defence of their right to be presumed innocent before trial. The project obtained twice as many release orders as the Public Defender's Office when strictly comparing their work. It also noted that public defenders only presented requests for release from pre-trial detention in a third of all cases in the first 20 days after the allocation date of the warrants for arrest in flagrante delicto in the Rio de Janeiro State Court of Justice.

Under-staffing of the Public Defender's Office may explain this deficiency, but it does not excuse it. The Public Defender's Office in Rio de Janeiro State is the oldest entity of this type in Brazil, and it is certainly among the best equipped in terms of human and material resources. If more public defenders are needed, they should be hired and they should also be supported by social workers to help them obtain the documentation that judges are currently demanding. As an interim measure, social work departments at universities could be used in order to bridge this gap. The work of the Public Defender's Office also needs to be streamlined in the short term, so that requests for release from pre-trial detention are dealt with more quickly. In response to repeated criticism of the conditions in police lock-ups, the authorities in Rio de Janeiro are now trying to ensure that remand prisoners are transferred to prison as soon as possible, so the Public Defender's Office now needs to ensure that it establishes an effective visiting presence in the prisons.

The problems that the project identified are systemic and consideration should be given to speeding up the entire justice system so that decisions about whether or not people should be held in pre-trial custody can be taken as quickly as possible. Initial hearings should take place within 24 hours of arrest and people accused of crimes must be able to exercise their right to a defence from the very start of the proceedings. For arrests in flagrante delicto, the criminal records of the accused should be appended to the proceedings immediately. For misdemeanours where provisional custody is obviously inappropriate, the entire process should be modified in order to lessen costs of all types for the accused, society and the state. Court proceedings should be similar to those used for petty crimes, particularly for first offenders. Within 24 hours of arrest, indicted prisoners should appear before a judge and a court prosecutor in order for them to examine the possibilities of conditional suspension.

While reform of the justice institutions is crucial, a more holistic approach is also needed that includes the police, prison authorities and state to tackle the crisis in the Brazilian criminal justice and penal systems. The authorities should speed up transfers of prisoners still held in police lock-ups to facilities in the various states' prison systems. They should also systematically compile and publish data and information on pre-trial prisoners and ensure ongoing monitoring of prisoners held in provisional custody by encouraging cooperation between the justice institutions, research centres and NGOs working in this field.

CHAPTER THREE

The Advocacy Project

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Introduction

This chapter describes the work of three São Paulo based non-governmental organisations (NGOs): Instituto Sou da Paz, Pastoral Carcerária Nacional and Conectas Direitos Humanos, which came together in 2010 to develop collaboratively a project to: monitor bills in Congress related to criminal justice and penal policy; carry out advocacy work with Members of Parliament; and promote discussion about penal reform – the 'Brasília Project'.

The project is part of a broader strategy developed through the Criminal Justice Network, which was created in February 2010 to strengthen civil society's work on reducing the abusive use of pre-trial detention in Brazil. The network is formed by:

- Instituto Sou da Paz;
- Conectas Direitos Humanos;
- Pastoral Carcerária Nacional;
- Justiça Global;
- Núcleo de Estudo da Violencia – NEV/USP (the Centre for Violence Studies at the University of São Paulo);
- Instituto dos Defensores de Direitos Humanos (IDDH);
- Instituto de Defesa do Direito de Defesa (IDDD);
- Instituto Terra, Trabalho e Cidadania – ITTC (Institute of Land, Work and Citizenship);
- Associação pela Reforma Prisional – ARP (Association for Penal Reform); and
- Centro de Estudos de Segurança e Cidadania – CESEC (Centre for the Study of Security and Citizenship).

The Criminal Justice Network uses a broad range of strategies to tackle the problem of pre-trial detention in the country, from gathering data to delivering legal assistance. The monitoring of bills in congress and federal policies related to pre-trial detention and related criminal justice matters began in 2010, under the responsibility of Sou da Paz, and soon became a major priority for the Criminal Justice Network. Throughout the year, we noticed that we could move a step further, rather than limiting our work to passive monitoring. This led us to the collaborative project with Sou da Paz, Conectas and Pastoral, which has recently expanded to include the IDDD and ITTC.

The network lobbied for the enactment of Law No 12,403, which entered into effect on 4 July 2011, providing alternatives to pre-trial detention and its significance is discussed in further detail below. The Brasília Project itself produces a newsletter and has established a permanent representation in Brasília for advocacy and monitoring purposes.

The Criminal Justice Network seeks to engage with the state and federal authorities to encourage reform and promote best practices. It argues for a criminal justice system that is fairer and more efficient and that combines public safety measures with social development initiatives, overcoming the traditional dichotomy of repressive versus social approaches to crime. It also recognises that change needs to come at both the local and national level, through a combination of legislative reform, investment, modernisation of institutions, training of staff and promoting a culture of peace and justice.

The Brasília Project has sought to consolidate a long-held desire of many civil society organisations concerned with the criminal legislative process: to strengthen participative democracy; to better understand the dynamics at the National Congress; and to actively participate in the construction of a criminal justice system that conforms to the rule of law.

The three organisations that initially formed the Brasília Project have very different backgrounds and mandates. Its formation was based on the mutual realisation that tackling the problems of the Brazilian criminal justice and penal systems needed an approach that went wider than any of them could address individually.

Pastoral Carcerária has long been involved in visiting prisoners and monitoring prison conditions. Its work has exposed some of the many violations and human rights abuses that take place within the Brazilian prison system but this alone cannot deal with the growing problem of chronic overcrowding and lack of resources, which clearly needs to be addressed through wider societal reform. Sou da Paz was formed to reduce the extraordinary levels of violence in Brazilian society and it has pioneered innovative social programmes, mainly in São Paulo, which have helped to increase public safety. However, since it is widely acknowledged that Brazilian prisons are the headquarters of and major recruiting grounds for organised criminal factions, no successful strategy can be developed that does not address the issue of penal reform.

For many Brazilians, the phrase 'human rights' has become synonymous with 'defence of the rights of bandits' or as something that rich Northern countries impose on the global South. Conectas Direitos Humanos is developing a two-pronged approach towards human rights, which combats these preconceptions. This seeks to use strategic litigation at the national level and existing international mechanisms to combat violations and promote access to justice for vulnerable groups, while also developing a programme of dialogue and debate in which the role of actors in the global South is explicitly recognised.

This chapter discusses the development of the network by first outlining the work of the three organisations that created it. This is followed by a description of its current work.

Pastoral Carcerária

Pastoral Carcerária was established as a national organisation in Brazil during the 1980s to help coordinate visits to individual prisoners. The tradition of visiting prisoners and concern for their welfare is deeply rooted in the Christian tradition. Jesus Christ was imprisoned and so were many of his Apostles. In Brazil, the leading role that the Catholic Church played in opposing the military dictatorship ensured that it became involved in monitoring prison conditions and documenting cases of torture.

Pastoral Carcerária works in two dimensions. The first is to offer personal assistance, often religious, to prisoners; and the second is to provide assistance regarding the struggle for access to basic human rights, the right to citizenship and adequate public policy in the areas of public security, the criminal code and the prison system.

In 1969, the Conferência Nacional dos Bispos do Brasil – CNBB (Brazilian Bishops' Conference) created a Commission of Justice and Peace, which in turn formed a network of lawyers to defend the rights of political prisoners on a pro bono basis. More than 250 centres for the defence of human rights were established, largely under the auspices of the Catholic Church. The first Amnesty International Report on Brazil, published in 1979, relied substantially on their information, which was also separately published in the seminal report on torture, *Brasil: Nunca Mais*. Campaigns against torture and deaths in detention were also important in rallying opposition to the dictatorship in wider Brazilian society. As the country returned to democracy, therefore, Brazilian politicians were forced to pay increasing attention to human rights. The prominent role assigned to it in the 1988 Constitution is largely a result of these pressures.

Among the rights guaranteed by the Constitution is the freedom to worship in penal establishments and this enabled Pastoral Carcerária to organise religious services in all penal establishments throughout Brazil. Its first coordinator, Father Francisco Roberto Reardon, universally known as Father Chico, joined Pastoral Carcerária in the Archdiocese of São Paulo in 1986 and became its state coordinator in 1988. The CNBB called for the formation of Pastoral Carcerária in all its dioceses in the same year and so it gradually emerged as a national organisation.

In addition to administering the sacrament and providing spiritual comfort, Pastoral Carcerária understands that its obligations derived from the Gospel include the protection of human dignity and human rights. If a pastoral worker realises that the conditions of life in a prison visited are not consistent with the requirements of the dignity of the person, he or she is duty-bound to take measures to bring the violations to an end. If the violation is torture or another crime against the person, then Pastoral Carcerária will send a complaint to the competent authority for determination of liability.

Even before the brutal massacre at Carandiru, in which 111 prisoners were killed in 1991, Pastoral Carcerária had been warning of the appalling conditions in which prisoners were being held and the growing number of brutalities practised against them. Its role in gathering evidence of what really happened during this massacre helped to discredit the sanitised official reports and enhanced its authority as an independent monitoring organisation. In 1996, Pastoral Carcerária formally became a national organisation. It now has 6,000 agents who regularly visit prisons across Brazil. This makes it the leading NGO conducting prison monitoring and the most reliable source of independent information on prison conditions.

In 1997, Pastoral Carcerária launched a national campaign of fraternity with prisoners, under the slogan 'Brotherhood and the imprisoned – Christ freed all from prison', which also sought to draw attention to prison conditions and how these were mainly suffered by the poor and excluded. During the same year, it registered around 1,600 denunciations of torture of prisoners. These denunciations sometimes brought results. In one case, Pastoral Carcerária collected statements from 107 prisoners who claimed to have been tortured in one prison in São Paulo, which eventually resulted in the authorities launching their own full investigation and taking disciplinary action against 570 police officers.

Since then, Pastoral Carcerária has become increasingly involved in advocacy work at both the national and international level. It has submitted reports to the UN Office for the High Commissioner for Human Rights (OHCHR) and worked with international NGOs such as Amnesty International, Human Rights Watch, the Association for the Prevention of Torture and the World Organisation Against Torture. It helped to coordinate the visit of the UN Special Rapporteur on Torture, Sir Nigel Rodley, in 2000 and has also worked with research organisations studying prison conditions, such as: the Centre for Comparative Criminology and Criminal Justice; Penal Reform International; and the International Centre for Prison Studies.

In response to Rodley's report, the Brazilian government launched a national campaign as part of its first ever national plan against torture. Pastoral Carcerária participated in both the plan and the campaign. It also helped to create the non-denominational campaign group, Action by Christians to Abolish Torture (ACAT), with which it jointly published a report, *Breaking the silence: acts and allegations of torture in São Paulo 2000 – 2002*, which updated Rodley's original report. Pastoral Carcerária also lobbied for the Brazilian government to ratify the Optional Protocol to the Convention against Torture, which provides for the establishment of a national system of independent monitoring of all places of detention.

Pastoral Carcerária is actively involved in helping to establish such visiting mechanisms in many Brazilian states. It has also helped to form *Conselhos da Comunidades* (Community Councils) in many parts of Brazil. Although the Lei de Execução Penal (LEP) specifies that these should be created in every *Comarca* (district), as mechanisms to visit and monitor prisons, they are still weak or non-existent in many parts of the country and the judges, whose responsibility it is to create them, have often proved reluctant to do so.

During the prison rebellions in São Paulo in May 2006, where violence between an organised criminal faction and the police resulted in the death of some 450 people inside and outside the prisons, Pastoral Carcerária monitored and documented the violations of human rights – including large-scale arbitrary executions by the police. It argued, again, that the policy of repression and criminalisation of the poor was self-defeating, and it has subsequently used the slogan 'public security through a Christian commitment to peace in society' for its fraternity campaigns.

In 2010, Pastoral Carcerária published a major report on torture in Brazil, based on its own experiences of monitoring conditions in prisons throughout the country. The report argued that independent monitoring of places of detention was one of the most effective ways of preventing torture and other forms of ill-treatment, but it also discussed some of the challenges that its own monitors had faced and which were likely to confront those involved in the creation of a national monitoring mechanism.

Sou da Paz

Instituto Sou da Paz is an NGO based in São Paulo which has been working on violence prevention since 1999 with the main goal of influencing public policy. Sou da Paz started with a disarmament movement, which prompted the first voluntary gun buy-back campaign in the country and put firearm control on the public agenda. Today, Sou da Paz develops actions related to policing, local

government management of public security, firearm control, developing a culture of peace and young people at risk of violence.

Sou da Paz adopts diverse strategies such as: developing and executing innovative projects with the populations and locations most affected by lethal violence; mobilising public opinion; participating in public debates with the aim of consolidating a new vision of public security; and creating permanent dialogue and advice channels to public policy managers.

The majority of projects developed and implemented to date take place in the city of São Paulo but Sou da Paz is also a major advocacy player nationwide. In 2003, it was one of the most active and influential organisations in the approval of a new firearm control law – The Disarmament Statute – which is partially responsible for the drastic and historic reduction in homicide rates across the country.

Sou da Paz continuously monitors firearm bills and participates in Rede Desarma Brasil (the Brazilian Disarmament Network), which includes organisations from across the country and develops actions to improve the implementation of the Disarmament Statute (such as supporting the national firearms buy-back campaign and helping local governments).

Among the projects developed by Sou da Paz are initiatives that: promote the revitalisation and democratic use of public spaces in areas with high rates of violence; encourage non-violent conflict resolution in school; provide assistance to municipal and sub-municipal governments in diagnosing problems relating to violence; and recognise good police practices through an award.

Sou da Paz is currently expanding its work in the area of criminal justice. In addition to the work carried out with the Criminal Justice Network, Sou da Paz conducted research on pre-trial detention in the city of São Paulo and started a project to influence the public debate on Law No 12,403. The project aims to analyse media coverage on this subject, identifying the main positions and experts consulted. The next step will be media training, focused on persuasive positions and accessible communication strategies.

Finally, Sou da Paz invests in the production of knowledge on specific subjects such as the implementation of firearm control legislation, crimes against property in São Paulo, regulation of the use of force by the police and profile of pre-trial detainees. These studies – in addition to creating a deeper understanding of the issues and informing the public debate – make it possible for the institution to develop new strategies that match the current context and challenges faced at a local and national level.

Conectas Direitos Humanos

Conectas Direitos Humanos was formally launched in São Paulo in October 2001. Its mission is 'to promote the realisation of human rights and the consolidation of the Rule of Law, especially in the Global South (Africa, Asia and Latin America)'.[1] It was accorded consultative status with the ECOSOC-UN in 2006 and observer status with the African Commission on Human and Peoples' Rights in 2009. It developed its activities under two broad programmatic banners that interact together and encompass national, regional and international activities. These are:

- **The global South programme** – which aims to increase the impact of the work of human rights defenders, academics and organisations through education, research, networking and advocacy activities, including the use of UN and regional human rights mechanisms.
- **The justice programme** – which works nationally, regionally and internationally to protect human rights and promote access to justice for vulnerable groups who are victims of human rights violations in Brazil. This is mainly accomplished through strategic litigation, interventions in the Supreme Court and constitutional debates, and the promotion of access to medicines and the right to health.

The launch of Conectas coincided with a fundamental re-shaping of the debate about international human rights and attitudes towards them in the global North and South. In its ten years of existence, Conectas has developed some of the most important forums for South-South discussion of human rights that exists in the world today. Conectas's flagship publication is *Sur – the International Journal on Human Rights*. It was created in 2004, to respond to a demand from the Sur Human Rights University Network for an independent publication that would provide a good communication channel for academics and activists: to debate new theories adapted to their realities and share experience. It is the only multilingual publication of its kind published in Portuguese, English and Spanish (and in 2011 one of Conectas's partners in Egypt published a special version of *Sur* in Arabic). All of *Sur*'s published articles are submitted to a blind peer-review process and 70 per cent are written by authors based in the global South.

Conectas regularly organises training courses for NGOs on how to use the UN and regional human rights systems and provides technical support, develops advocacy activities and fosters the creation of networks for groups supporting reports or complaints. Courses have been organised for more than 500 human rights defenders from 25 countries, with a special focus on the UN Universal Periodic Review (UPR) mechanism and the African human rights system. Conectas has participated in 14 sessions of the UN Human Rights Council and two sessions of the African Commission on Human and Peoples' Rights. It helped to create the Brazilian Committee on Human Rights and Foreign Policy and publishes a yearbook on Brazil at the UN, a compilation of Brazil's votes and initiatives as well as the recommendations addressed to the country. It has lobbied particularly hard in relation to violations in North Korea, Iran, Myanmar, Zimbabwe and Venezuela and has sought to encourage the Brazilian government to take a consistent stance on human rights in those countries. In 2010, Conectas established a permanent representation in Geneva, in partnership with the Centro de Estudios Legales e Sociales (Argentina) and Corporación Humanas (Chile).

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1 See, *On the Frontlines of human rights in the Global South: lessons learned by Conectas and partner organizations*, Meeting Report, Rio de Janeiro, 23 May 2011.

Conectas also organises an international human rights colloquium, which has been attended by more than 870 activists and academics from 50 countries over the last nine years. The colloquium takes place over the period of a week in São Paulo and is conducted in three languages: English, Portuguese and Spanish. It is intended to strengthen the individual and collective impact of human rights defenders and at the same time encourage them to engage internationally in promoting these rights. The colloquium also aims to have a multiplier effect, which benefits both the participants and their organisations, through networking and joint actions. Many of these actions involve using the UN and regional human rights systems: topics that are addressed at all the conferences. Much of the follow-up training and advocacy work that Conectas undertakes in this area is based on contacts established at the colloquium.

The second of Conectas's programmatic banners is its justice programme. Since 2003, the organisation has worked to defend and guarantee the rights of adolescents held in the juvenile system's facilities of Fundação Casa (formerly Febem) in the state of São Paulo. It has filed 65 compensation lawsuits and administrative proceedings in cases involving torture or deaths in custody. These cases have managed to raise compensation levels for the deaths of juvenile prisoners from R$10,000 to R$500,000. Conectas has also succeeded in obtaining the first pension for a mother of one of the victims. Other cases on visiting rights and the need for proper investigations have also brought some improvements and, while Conectas does not claim all of the credit for this, it feels that it has been part of the process. Some of the worst prisons have been closed down and smaller, more modern ones have been opened.

In 2007, Conectas began working with the adult prison system and in 2009 it began to specifically focus its efforts in the state of Espírito Santo. Massive overcrowding in prisons and police cells has led to people being held in appalling conditions but, in an effort to deal with this, the authorities have placed prisoners in metal containers, which suffer from lack of ventilation and basic sanitation facilities and can become unbearably hot. Along with Justiça Global and other organisations, Conectas has conducted prison visits and has reported the situation to the Brazilian authorities as well as to the UN and Inter-American human rights system. A side event was held at a session of the UN Human Rights Council, bringing international exposure to the issue and the Brazilian government has at least recognised that it is a problem and has begun a dialogue with civil society groups about how to deal with it.

The Brasília Project

As can be seen from the above discussion, the three organisations involved in establishing the Brasília Project have quite different histories, backgrounds and mandates. All three organisations are São Paulo-based and it was not easy to establish a presence in Brasília, where the National Congress and the Federal Executive and judicial powers are based.

In Brazil, even though judicial courts and the correctional system are run by state authorities, all penal and criminal procedure laws are federal; therefore the presence of the group in Brasília is essential. Monitoring the progress of legislation is complex, time-consuming and often frustrating. There are a huge number of bills before Congress at any one time and their passage is often subject

to considerable political manoeuvring, which is conducted in a non-transparent manner. Deals are done, not just between the different political parties – of which there are many in Brazil – but also by powerful regional and interest-based blocs.

No political party has ever achieved a majority in either house since Brazil returned to democracy. Governments tend to be based on fairly unstable coalitions, whose leaders cannot be certain how even members of their own parties will vote. Brazilian politicians frequently change political party mid-way through their term of office and the Constitution provides them with considerable autonomy by protecting them against the constraints of party discipline. This makes it difficult to conduct political advocacy at the national level and there is little tradition of civil society engaging with the Brazilian legislature on this basis. Conversely, Brazilian legislators are not used to being lobbied by civil society and often lack accurate and up-to-date information on which to base their decisions. The project, therefore, quickly found that it was occupying an 'empty space' in the political sphere. It is clear that legislators and policy-makers are looking for 'fixes' to the problems of the criminal justice system. The organisations soon began to receive a high level of demand for well-researched policy briefs, statistical information, reports and advice on projects, speeches, legislative bill proposals and evaluations.

The project heavily invested in identifying the 'key players' in the area of criminal justice reform and then began to engage with them through a series of briefings and one-to-one meetings. The establishment of a representation in Brasília and the production of a regular newsletter were key parts of this process.

One of the project's focuses and main tools is a database of forthcoming legislation. This soon contained 1,300 legislative proposals, which are currently under consideration by both houses of Congress. Each bill is evaluated as negative, positive or positive with reservations, and from this initial list the network selects bills in which it decides to invest more time. The progress of these bills is then monitored by accompanying the discussions and voting at committee meetings of the House of Representatives (the Commission on Human Rights and Minorities, the Commission of Public Safety and Combat against Organized Crime, and the Commission on the Constitution, Justice and Citizenship), and in the Senate (Committee on Constitution, Justice and Citizenship, Commission on Human Rights and Participatory Legislation).

The advocacy coordinator (the representative in Brasília) also attends the meeting of the college of party leaders – where the weekly legislative agenda is established – and the relevant floor sessions. By accompanying the activities in person, the advocacy coordinator enables the organisations to identify the stakeholders for and against each bill. This also helps the project to: anticipate the positions of key players; establish a dialogue with decision-makers; and place bills on the voting agenda. Around 43 per cent of the bills in Congress on criminal issues are introduced by the Executive Body, and these have much more chance of passing into law than those introduced by representatives and senators.[2] This partly explains why law-makers lack capacity as individuals to produce law and is one of the reasons why they have been so open to receiving help from the Brasília Project.

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2 Marcelo da S Campos, 'Crime e Congresso Nacional no Brasil pós-1988: uma análise da política criminal aprovada de 1989 a 2006', (2010) Dissertação apresentada ao programa de Pós-Graduação em Ciência Política da Universidade Estadual de Campinas.

The demands placed on the project have frequently stretched its capacity. We have often called our network partners to help us, and this broader and diverse network has proved to be an important strength of the project. We rely on our partners for data production and for various kinds of expertise. At the same time, the difficulties of coordinating advocacy activities between three (now five) organisations, all of which are based in São Paulo, ranging over such a vast policy area, have been immense. It has been necessary to develop a high level of trust, delegate responsibilities and build team-work between the organisations and with the Brasília representation. All of the organisations have worked in as participatory a way as possible, including putting proposed bills out for consultation with their activist bases. Although this has been time consuming, it has increased the legitimacy of the project's advocacy proposals and makes a big difference to our work.

Unfortunately, the majority of bills that the project monitors are negative, in that they propose measures that would increase the number of people being sent to prison. Therefore, the work of contention, or improving existing bills, is more important than the work of proposing new bills. Nevertheless, we have realised that having what may be seen as a negative agenda in Congress is counterproductive; it is strategically important to select good bills and support them, since this is how we can establish collaborative work and gain allies.

As the Brasília Project has grown, its influence among policy-makers, members of Congress and the Executive has increased. This has led to an ever-increasing demand for advice in criminal matters and requests from law-makers for information and briefings. To deal with this increased workload, the project has expanded its staff by hiring a lawyer and a sociologist to draft technical briefings.

Legislative advances

The project's two most important successes came in June and July 2011, when National Congress approved two important penal-related bills.

The first piece of legislation approved was the law of precautionary measures, which became Law No 12/403/2011. This had originally circulated as Bill 4.208/2001 in 2000. This bill had been in Congress for more than ten years and had originally been ranked by government as a high-priority bill, but had lost its importance over the years. The bill had originally been proposed by the Executive, which increased its chances of becoming law. Moreover, one of its original rapporteurs was José Eduardo Cardozo, who was appointed Minister of Justice by President Dilma in the current government. The bill also contained extremely positive proposals in relation to pre-trial detention and so became a major focus of our advocacy work. The challenge was to put it back on the agenda. After almost a year of discussing the importance of the bill and talking to different actors, we found strong allies at the Office of Legislative Affairs of the Ministry of Justice. With them, we were able to capture the attention of party leaders and heighten the priority level of the proposal.

A key alliance was formed between Paulo Teixeira (leader of the Workers' Party), Domingos Dutra (rapporteur for the Penal System's Congressional Investigative Committee) and João Campos (rapporteur for the Bill in the House of Representatives). Through daily monitoring, distribution

of documents in support of the project to political party leaders and coordinated meetings, the network strongly contributed to the bill's placement on the legislative agenda and vigorously persuaded party leaders and legislators to approve the proposal. The law was approved in April 2011 and went into effect on 4 July 2011, with the potential for significant positive effects on a national scale.

The new law stipulates that preventive custody is no longer appropriate for crimes subject to prison terms of up to four years, when the defendants are first offenders and the crimes are non-violent. For these cases, there is a list of precautionary measures that may be adopted by the judges either individually or in conjunction with one another. The law contains nine alternative precautionary measures to pre-trial detention: electronic monitoring; house arrest; regular court appearances; night curfew at home; payment of bail; ban on accessing or spending time at certain places; ban on entering into contact with a specific person; ban on leaving the district; and suspension of work in a public function. While judges still retain their broad discretionary power to impose pre-trial detention, the specification of these alternatives should help to ensure that it really is only used as a last resort. This means that it has the potential to drastically reduce the prison population awaiting trial. Clearly, the next step will be to monitor the application of this new law in practice.

The second legislative victory achieved by the project was the passing of Law No 12.433/2011, which allows prisoners to reduce their sentences through studying; this law came in to effect in June 2011. Under the new law, for every 12 hours of study, prisoners will be entitled to a one-day reduction of their sentence. This bill is extremely important, as it creates a concrete incentive to study in prisons. It is worth noting that in Brazil, 63 per cent of prisoners have never completed elementary (primary) school.

The bill had originally been introduced in Congress in 2006. During the vote in the House of Representatives, many negative changes were made to the bill. Our work in the Senate focused not only on encouraging the adoption of the bill, but most importantly, on making changes to the text in order to recover its original meaning. The rapporteur on the matter, Senator Antonio Carlos Valadares, accepted the alterations put forth by the project's team and the bill was approved on the same day by the House Commission on the Constitution and Justice and by a full Senate vote.

Implementation of both laws will be a considerable challenge. The majority of penal institutions in Brazil do not currently provide education classes – although they are legally obliged to – and so most prisoners will not be able to avail of its proposed benefits. Efforts to create a structure in the prison system to put the law into practice are necessary; we have already started discussing this issue with directors of two prisons in São Paulo.

The precautionary measures law demands even more attention and investment by the government. Most of the alternatives to pre-trial detention stipulated by the law demand some sort of state control, for example: limiting movement to certain places (which needs verification); electronic monitoring (equipment is needed); etc. On the other hand, there is one measure that is easy to apply: bail. We feel it is too early to discuss in detail the use of the new law by the judiciary; however we can confirm that bail has been widely used in the recent past, and a few other pre-trial alternatives have been applied. This is a current and important concern for us at the moment and it will be mentioned below when we discuss our challenges.

The project has also actively participated in influencing the policy made by the National Council on Criminal and Prison Policy (CNPCP). Several of the project's proposals were included in the National Plan of Prison Policy of the CNPCP.

Conclusions

We discovered that there was an information vacuum in Congress in the area of criminal justice, as there are few civil society organisations that systematically work in this area. In addition, we discovered that some law-makers are quite open to collaborating with us. We cannot credit the passage of the above-mentioned laws solely to our project, but we know that our contribution was of great importance within the process.

We also came to realise that working within a network is very productive, as each organisation contributes its best. Sou da Paz has considerable experience in legislative monitoring and advocacy. Conectas has extensive experience in strategic litigation. Pastoral Carcerária possesses a national grassroots network and has done extensive on-the-ground work within the prison system, including providing legal assistance to detainees.

This is ongoing work and, as mentioned above, two additional organisations from the Criminal Justice Network have joined the advocacy project. At the beginning of this year, we held a project planning meeting for 2012 at which we selected our priorities for the year. Prioritising has been a very difficult challenge that we have faced, as all matters related to criminal justice are relevant to us. However, as seen here, we follow the progress of over 1,000 bills and in order to have impact, we have to focus. Therefore, our priorities for 2012 are:

- working on implementation of the precautionary measures law;
- advocating for the approval of a bill that creates what we have called 'custody hearing' (the right to see a judge within 24 hours of being detained) – we have worked on the new text of this bill;
- starting a serious discussion about our current drug law and bringing reliable information produced by the group to congressmen and women;
- advocating for the approval of two bills that we have been closely involved with since their inception:
  - the regulation of body searches of prison visitors; and
  - the bill that ensures family contact between prisoners and their children is maintained, which ensures prisoners do not lose their parental powers due to the lack of defence; and finally,
- external control of the penal system through a new bill that creates a national mechanism for the prevention of torture (MPNT), which was created as a consequence of the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and a broader objective to strengthen all kinds of external control of the penal system through the participation of civil society.

We are aware that we have many challenges ahead of us but we have found several significant supporters since the beginning of the project, from funders to members of the Executive and legislative federal powers. It has been a rewarding experience for us and we believe we can increase the level of transparency and democracy in the legislative process with regard to criminal justice and the penal system in Brazil.

CHAPTER FOUR

The Silent Revolution: Innovare and Justice Reform

Conor Foley

Introduction

The Innovare Institute ('Institute') was established in the context of the reform of the Brazilian justice sector. It was created to identify, reward and disseminate innovative practices from within the judiciary. It brings together the private and public sector, academics and the media, politicians and public servants as well as legal professionals to support judicial reform in Brazil from the bottom up. Its stated goal is to promote a 'silent revolution' in the Brazilian system of justice to make it more accessible, democratic, rapid and efficient. As its scope has widened and its influence and impact increased, the Institute deserves to be recognised as an innovation in itself.

The project was created in 2004 during a politically tumultuous period. Two years beforehand, Luiz Inácio Lula de Silva, of the Partido dos Trabalhadores – PT (Brazilian Workers' Party) – had been elected President of Brazil, on a mandate that included reducing inequality and poverty and tackling Brazil's powerful and entrenched interests. It was the first time that the Left had won a presidential election since Brazil's return to democracy and Lula was the first working class President in the country's history. He declared judicial reform was to be a major priority of his government, appointing the highly respected lawyer, Márcio Thomaz Bastos, as his Minister of Justice.

In May 2003, the government established the Secretaria de Reforma do Judiciário (Secretariat for Judicial Reform) within the Ministry of Justice, charged with 'formulating, fostering, supervising and coordinating the process of reforming the administration of justice and fostering dialogue between the legislative, executive and judicial branches'. On 7 July 2004, Brazil's Senate approved a bill on judicial reform, which included Constitutional Amendment 45. This created the Conselho Nacional de Justiça – CNJ (National Justice Council) and sought to speed up the process of cases through the courts. The law was subsequently approved by Congress in 2005; which was a huge breakthrough after more than a decade of political wrangling and paralysis on the issue. The process of judicial reform in Brazil is discussed further in the final chapter of this book.

Sérgio Renault was appointed the first Secretary of Judicial Reform in 2003. He accepted the position while being fully aware of the scale of the task. He remembers that:

> 'we understood that judicial reform was a concern for everyone and not just the judiciary or executive. It was not possible to think of the development of the country, reducing poverty and inequality or strengthening democracy without a judiciary functioning in accord with the needs of its citizenry. It was through stressing the need for dialogue, respect and consciousness of the need for cooperation between the executive and judiciary that we were able to advance the process. Most importantly, we succeeded by gaining the understanding that judicial reform was in the interests of the judiciary itself and depended on them to be carried forward. In truth, the Constitutional reform of the judiciary, the creation of CNJ and numerous other projects of law that reformed the criminal, civil and labour codes arose out of that understanding'.[1]

1 *Revista Innovare*, 2011, 6.

As part of this approach, Renault stresses:

> 'we were also clear that improving the functioning of the judicial system did not just depend on changes to the law and that there was a movement of modernisation in progress inside the judiciary itself that was searching for changes to the administrative proceedings, implementing alternative systems of conflict resolution and creating other forms of expanding access to justice. This is what Professor Falcão referred to as the "silent revolution in the judiciary" and we saw it as our duty to identify and value these actions. It was out of this process that Innovare emerged.'[2]

Breaking the paradigm

An initial partnership was forged between Renault, the Secretary of Judicial Reform, and Professor Joaquim Falcão, the Director of the Law Faculty at Fundação Getulio Vargas (FGV). The project became more concrete when it linked up with Pedro Freitas, a private sector lawyer, and formed an institutional partnership with the Associação dos Magistrados Brasileiros – AMB (Association of Brazilian Judges). The first prize was awarded in 2004 for projects that had identified solutions under way aimed at solving problems related to the management of the judiciary and simplifying its administration. Over 400 applicants were received from all over Brazil. This greatly exceeded the expectations of the organisers – who had assumed that they would receive about 60 applications – and showed that there were a huge number of innovative practices that could be learnt from and disseminated throughout the justice system.

Falcão remembers: 'when we started the project it was based on the hypothesis that there were multiple, hundreds, perhaps even thousands of innovative judicial projects searching for a path to the future and a justice system more administratively efficient, socially equal and politically independent. The projects that we received in the applications proved that this is the case. The silent revolution is under way'.[3]

As Professor Maria Tereza Sadek of the University of São Paulo (USP) has noted, the combined impact of constitutional reform and the creation of Innovare meant that the year 2004 should be considered as a 'division of the waters' in the history of Brazilian justice. She says that 'both projects can be seen as responses to the criticisms made about the deficiencies in the distribution of justice in the country. They embodied propositions with the potential not just to shake up the day-to-day functioning of the justice system but to produce reflections on the process of consolidating democracy and protecting individual rights in Brazil.' While Constitutional Amendment 45 introduced significant changes in the overall legal framework, she believes that Innovare can be seen as a 'bundle of innovation' in itself. In particular, the partnership between the public, corporate and private sectors 'broke the paradigm based on which the only way to reform the judiciary depended strictly on alterations to the law and/or increasing the number of judges and providing them with more human resources and materials'.[4]

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2 *Ibid*.

3 Premio Innovare, *Práticas Vencedoras*, Volume II, 2007.

4 *Revista Innovare*, 2011, 70.

Another innovation is the project's conceptual simplicity. Innovare organises an annual competition for projects that support judicial innovation. The Innovare jury includes Supreme Court judges, representatives of the main justice institutions, members of CNJ, prominent academics and other legal specialists who meet for a day to discuss the projects and select the final winners, each of which receives a prize of R$50,000, together with a special plaque. The prizes are awarded at a special ceremony, held at the Supreme Federal Court building, which has steadily grown in stature and significance.

The announcement is widely publicised both by the justice institutions and the mainstream media. Applicants are required to fill in a standard application form, summarising their project, describing how it is being implemented, the results obtained and the physical structure on which it is based. Only actual functioning projects are considered, rather than ideas or suggestions. After all of the applications have been received, consultants are hired to check the eligibility of the projects and provide an independent evaluation of their effectiveness. This shortlist is submitted to the jury, which selects the winners.

The criteria against which projects are evaluated are:

- efficiency, in terms of increasing the number of cases dealt with or reducing costs;
- quality, in terms of user-satisfaction, effectiveness and impact;
- speed in solving cases and cutting down on delays;
- optimal use of resources, as well as originality, creativity using resources in unusual ways and the development of new processes;
- improvement of management practices;
- social inclusion and outreach to marginalised communities;
- practicality and simplicity;
- territorial scope; and
- transferability, so that the practices developed in one place can be spread to others.

In its first year, Innovare awarded four categories of prizes: for individual judges; for groups of judges working together on a particular project; for judges of special courts; and for courts themselves. These four categories were merged into two (individual judges and court tribunals) the following year and an additional category was added for the Ministério Público (Public Prosecutor's Office). In 2006, the Defensoria Pública (Public Defender's Office) was also included. In 2008, a prize for individual lawyers was added, while in 2010 a new special category of prize was added to the list. These changes were part of the process of the project's natural development but were also in response to some specific developments that are discussed in more detail below.

Innovare was initially managed as a project by FGV and drew on the sponsorship of Vale and a number of private companies that provided the prize money. In 2009, it became the Innovare Institute, as a separate body and with the formal sponsorship of Globo Organizations, Brazil's leading media broadcaster. Globo's sponsorship brought not just resources but also increased media coverage. The announcement of the call for projects is now made on Brazil's main television channel, which also carries regular advertisements for it. The prize ceremony is compered by one of its news broadcasters and features as a prominent item in that day's news bulletin.

Every year, a new theme is chosen and the inauguration ceremony is hosted by the Superior Tribunal de Justiça – STJ (Superior Court of Justice), the highest non-constitutional court in Brazil. The prize-giving ceremonies are presided over either by the Minister for Justice or the President of the Republic. The list of attendees reads like a 'who's who' of the legal profession.

The 'threat' of a good example

The prestige associated with the prizes has become enormous. However, it would be wrong to allow such superficial glamour to obscure the Institute's subversive potential. Successive opinion polls show that most Brazilians believe that their judiciary is unaccountable, lacking in transparency and not always impartial.[5] Trials are slow and the bureaucracy and delays associated with them make access to the justice system difficult for ordinary people.

Conversely, the substantial and continuous increase in new cases shows that more and more Brazilians are using the court system, which perhaps indicates a growing incremental trust. Judges themselves have to cope with huge backlogs in their caseloads and there is a significant shortage of judges in relation to the number of cases with which they have to deal. This has led to growing dissatisfaction within the judiciary about the existing system, creating a double pressure for reform. Prior to the creation of CNJ, there was also no effective system of oversight or internal discipline within the judiciary. However, many judges have resisted reform because they fear that changes imposed from the top down, without their active involvement, would undermine their independence while failing to deal with the underlying systemic problems that they faced. The result has been institutional stagnation in what one observer has described as 'a classic case of producer capture'.[6] As is described in several other chapters of this book, this has led to a particular crisis in the criminal justice system, with the courts being unable to effectively oversee and control the country's prisons.

Innovare has consciously sought to apply lessons from the private sector to promote institutional reform. As Freitas notes, successful businesses are constantly searching for more efficiency and improvements in production, marketing and distribution. Innovation is actively encouraged and successful projects are then scaled up and diffused throughout the company. Each potential new contribution is assessed to weigh its impact against the cost of its introduction. Successful companies regularly consult their workforces, since these are the people with the best understanding of the productive processes and how they can be improved. The measure of success in any services-oriented business is the focus on attending to the needs of the client, which is how the business justifies its existence. The judiciary is a service provider to the general public and has to ensure that this mission governs its daily activities. This is the model that Innovare is trying to introduce to overhaul entrenched interests and outmoded practices in the Brazilian justice sector.
Freitas emphasises that,

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5 See *One in Five: the crisis in Brazil's criminal justice and penal systems*, International Bar Association, 2010, 41–43. A poll commissioned by the Brazilian Bar Association in 2003, for example, showed that the judiciary was the second-least trusted state institution in Brazil. A poll commissioned in 2009 found that 69 per cent of respondents believed that judges lacked impartiality.

6 Fiona Macaulay, 'Democratization and the judiciary', in Maria DiAlva Kinzo (ed) and James Dunkerley, *Brazil since 1985: economy, polity and society* (London: Institute of Latin American Studies, 2003) 86.

> 'Innovare does not honour the Kafkaesque sections of the judiciary that have lost their purpose in trial and procedures that have no perceptible purpose, that adore bureaucracy and no longer recognize their time or mission. Those that desire to use their authority only to enjoy the privileges of office without recognizing its duties and responsibilities. We don't want an oppressive judiciary, a labyrinth without end that generates fear and dismay amongst the people who have contact with it.'[7]

Instead, Freitas says that Innovare is identifying 'heroes' within both the judiciary and its administration, who are trying to increase the efficiency, transparency and accountability of the system. These good examples can help the justice system become more effective in fulfilling its fundamental function of promoting harmony in social relations. Freitas believes that judges, public prosecutors and defenders, as well as private lawyers, have a hugely important role in: defending society from organised crime; fighting the militias and drug-traffickers; monitoring the conduct of elections; improving prison conditions; resolving conflicts in the family; regulating construction; preserving the environment; and promoting community justice. There are many individual examples of projects that do all these things very successfully in Brazil. This is what Innovare wants to honour with prestige.

Roberto Marinho, the Director President of Globo, similarly notes that Innovare's impact needs to be understood in the context of the enormous transformations that are taking place in Brazilian society. Democracy is being consolidated, but the country still faces many challenges in ensuring that its rapid economic development is achieved in a manner that is consistent with improving the living conditions of the population and improving the services provided by the state. The experiences of many other countries at similar levels of development to Brazil show that none of these things can be taken for granted. 'The role of Innovare', he concludes, is to 'identify good practices to stimulate further good practices and so create a virtuous circle of innovation'.[8]

The first four Innovare prizewinners, in 2004, were: a project to combat electoral fraud in Maranhão; a family mediation centre in Minas Gerais; a mobile court that works to protect the environment in Mato Grosso; and the management of the Court of Rio de Janeiro which, through the introduction of goals, indices, indicators and standards, had speeded up the process of appeals and computerised 99 per cent of all its cases.

In 2005, Innovare presented awards to: a project by Ministério Público in Santa Catarina to combat corruption; a project to speed up the settlement of cases through conciliation in São Paulo; an administrative model that had increased the efficiency of the Federal Justice Court of Rio de Janeiro; and a Justiça Comunitária (Community Justice) project in Brasília. Following the Innovare award, the Justiça Comunitária project was scaled up in 2008 into a public policy by the Programa Nacional de Segurança Pública Com Cidadania – PRONASCI (National Programme of Public Security and Citizenship). Several similar projects are being implemented elsewhere in the country, including some of the newly 'pacified' favelas of Rio de Janeiro. This project is discussed in chapter five of this book.
In that year, the Innovare jury also decided to give 'honourable mentions' to four other projects, which had overtly social themes: improving prison conditions; the rehabilitation of young offenders;

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7 *Revista Innovare*, 2011, 68.

8 *Revista Innovare*, 2011, 67.

combating child labour; and monitoring children being held in state institutions. Each of these projects showed how small-scale initiatives by professionals working in the justice system could make a practical difference, using their ingenuity and hard work.

Between 2004 and 2011, Innovare collected, evaluated and judged more than 3,000 projects, all of which provide examples of good practice, even where they have not been selected for prizes. To accompany the awards ceremony, Innovare produces a yearbook detailing the shortlisted projects, which is widely distributed throughout the judiciary. Since 2009, it has created an electronic application process and database which means that all of the projects that have been submitted to it in applications for prizes can be accessed and downloaded. There is no other comparable reference source on justice sector projects and initiatives in Brazil.

Innovation and penal reform

In 2009, Innovare signed a partnership agreement with CNJ to exchange information on good practices and provide reciprocal support. One of the stated aims of the project Mutirão Carcerário, which is discussed in the first chapter of this book, is to examine which of the projects that it has evaluated could be used to promote reform within the criminal justice and penal systems. The *mutirão* in Rio Grande do Sul, for example, refers to one Innovare-nominated project pioneered in Brasília Federal District, which enables prisoners to follow the process of their case by accessing their sentence files electronically, through a type of self-service bank.[9] Given the huge number of prisoners that the *mutirões* have discovered who have not received the progression of their sentences because their case files are not being updated, this innovation is of enormous practical use.

The *mutirão* project itself won a prize in 2009. The following year, Innovare and the International Bar Association (IBA) created a new special prize that was won by Começar de Novo, another initiative of CNJ, which gives prisoners and ex-prisoners a chance to obtain employment and reintegrate themselves into society. Both Mutirão Carcerário and Começar de Novo were founded by Judge Erivaldo dos Santos when he was special adviser to CNJ's President Gilmar Mendes.

Começar de Novo has succeeded in helping over 1,600 former prisoners into job placements. There are another 2,551 placements available but they have not been taken up because of the lack of professional qualifications, which shows the lack of educational opportunities currently available in Brazil's prisons. Discussions are currently ongoing with the authorities in Mozambique about implementing a similar project there, following a visit by Santos.

Hundreds of the projects that have been shortlisted for Innovare prizes relate to criminal justice and penal reform. While it would take too long to detail them all individually, they can be grouped into broad themes, which correspond to some of the main areas of concern about the current system. As is described in several other chapters of this book, Brazilian prisons and criminal justice institutions simply cannot cope with the number of cases, trials and prisoners that they are being forced to deal with. The judiciary and Ministério Público are overwhelmed with their caseloads and huge backlogs

9 Mutirão Carcerário de Rio Grande do Sul, 14 March 2011 – 15 April 2011, 293.

have developed in their trials, which are often extremely lengthy and subject to numerous delays. They are also unable to perform their tasks of monitoring prisons and the progress of individual prisoners through their sentences. Defensoria Pública is even more understaffed, which means that the 80 per cent of prisoners too poor to afford a private lawyer do not receive adequate legal advice and representation. This frequently results in people being wrongfully detained in prisons.

The number of prisoners in Brazil is growing rapidly and an increasing proportion of these are being held in pre-trial detention. This has led to massive overcrowding as the number of prisoners exceeds existing capacity by over 40 per cent. Wages of prison staff are low, which, together with their increased workload, has devastated morale and led to staff shortages, absenteeism and corruption. The conditions in many prisons are inhumane and some are effectively under the control of criminal gangs. There are numerous allegations of torture perpetrated against prisoners – both by prison staff and in inter-prisoner violence – and some groups such as women prisoners and young offenders are particularly vulnerable to abuse.[10] Few prisons are able to provide the social programmes that the law specifies should be used to help the social reintegration of former prisoners. This probably contributes to their high recidivism rates and Brazil's high rates of crime, which, in turn, places greater pressure on its criminal justice and penal systems.

Part of the answer to these problems is that the system needs more resources, but the Brazilian government already spends and taxes at higher rates than most countries of a comparable level of social and economic development. A project costing R$2 billion is currently under way to build more prisons and modernise existing ones. However, human rights monitoring groups have noted that sometimes the problem is not lack of money. For example, in a major report published in 1999 on prison conditions in Brazil, Amnesty International noted that there had been a significant under-spend in some areas of the prison budget:

> 'Although the federal and state governments are currently building new prisons, and prisoners are gradually being transferred out of the police stations, equal importance should be accorded to investment in human capital and to increasing the quantity, quality and accountability of the personnel working within the prison system. The federal government allocated nearly US$456 million to the prison system in 1995–1997, but spent only 57 per cent of that budget allocation. Of the US$540,000 earmarked for staff training, reportedly none was spent.'[11]

In a more recent report on conditions in a youth detention facility in São Paulo (CASA), the Brazilian human rights organisation Conectas noted the institution was comparatively well funded and that lack of material resources was not the root cause of the problem:

> 'Rather, it is an institutional culture that values punishment over rehabilitation and fails to hold its personnel accountable for abusive acts. The situation is reinforced by the widely held view in Brazilian society that the young people housed in CASA are dangerous and require the most brutal methods to keep them in check. In fact, young

10 See Conor Foley, *Protegendo os Brasileiros Contra a Tortura: um manual para Juizes, Promotores, Defensores Públicos e Advogados*, International Bar Association, 2011.

11 AI Index: AMR 19/009/1999, 22 June 1999.

people convicted of minor infractions are mixed in with those convicted of more serious offences; the one common denominator is that all come from poor backgrounds. Affluent youth are seldom relegated to CASA.'[12]

Acting locally, thinking globally

Changing an institutional culture cannot be done through simply increasing resources, but the Innovare Institute offers an approach that could lead to more systemic reform, from the bottom up. Each of the individual projects that has been shortlisted for its prizes represents a localised response to the problems in a particular state. Most have been created by legal professionals working in their spare time, with extremely limited resources, out of frustration with the flaws that they encounter in the existing system. Scaling up the best of these projects into national initiatives – as has already happened with Começar de Novo and Justiça Comunitária – could become part of an effective strategy for building a better overall system.

Some projects address an obvious unmet need, using the simplest and cheapest forms of technology. Defensoria Pública in Ceará, for example, has created a Nucleo de Execução Penal – NUDEP (Centre of Penal Execution), which has distributed pamphlets to all prisoners in the state informing them of their rights and duties in the penal system, giving them useful addresses to contact and setting out the timeline by which they can expect a progression of their sentences to lower levels of security. Ministério Público in Goiâna, similarly, distributes a simple complaints form to every prisoner in the state once every 15 days. This enables prisoners to describe the conditions in which they are being held and whether their rights are being respected. Prisoners who are aware of their rights are more likely to complain when they are violated and that makes the task of monitoring and inspecting institutions easier. Such initiatives play a vital role in empowering prisoners, which helps them to make the system more accountable.

Other projects make extremely innovative uses of technology. The integrated assistance programme established by Defensoria Pública in Mato Grosso, for example, provides for the online registration and monitoring of each criminal case in the state. Prisoners can access this and receive updated information about the progress of their sentence, when they are entitled to reductions of security and progress towards parole and when they can expect to move from a closed regime to an open or semi-open one. It also registers complaints that they may make about their conditions, together with requests sent to the prison administration. Requests for certificates of employment and referrals to healthcare facilities can also be registered.

12 Oscar Vilhena, 'Public Interest Law, a Brazilian perspective' (2008) 228 UCLA Journal of International Law and Foreign Affairs 250.

A number of courts have also made use of technological innovation to increase their efficiency. The state court in Espírito Santo, for example, networked its computer records systems so that judges can be immediately informed if a defendant appearing before them has a criminal record or is subject to other criminal proceedings, which greatly facilitates decisions about bail or remand. Courts in São Paulo and Recife developed new information technology systems to cut down on the amount of paper that needs to be printed out during court hearings, so speeding up their conduct and cutting down waste. The Superior Tribunal de Justiça – STJ (Superior Court of Justice) has managed to completely eliminate paper hearings by digitalising all of its hearings. The court in Paraná introduced software which enabled judges to identify key words from videotaped hearings, meaning that statements no longer had to be transcribed long-hand, resulting in a reduction of the length of court proceedings by half.

As well as achieving efficiencies, new technology can also be used to humanise the criminal justice system. For example, the state court in Rio Grande do Sul introduced a special room next to its trial chamber where children who have been the victims of sexual abuse can give a single interview to a psychosocial counsellor, which is video recorded and taped while being directly used as evidence in a criminal trial. Previously, children needed to repeat accounts of their suffering several times, to different public officials and finally in court itself, while facing the person who is charged with carrying out the abuse. This was obviously extremely traumatic and the project – Depoimento Sem Dano (Statements without Damage) – simplifies the system. The child now only needs to make one recorded statement in a room adjacent to the court where the trial is taking place. The judge, prosecutor and defence lawyer can put questions to the witness, via the psychosocial counsellor, who is wearing an earphone, and will ensure that they are phrased in appropriate language, often using toys and dolls to help the child explain what happened.

The court in Rio Grande do Sul received evidence from 2,000 children using this method in the project's first seven years. Despite some fair-trial concerns, it has generally been widely welcomed by criminal justice specialists, who say it is far less invasive and traumatic and makes children more willing to testify about the abuse that they have suffered. The project has become a model for many other states throughout Brazil. In March 2009, the Senate passed a Bill that incorporates the methodology in the Comissão de Constituição e Justiça (Commission of the Constitution and Justice).

Many of the projects involve the creation of multidisciplinary teams to address particular problems in a holistic manner. For example, the Programa de Atenção Integral ao Paciente Judiciário Portador de Sofrimento Mental Infrator – PAI-PJ (Programme of Integrated Attention to Judicially Detained Patients), which was created by the Court of Minas Gerais, involves an inter-sectoral partnership between the judiciary and the state authorities, with the active involvement of the local community. It aims to provide a fully integrated system of monitoring detained patients through all stages of the criminal justice system by a multidisciplinary team. Judges receive advice from mental health professionals and are encouraged to consider alternatives to incarceration, such as care within the community. Hundreds of defendants with mental health problems have benefited from non-custodial sentences as a result.

A judge in São Paulo developed a Núcleo de Atendimento Integrado – NAI (Centre of Integrated Treatment) to provide a similarly integrated approach to treating young people in conflict with the law who had previously ended up in places such as the notorious young offenders' institute, FEBEM. NAI was formed out of a formal partnership between the judiciary, Defensoria Pública and Ministério Público, along with the State Secretaries for Public Security and for Social Assistance to ensure that young offenders who receive institutional sentences are given proper care and assistance, from qualified professionals. Only four per cent of inmates at NAI reoffend, compared to 30 per cent who attend traditional young offenders' institutions, and the centre has become a national reference point, running training programmes on its approach in other cities and states.

Other projects also actively seek links with civil society and the wider community. The NUDEP project created by Defensoria Pública in Ceará, for example, involves a partnership with Pastoral Carcerária, a non-governmental organisation working on prison issues with the Catholic Church, as well as the State Secretary for Justice and Citizenship and various educational institutions. It runs education and social projects inside prisons, using volunteer activists, backed by an interdisciplinary team that can also provide psychosocial services which provide practical support to prisoners with the aim of supporting their rehabilitation and reintegration into society. There are numerous similar projects working on the rehabilitation of prisoners and strengthening their ties with the communities to which they will return. In fact, Começar de Novo, which was launched as a national project by CNJ in 2009, can be seen to have been constructed on their cumulative experiences.

The Núcleo de Defesa dos Direitos da Mulher – NUDEM (Centre for the Defence of the Rights of Women), created by Defensoria Pública in Minas Gerais, also provides women with psychosocial as well as legal support so that they can escape from situations where they are facing violence. It also links up with civil society groups and networks of women's support organisations. A group of public prosecutors in São Paulo made a similar link-up when a series of courses that they had provided to community activists in Jardim Ângela, once considered one of the world's most violent neighbourhoods, led to the formation of the Grupo Organizado de Valorização da Vida – GOVV (Group Organised to Value Life). The GOVV began meetings with the authorities to discuss problems in the area, as well as forging links with groups working on issues such as domestic violence. Together they have been able to significantly reduce rates of violence, as well as address some of the social problems in the area.

Innovare is itself continuing to innovate. As stated above, in 2010 it linked up with the IBA to provide a joint prize for a project working on the issue of penal justice. This was the first time that it had cooperated with an international organisation and the success was repeated the following year when it again awarded a joint prize with the IBA; this time on the theme of combating organised crime. In the same year, Innovare also granted its first award to a project located outside Brazil. The President of the Supreme Court of the Dominican Republic was awarded a prize for a project that has reduced delays and speeded up the delivery of sentences by 30 per cent in the country. The Innovare approach offers a potential model to other countries whose justice sectors face similar challenges to those of Brazil. The scale of the tasks facing those involved in justice reform here means that innovative practices that can succeed here are potentially applicable almost anywhere else in the world.

Conclusion

The above list only represents a handful of the projects that Innovare has received in response to its call for applications for prizes in the last eight years. It should, however, be sufficient to show the range of good practices that can be drawn on to reform, stimulate and improve the functioning of the justice sector in Brazil. It also shows that judicial reform should not be thought of as something that must be imposed from outside. It is instead a natural process of learning and experimenting with new practices, the best of which will replace those that have become inefficient or ossified over the passage of time.

Perhaps the most emblematic Innovare award has been to a project developed by a Federal Public Defender in the Amazon, Luciene Strada de Oliveira. She had been receiving a number of cases of indigenous women who had been 'scalped' in accidents where their hair had become tangled up in the outboard motors of boats, causing horrific facial injuries. Indigenous women traditionally wear their hair long. Boats are the main form of transport for families in the region, and many of these are old and unreliable. As Oliveira began to research the issue, she discovered that there had been around 240 such cases reported to Defensoria Pública in the previous six years. All of the victims were women and this, combined with the facial disfigurements that many suffered, made them reluctant to speak out. Their own society was, therefore, slow to recognise the scale of the problem.

Many of the boats involved in the accidents were operating without a licence but Oliveira decided to pursue a culturally sensitive, rather than a punitive, approach. She remembers that 'there were a huge number of cases, but we had to work at an ant's pace to encourage the women to identify themselves.' The project adopted a three-pronged approach: winning compensation for the victims and paying for their medical treatment, which often involved reconstructive surgery; opening lines of credit to boat owners so that they could modernise their boats and make them safer; and community education, to teach people about the dangers. The result was an 80 per cent drop in cases over two years.

Such a project could only be successful by stepping outside the traditional paradigm of what is considered to be the justice sector. It also required Oliveira to approach the problem holistically, think about it creatively, work to establish a genuine partnership with the affected community, understand their culture and avoid imposing any stereotypical views or prejudices on them. This is almost the exact opposite of the way in which the Brazilian justice system is often seen as working.

It is the thousands of similar projects that have been created all over Brazil, and which Innovare is seeking to identify, publicise and learn from, that is driving forward the reform process. Many of the projects are being implemented in extremely difficult conditions and some will fail as those involved, isolated within their own areas, give up in demoralisation. But those that succeed in linking up with similar activists, learning from one another and scaling up from the local to the national, and even international, level can legitimately claim to be part of a revolutionary movement that is transforming how we think about justice in Brazil.

CHAPTER FIVE

Community Justice: Building Peace

Gláucia Falsarella Foley

Introduction

The Community Justice Programme (the 'Programme') was created in October 2000 with the aim of making justice more democratic by giving back to citizens and the community the ability to manage their conflicts themselves. The Programme is coordinated by the Brasília Federal District Court and currently takes place in Ceilândia, an administrative region just outside Brasília with 398,374 inhabitants.[1]

The Programme is implemented by 90 'Community Agents' who are members of the communities in which they operate. This means, as is discussed further below, that they share the same language and the same community values as those that they work with, which is a fundamental distinguishing feature of the Programme. After selection, the Agents receive continuous training in the Centro de Formação e Pesquisa em Justiça Comunitária (Centre for Training and Research in Community Justice). Their work is also supported by a three-member multidisciplinary team, comprising a psychologist, a lawyer and a social assistant, which supervises activities related to the three main pillars of the Programme:

- **Rights education** – The first of these activities aims to democratise access to information on citizens' rights by decoding the complex legal terminology in which rights are often codified. The Programme also produces educational and artistic materials, for example, textbooks, films, plays and musicals, based on the learning methodology that is set out in the continuing education programme.[2]
- **Community mediation** – The second activity is community mediation, which is an important tool for making justice more democratic, as it promotes empowerment and social emancipation. Through this technique, parties directly and indirectly involved in the conflict have the opportunity to reflect on the context of their problems, to understand different perspectives, and to build a solution together that is capable of ensuring peace in the community in the future.
- **Social network mobilisation** – The third activity democratises the 'management' of the community by transforming a conflict – which is sometimes only occurring between certain individuals – into an opportunity to mobilise the community as a whole and create solidarity networks between people who share common issues and resources.

In developing these activities at the local level, the Programme aims to promote social cohesion as a way of achieving peace and justice within those communities. In 2006, the Programme was adopted as a reference for the establishment of the same experience in other states of the country at the initiative of the Secretariat of the Judicial Reform of the Ministry of Justice, through the Programa Nacional de Segurança Pública Com Cidadania – PRONASCI (National Programme of Public Security and Citizenship).

1 Source: SEPLAN / CODEPLAN – District Survey by household sample – 2010.

2 The material produced so far is available at: **www.tjdft.jus.br**.

Since its establishment as a national programme, 57 similar projects have been established in 13 states throughout Brazil.[3] The Programme is currently in the process of being implemented in some of the recently 'pacified' neighbourhoods of Rio de Janeiro and some of my initial experiences and impressions of this are described at the end of this chapter.

History of the project

The Community Justice Programme of the Brasília Federal District Court was created following my experiences as a Juizado Especial Cível Itinerante (Itinerant Special Civil Court), serving those communities of the Federal District with poor access to the formal justice system. I spent three years, between 1999 and 2001, working inside a bus that had been specially adapted for court hearings. During this time, it was striking how the complete lack of rights awareness among the community consistently hampered the production of evidence in civil cases. People simply did not understand what, in legal terms, their rights were because of the informal manner in which business is often conducted in such communities.

The success of the initiative can be shown by the fact that approximately 80 per cent of the cases brought before the Itinerant Court resulted in friendly settlements. This confirms that the initiative effectively broke both the material and symbolic obstacles faced by the community regarding access to justice. The dispensing of some of the formal, technical legal procedures and the fact that hearings were held face-to-face and eye-to-eye in the bus with all parties physically on the same level, helped to develop an atmosphere of trust, which resulted in the high rate of agreements reached.

However, the swift adjudication of disputes offered by the Itinerant Court did not always meet the expectation of the parties involved. Although it never resulted in any conflict or violence, what was noticeable at the time was that the parties to the dispute did not always feel a sense of justice following the agreement. As the production of evidence was often complex, agreements seemed to be the result of one simple determinative factor, which was based on which party thought they would win or lose. Compromises were, therefore, only agreed when the alternative seemed to be a complete loss of the case by one side or the other. This 'resignation consensus' seemed to impede all efforts to achieve the democratisation of access to formal justice.

These findings – the citizens' lack of information in relation to their most basic rights, coupled with the success of the opportunity for dialogue provided by the Itinerant Court service – prompted a discussion about the possibility of creating within the communities spaces in which access to information could be democratised and communication channels aiming at reaching fair agreements between members of the community could be established. Therefore, the classic 'legal professional' would cede space to ordinary people who shared the same code of values and language and would consequently make the necessary translations and adaptations to the reality of that particular community.

3 See **http://portal.mj.gov.br**.

The first draft of the Community Justice Programme was formulated on the above principles. However, its outlines became more defined after discussions were held between the representatives of partner organisations, which allowed each institution to contribute to the development of the Programme, as is shown below. During the second semester of 1999, the following partner institutions were involved in the elaboration of the project: Public Defender's offices in the Federal District; Law School of the University of Brasilía; Public Prosecutor's Office of the Federal District and Territories; Human Rights Commission of the Brazilian Bar Association (Federal District) and the Human Rights Special Secretary of the Presidency of Republic; and also the Tribunal de Justiça do Distrito Federal e dos Territórios – TJDFT (Court of the Federal District and Territories). Currently, the institutional partners of the Programme are the following: The Secretary for the Judicial Reform of the Ministry of Justice (SRJ-MJ); Public Defender's office of the Federal District (DPDF); Law School of the University of Brasília (UNB); and the Public Prosecutor's Office of the Federal District and Territories (MPDFT).

The concept of community

In every society, there are groups of human beings united by a territorial identity, which provides the community with the status of being the *locus* for the development of social transformation programmes. Marcos Kisil has argued that it is in the territorial sphere – in other words, the place where people are born, study and establish their relationships – where individuals recognise themselves as belonging to the same community.[4] Amid the vast sociological literature dedicated to the concept of 'community', the definition presented by Rogério and Lycia Neumann is very useful for this kind of work, due to its objectivity: 'community means a group of people which share a same common characteristic, one "common unity", which brings them together and by which they are identified'.[5] The core of the concept is, therefore, the idea of shared identity.

The Federal District Community Justice Programme adopts the community as its sphere of work, conceiving democracy as a process which, when exercised at a community level by local agents and channels, promotes social inclusion and active citizenship, all built using local knowledge. It is within the community that individuals build their social relationships and may play a more active role in political decisions. In this context, it can encourage the ability of citizens to exercise their right to self-determination and have ownership of their own histories.

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4 'The most immediate source of self-recognition and autonomous organisation is the territory. People identify with the places where they are born, grow up, go to school, have family ties, finally, socialise and interact in their local environment, forming social network with relatives, friends, neighbours, organisations of the civil society and government authorities'. Marcos Kisil, *Comunidade: foco de filantropia e investimento social privado* (São Paulo: Global; Instituto para o Desenvolvimento Social (IDIS), 2005) 38.

5 Lycia Tramujas Vasconcellos Neumann and Rogério Arns Neumann, *Repensando o investimento social: a importância do protagonismo comunitário* (São Paulo: Global; Instituto para o Desenvolvimento Social (IDIS), 2004) 20–21 (Coleção Investimento Social).

In the design of the Community Justice Programme, the term 'community' is assigned to those human groups who live in the same geographical location and that tend to share the same services, or in the absence of them – issues, codes of conduct, language and values. The territorial division, however, does not necessarily lead to the construction of a socially cohesive community. This will depend on the degree of connection between its members and its ability to promote local development. According to Robert Chaskin, the measurement of social cohesion in a community starts from the analysis of four elements, namely:

- the sense of community or degree of connectivity and reciprocal recognition;
- commitment and responsibility of its members to community affairs;
- its own mechanisms of dispute resolution; and
- access to human resources, physical, economic and political, whether local or not.[6]

As is discussed in the introduction to this book, Brazil has urbanised comparatively recently and, therefore, many of its urban communities are new formations which are still in the process of finding social cohesion.

Where there is shared identity, there will be social cohesion; the creation of which depends on mobilisation and involvement with local problems and local solutions. There is, according to Robert Putman,[7] a reciprocal connection between social capital and sustainable local development. In this sense, developing community is a process that 'grants ethical values to democracy and builds solidarity ties'.[8]

Knowing the *locus*: social mapping

Acting locally requires an understanding of the working area through social mapping. First, it is necessary to define what is intended by the social mapping. A map of the social network is not restricted to a momentary snapshot of the actors in question; it is a guide to support dialogue between those actors to form the basis of ongoing dialogue within the social networks. The identification of social organisations present in each community in which the Programme operates is essential to serve as a reference to the: selection of new Community Agents; referral of participants to the social network, when resolution of the conflict requires it; knowledge of the circumstances that surround community issues; and the creation of new social networks, or strengthening and animating those that already exist, where possible.

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6 Robert J Chaskin, 'Defining community capacity: a framework and implications from a comprehensive community initiative' in Lycia Tramujas Vasconcellos Neumann and Rogério Arns Neumann, *Repensando o investimento social: a importância do protagonismo comunitário*, see note 5 above, 24.

7 Robert D Putnam, *Comunidade e democracia. A experiência da Itália moderna* (Rio de Janeiro: Editora da Fundação Getúlio Vargas, 4th edn, 2005) 186.

8 See note 4 above, 51.

Knowing that social mapping is a constant activity, the territorial definition of the mapped area and its limitations follow the criteria of the local residence of each Community Agent, allowing for a greater integration of them into their community. The idea is not only to locate deficiencies and needs, but also talents, skills and available resources. This strategy allows the mapping to mirror the community which, through reflecting upon itself, will become aware of its issues and will also get to know its own potential. This is essential to the building of a common identity.[9]

This method makes it possible to investigate to what extent solutions to community issues are already available within the community; the very community which, for historic and structural reasons of social exclusion, allowed its problems to be settled only by external institutions to that habitat. This connection between issues and solutions promotes 'a sense of responsibility by the community as a whole, creating a positive spiral of social transformation'.[10] For the effective achievement of this connection, it is essential that the mapping process does not aim exclusively to make a database full of useful but unconnected information. The constant construction of the database is primarily a means to strengthen relationships and create new partnerships.

Social networks

According to Manuel Castells, 'networks constitute the new social morphology of our societies, and the diffusion of logic of networks substantially modifies the operation and results of the production processes as well as experience, power and culture'.[11] The pattern of network organisation is characterised by the large number of horizontally interconnected elements or actors. Links in a network communicate voluntarily under an intrinsic agreement whose modus operandi is 'cooperative work, respect for the autonomy of each of the elements, coordinated action, the sharing of values and goals, multi-leadership, democracy and, [e]specially, the devolution of power'.[12]

As already noted, social mapping enables the discovery of vocations, talents, strengths, needs and issues of the community and its members. During the process of logging and analysing data, it is important for there to be a movement that links initiatives and community organisations, putting them in constant contact and dialogue. The mobilisations of these networks aims at promoting social capital; whose degree, although it cannot necessarily be measured,[13] may be evaluated from the presence of a number of elements in the community. These are: a sense of belonging; reciprocity; identity in difference; cooperation; mutual trust; developing local responses; the

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9 In order to ensure the exploration of the mapping was interesting and creative, the Programme developed a project called 'Portray your Reality', by means of which some cameras were given to Community Agents, in a rotating system, so they could express their views of the reality in which they live and work. The best pictures were chosen in a competition that awarded prizes and enabled publication of the pictures: **www.tjdft.jus.br**.

10 Lycia Tramujas Vasconcellos Neumann and Rogério Arns Neumann, *Desenvolvimento Comunitário baseado em talentos e recursos locais – ABCD* 26, IDIS, São Paulo, 2004.

11 Manuel Castells, *A sociedade em rede* (Tradução de Roneide Venâncio Mayer com a colaboração de Klauss Brandini Gerhardt, 3rd edn São Paulo: Paz e Terra, 2000) 497 (A Era da Informação: Economia, Sociedade e Cultura, v 1).

12 Cássio Martinho, 'O projeto das redes: horizontalidade e insubordinação' (2002) 2 Aminoácidos 101.

13 Augusto de Franco, *Capital Social* (Brasília: Instituto de Política; Millennium, 2001) 62.

emergence of a common project; shared symbols, actions, concepts, practices, tools, stories and gestures; relationships; communication; and acts of accomplishment together. However, how is it possible to promote these elements where scepticism and a lack of trust in politics are common in the community? According to Lycia and Rogério Neumann:

> 'in low-income communities, the high migration of residents, violence, insecurity and distrust in everything and everyone tend to break down social relations and isolate people in their homes and spaces, not allowing them to share concerns, doubts and fears. The development of a community from the inside to outside should start by bringing people together and help them build or strengthen their relationships and mutual trust.'[14]

Hence, it is essential that Community Agents keep their schedules filled with regular meetings with the community so that they lead to reflection, engagement and exchange of knowledge, including technical as well as local knowledge. There should also be a space in which to talk about the future, which is always a guideline for community efforts. Promoting these meetings and dialogues, Community Agents act as 'weavers' that contribute to the strength of this social web, in which the construction of a cohesive community is integrated.

Social actors: Community Agents of justice and citizenship

Community Agents are selected according to their ability to undertake the following practical activities:

- to attend members of the community who are involved in individual or collective conflict;
- to consult with the professional three-member multidisciplinary team installed at the Centre for Community Justice and Citizenship on the possibility of referring the case. Each professional interprets the claim brought before the PJC-DF from his or her own professional perspective, whose knowledge is added to the Community Agent responsible to the claim.
- if the claim is not suitable for mediation and, if the claimant is willing, to refer him or her to a centre for free legal aid, or suggest private lawyers who can file a claim;
- if the claim is administrative, to inform people or groups about the competent bodies and documents required for a better referral of the case;
- if the claim is suitable for mediation, to inform the parties about the possibility of dispute resolution and to encourage all participants to accept this option;
- to mediate, in partnership, conflicts between people or groups interested in solving them without the intervention of the formal judiciary, in order to achieve a mutually acceptable agreement;
- to follow up the claim, even after the agreement;

14 See note 10 above, 32.

- to integrate the community by participating in community events and/or events promoted by public bodies;
- to encourage the construction of networks in the community, for the collective pursuit of the best solutions to common issues;
- to disseminate the Community Justice Programme within the community, by distributing flyers, meeting with various groups, interviews in the media, presentation of plays, among others;
- to undertake multidisciplinary training courses organised by the Centre for Training and Research in Community Justice;
- to promote research of the institutions and social movements which operate in the area corresponding to each Agent (elaborating on social mapping);
- to share with the community information gathered during the development of the social mapping;
- to promote coordination between the community and the mapping institutions, the aim of which is to promote social networks;
- to solicit advice or support from the multidisciplinary team, whenever necessary, regarding the understanding of his or her role; and
- to be constantly up to date, through reading and discussion with other Agents and being present at the meetings of the Centre for Training, among others.

So that the activities of the Programme are relevant to the needs of the community, it is essential that its main operators are part of the community in which they act. It would be meaningless if an effective community approach for the realisation of justice depended on the direct work of operators with no affinities with the local environment, or with the community's own language and value code. The fact that Community Agents necessarily belong to the community in which the Programme operates is essential for the harmonious balance between aspirations and local actions. It is through the role of local agents that the community may formulate and implement its own transformation.

A question arises: if the goal of the Programme is to promote community autonomy, would it not be more coherent if the community could choose its own mediators? In other words, is it not a paradox to allow the state to control the selection of Community Agents if what is sought, ultimately, is community autonomy? Such questions are relevant because they convey the classic tension between regulation and emancipation.

The fact that the Programme is coordinated by a court – and, consequently deals with public financing subject to accountability and internal and external control – leads to regulation being inevitably present in its institutional framework. Although those involved in organising other community justice programmes do not have a juridical nature, it is highly likely that there will be regulation to the extent that, generally speaking, such programmes are supported by either national or international public funds.

Therefore, the experience acquired in the Programme may have an emancipatory effect, despite the inevitable administrative control as well as the duty of rendering a quality service. In this sense, it is essential that old paradigms are broken, new identities are affirmed and concepts based exclusively on the authority of law are pushed back. On the other hand, although there is state control in the selection and working of Community Agents, it is crucial to develop mechanisms that ensure a greater inclusion of the community in the selection process as well as in its own management of the Programme.

The three pillars of the Community Justice Programme

Each Agent preferably acts in the area closest to his or her neighbourhood, dealing with individual or collective claims that are brought to him or her directly by citizens, or are referred by the Programme's Community Centre. Depending on the nature of the claim, there are several options that may be proposed by Community Agents to members of their communities. The decision to refer each claim to the Centre is taken in a meeting among Community Agents and the professional multidisciplinary team based in the Justice and Citizenship Community Centre. In any case, whenever possible, the Community Agent may encourage dialogue between the parties to the claim, proposing, when possible, mediation. Basically, the activities exercised by Community Agents match the three sustaining pillars of the Programme: rights education; community mediation; and the mobilisation of social networks.

Rights education

The lack of knowledge of citizens regarding their rights and of the tools available to exercise them is one of the main obstacles to the realisation of justice. Technical language inserted in the legal rules and the formality and complexity of the proceedings also hamper access to the justice system.

The democratisation of information promoted by the Programme, through rights education, has three goals:

- to prevent, as it avoids future claims arising solely due to lack of information;
- to emancipate, as it gives power to the parties involved in the claim to mediate the issue, through equal dialogue; and
- to teach the citizen to understand how to gather information and how to search for information on his or her rights, in the courts system or in the social network, when and if necessary.

The Programme's educational activities have as their basis the production and presentation of educational resources – books, musicals, shows and plays – inspired by popular art culture. This contributes not only to the democratisation of access to information, but also strengthens cultural Brazilian roots and cultural identity among the members of the community.

Besides producing and presenting such educational material within the community, Community Agents advise on socio-juridical referrals, which are another dimension of rights education. This means that when the conflict may not be submitted to mediation – because the parties do not want to, or due to the nature of the claim – Community Agents inform the claimants about how to refer their claims to the competent bodies – meaning juridical bodies or social networks. This information is systematised in a Referral Guide which is provided to all Community Agents.[15]

Community mediation

Conflicts are not necessarily negative. They are the natural result of the differences between human beings, which is a phenomenon inherent to life itself. Therefore, a new concept of justice may give a positive meaning to the conflicts in order to overcome them in a creative way and, whenever possible, with solidarity.

Judicial proceedings, as a tool to the resolution of conflicts, appraises differences between the parties, divides dialectically between right and wrong, ascertains guilt and in the end identifies winners and losers. Even when the judicial proceeding reaches an agreement between the parties, the settlement is not always able to fulfil the sense of justice expected by each party to the proceeding. In the majority of cases, the agreement to settle the claim is simply due to fear of losing by one of the parties.

Mediation offers a different approach through which a consensus must be built about the fairness of the solution, which may help to solidify the ethics of 'otherness'. It is based on the hypothesis that the protagonists to a conflict, when interacting in a favourable environment, through dialogical reasoning, may find a more sensitive solution that is fair and based on satisfactory valuable and material bases. It is defined by Stephen Littlejohn as a 'method in which an impartial third party helps the parties to the conflict to find their own solution to the claim'.[16] Whatever the mediation technique to be applied, the essential elements that characterise them are the same: it is voluntary; the mediator is a third party not interested in the conflict; the mediator does not have any decision-making power; and the solution is built up by the parties to the conflict.

When it is used in a community environment, mediation has a special meaning, as mediators are members of the same community. Hence, although impartial in relation to the parties, Community Agents are part of the local environment which allows them to identify and understand which values are relevant to the solution of the claim. Besides, the dynamics of community mediation strengthens social ties as it operates *for*, *by* and *within* the community, converting the conflict into opportunities to create a new social web. In the area of community mediation, the community creates and uses its local knowledge for the construction of a solution to the issue affecting it. In other words, the community opens a channel to 'give community answers to community issues'. As already noted, developing a social map is crucial for Community Agents since these social

15 The Referral Guide is material created by the multidisciplinary team of the Programme with the help of Community Agents, providing easy access to the data related to entities and services – social, juridical, psychological – offered by public service. The content of this material is available at the website of the Programme: **www.tjdft.jus.br**.

16 Stephen W Littlejohn, 'Book reviews: *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* by Robert A B Bush and Joseph P Folger' (1995) International Journal of Conflict 103.

networks play a crucial role in community mediation and help the parties to a dispute to understand the context in which the conflict is located. Therefore, at the same time as work is being developed regarding preventing the problem from continuing, mediation enables reflection about the context in which conflicts have occurred. In this sense, even if there is no friendly settlement, mediation will not be considered a failure as its objective is the improvement of communication and participation of the community. The idea is that participation in community mediation empowers the parties to the conflict, as well as providing the community with a means to manage the conflict peacefully.

In this regard, the transformative model of Bush and Folger may be successfully adopted:

> '(1) if parties are aware of opportunities to gain power and recognition presented during the mediation process; (2) if parties are helped to clarify their goals, options and sources to make free choices; (3) if parties are encouraged to recognise the decision whichever the decision taken'.[17]

Encouragement of social networks

Local development, when balanced and sustainable, allows communities to identify and mobilise local resources, and to know their real vocations and abilities. The Community Agent, as an operator of a citizenship network, identifies – together with the representatives of existing social movements – social needs that may be converted into social mobilisation and the promotion of collective mediations. Such a process gives back to the community the ability to exercise self-determination and to solve its own conflicts. Diversities that are inherent to any community space, when fragmented, can lead to social conflicts. The Community Agent has an active role in restoring the social framework, creating and/or giving value to a web of relationships that may integrate several initiatives and promote a multifaceted local development.

This process is not unilateral. While acting within the framework of the social web, the Community Agent is involved in a series of interwoven changes in its subjective and relational spheres. It is in the 'otherness', in the concrete relations arising from its operations, the collective reflections on community issues, discussions on human rights, the respect for differences, and in the reflections on subjectivity, among others, that the Community Agent can experience the exact dimensions of democracy, solidarity and peace. Therefore, the Programme's multidisciplinary team, together with respective Community Agents of each area, organises frequent meetings in the community aimed at:

- strengthening ties between Agents and the community;
- knowing the range of services available and social movements;
- mapping community issues;
- collecting claims for community mediation;
- identifying and establishing dialogue with local leaders;

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17 Robert A Baruch Bush and Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (San Francisco, CA: Jossey-Bass, 1994) 81.

- knowing the areas in which mediation processes may occur;
- disclosing objectives and the workings of the Programme; and
- evaluating permanently the impact of the Programme's work.

There are two kinds of networks that may be developed in this activity: social and local. The social network is compounded by several entities – both public and private – including service providers, residents' associations, social movements and religious organisations, among others. It is precisely because of the acknowledgment of these organisational bodies that the Programme develops the social mapping. In order for the network to operate as an integrating element of diversity,[18] the Programme must be proactive in arranging meetings and dialogues that enable the exchange of information and sharing of all members' experiences. Only then can the network be strengthened, which enables the member organisations to multiply their efforts through the flow of information and mutual referrals.

Local networks are those formed from a specific conflict. One of the first measures taken by the Community Agent, when he or she is required to act, is to analyse whether the apparently individual issue may be a collective one in reality. In other words, it is necessary to investigate to what extent the issue may be the result of a problem also shared by the other members of the community. If the answer is positive, it is essential that all of those affected by the issue are mobilised to find a definitive solution – built by and for all. This is a simple measure with enormous potential for creating solidarity from conflict.

The multidisciplinary team

The multidisciplinary approach is an alternative to the fragmentation of knowledge inherent in the positivist doctrines. This is an appropriate tool for building an integrated knowledge that breaks boundaries and hermetic disciplines. The dialogue between the various areas of knowledge provided by the multidisciplinary approach, however, does not result from a mere juxtaposition of content, but from an attitude that implies reciprocity, mutual commitment and integration between different perspectives on the same object.

In regular meetings conducted at the Justice and Citizenship Community Centre, the team examines the claims brought by Community Agents from different professional perspectives. This analysis, coupled with the experience and knowledge of local Community Agents, ensures that the approach to the conflict, constructed from a multidisciplinary perspective, provides several options for the settlement of claims brought to the Programme. This meeting, whose purpose is to analyse concrete cases, also allows the assessment of the adequacy or inadequacy of the claim for mediation and possible referrals to the social network, if applicable.

It is important to highlight that within the dynamics of mediation, it is the parties that know the conflict and possible solutions to it, and not the mediators. As Juan Carlos Vezzulla has noted,

18 Ana Luisa Curty, A ética nos dá o sentido, in Célia M Ávila (Ed), *Gestão de projetos Sociais* (São Paulo: AAPCS, 2nd edn, 2000) 52.

'being a mediator is to recognise that not knowing is a necessary condition to awaken in others their knowledge'.[19] In this sense, the multidisciplinary team's knowledge – (psychological, sociological and legal) and the Community Agent's knowledge (local) – cannot conduct the mediation process without risking the *disempowerment* from the parties. However, if the knowledge of the Community Agent and of the technicians is limited to knowledge of mediation techniques, how does the Programme enhance the recovery of local knowledge as represented by the knowledge of the Community Agents?

It must be stressed that the actions of these agents are not limited to community mediation, as the Programme is supported by three pillars of action: rights education; community mediation; and mobilisation of social networks. It is exactly the relationship between these pillars that requires local knowledge, so that there is not a vertical institutional imposition of the services rendered to the community, without opening channels for expressing its own needs and the means by which it prefers to resolve them. Thus, it would make no sense to assign the main activities of the Programme to a purely technical team.

The Centre for Training and Research in Community Justice

The Centre for Training and Research in Community Justice is part of the Community Justice Programme and aims at promoting the training of Community Agents and other segments of the community, through multidisciplinary exchange. To do so, the Centre offers training in mediation, promotes multidisciplinary theoretical discussions, offers practical activities for the training of the Community Agent, monitors and evaluates Agents' activities, develops the critical views of Agents in relation to the action and listening of community issues and produces multidisciplinary knowledge in the field of community mediation.

The learning process of the Community Agent for Justice and Citizenship is promoted through an initial period of training – which includes content related to general principles of the Programme, its tools and techniques of community mediation – and continuing education, which involves meetings to discuss theoretical and practical issues. In this activity, the professional team monitors the work of the Agent and leverages the collective learning resulting from the sharing of difficulties and solutions found during the performance of each specific Community Agent. In this sense, the operation of the Training Centre is permanent, in the same way that the activities performed by Community Agents are continuous.

19 Juan Carlos Vezzulla, 'Ser Mediador, Reflexões', in Lilian de Morais Sales (Ed), *Estudos sobre Mediação e Arbitragem* (Fortaleza: Universidade de Fortaleza, ABC, 2003).

Epistemological assertions

The Centre for Training and Research in Community Justice has as its epistemological assertion the construction of knowledge from the critical reading of reality. The learning process does not simply comprise mere mechanical transfer of knowledge. Each student is, after all, a citizen who knows the world, regardless of his or her education level and as such, is capable of reflecting on topics related to citizenship. Accordingly, the Centre for Training does not teach concepts that do not have any specific relevance to the knowledge and social reality of its students. If the learning process is an act for critically knowing the social context in which one lives, the development of the course content should take into consideration the knowledge of the Community Agent in this 'vocabulary universe'.[20] From the identification of this knowledge, the Centre for Training seeks to recreate, redesign and give new meanings to topics related to citizenship, which form the object of learning.

This process has a political dimension, as it is directed to develop a critical awareness of reality, not limited to operating only within the cognitive sphere. Moreover, reflecting on their role in society and history, students are challenged to think about ways in which to change reality. A critical reading of social dynamics, exposing reality, allows the utopian projection of another reality that drives one towards a transformative action. The method developed by Paulo Freire considers 'education at the same time as a political act, an act of knowledge and as a creative act'.[21] The political approach of the Centre for Training is essential for the desired (re)appropriation of the management of community issues by members of the community itself. This is based on experienced reality rather than institutional formulas previously developed from technical knowledge. According to Edgar Morin:

> 'reducing the political to the technical and the economical, the reduction of the economical to the growth, the loss of references and horizons, all this leads to the weakening of civility, to escape and to seek refuge in private life, the alternation between apathy and violent revolt and thus, despite the permanence of democratic institutions, democratic life weakens.'[22]

The principles, therefore, with which the Centre for Training operates, reveal a commitment to discovering new dimensions and possibilities of reality, with a view to improving people's lives. Besides the political dimension, the educational process develops a humanist dimension when it is created as a means of communication and understanding between human beings. To this end, the Centre for Training seeks to strengthen human relations, opening channels of permanent dialogue with the community. Thus, 'open activities' are developed, in which the topics discussed in the Centre for Training's classes are brought to discussion within the community to better understand the individuals who compose that social group, respecting their identities and diversities. The

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20 Sonia Couto Souza Feitosa, *Método Paulo Freire* Part of a Master's dissertation from FE-USP (1999) entitled, *Método Paulo Freire: princípios e práticas de uma concepção popular de educação* available at: **www.undime.org.br/htdocs/download.php?form=.doc&id=34** accessed 14 May 2009.

21 Moacir Gadotti, *Paulo Freire: a Prática à Altura do Sonho* available at: **www.antroposmoderno.com/textos/freire.shtml** accessed 14 May 2009.

22 Edgar Morin, *Os sete saberes necessários à educação do futuro*, Catarina Eleonora F da Silva and Jeanne Sawaya (trs), Edgard de Assis Carvalho (ed) (São Paulo: Cortez; Brasília: UNESCO, 2000) 112.

Centre approaches it this way as it is not enough for the community and its members to be the subject of discussion in the classroom. The 'otherness' presupposes a knowledge of people who communicate and interact. In assuming that the learning process should be multifarious, as it is the result of the blend of different interpretations of reality, the Centre for Training aims at contributing to the construction of an 'ecology of knowledge', according to the words of Sousa Santos:[23]

> '[...] the logic of the monoculture of knowledge and scientific rigor has to be questioned by the identification of other knowledge and other criteria of rigor that operate credibly in social contexts and practices declared non-existent by metonymic reason. This contextual credibility must be considered enough for the knowledge in question to be legitimate to be discussed in epistemological debates with different knowledges, notably scientific knowledge. The central idea of the sociology of absences in this domain is that there is not ignorance in general nor general knowledge. *All ignorance is ignorant of a certain knowledge and all knowledge is the overcoming of a particular ignorance. From this principle of incompleteness of all knowledges elapses the possibility of dialogue and epistemological dispute between the different knowledges.* What each knowledge contributes to this dialogue is the way it guides a given practice to overcome a certain ignorance. *Confrontation and dialogue between knowledges is a confrontation and a dialogue between different processes through which practices differently ignorant become differently wise.'* [Emphasis added.]

The training of Community Agents and the training of other segments of the community is aimed not only at ensuring the proper performance of their activities, but also at stimulating critical reflection on their personal choices and on social reality. The learning system adopted is comprehensive, providing integration of cognitive, emotional and social dimensions involving personal, professional and institutional issues present in the living context of the Community Agent. The Centre for Training operates with participatory dynamics that contribute to the creation of a non-fragmented knowledge, enabling new perspectives and new relationships with the world and with the Community Agents themselves.

The basic content of the training includes courses and workshops for training in community mediation techniques and in animation of social networks, as well as lectures on general guidelines of law and discussions of legal topics, with a focus on human rights. Educational activities developed by the Centre for Training also include the intensification of the interaction of Community Agents with their community, through the development and dissemination of educational materials and the promotion of artistic events that provoke debate about individual and collective rights.

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23 Boaventura Sousa Santos, 'Para uma sociologia das ausências e uma sociologia das emergências', in Sousa Santos (ed), *Conhecimento Prudente para uma Vida Decente. 'Um Discurso sobre as Ciências'* revisitado (São Paulo: Cortez, 2004) 790.

Since the success of the Community Justice Programme has boosted its expansion nationally, the Programme has been remodelling the role of the Centre for Training in order to transform it into an essential tool for its extension across the whole Federal District. To this end, the Centre for Training is offering to organised sectors of civil society and state entities – such as the Regional Secretaries on Public Education, for example – basic training in community justice, in order to provide to interested social groups some reflection on the basic principles of community justice and also to introduce the instruments with which the Programme operates.

Community justice in Rio de Janeiro

From March to June 2011, the Programme conducted a series of workshops to raise awareness about bringing community justice to some recently 'pacified' neighbourhoods of Rio de Janeiro. The areas chosen for the workshops were: Cidade de Deus, Complexo do Alemão, Complexo do Borel and Morro da Providência; part of the seven communities where the Programme will be developed in partnership with the Secretariat for Human Rights (SEASDH) of Rio de Janeiro. This dialogue provided an immense learning experience and there was a clear desire from the community for more dialogue, information and mobilisation; which corresponds exactly to the principles of community justice. The workshops are described below.

Outline of workshops

The four workshops on awareness were held in the evening, in order to extend the possibilities of community participation in the debate. Before each meeting, there was a mobilisation by which the staff of the Department of Human Rights and the Coordinator of PJC-DF – also sponsoring the workshops – contacted key individuals and entities *in loco*, with the collaboration of some managers and assistants of the Territórios da Paz (Territories of Peace), also connected to the Secretariat for Human Rights. The previous mobilisation was essential to clarify that the purpose of the workshops was limited to presenting a proposal of community justice, before the establishment of the selection process of Community Agents.

We structured each workshop in a similar manner, focusing on the issues of the community. Following a short presentation from the facilitator, we broke into small groups to ask each participant to discuss the following questions:

- What are the main conflicts in this community?
- What are the currently available means of resolving these conflicts?
- What would be the fairest means for resolving these conflicts?

The questions were analysed in teams, with the broad participation of those who were present. After the debate, one member of each group reported their reflections, which were recorded by the facilitator in the presence of everyone. Only after these questions was the presentation given on the development of the Community Justice Programme in Brasília Federal District.

At the end, a new debate was opened so the group could express its thoughts on the development of this project in their communities. On this occasion, the participants showed great interest in community mediation to deal with individual and collective conflicts that have a great social impact. As an example, the group assessed the possibility of submitting to collective mediation the regulation of funk parties in some communities. Such a session could even be conducted during the training course in community mediation as one of the stages of implementation of the Programme.

Despite the heterogeneity of the groups that participated in each workshop, which ranged in size from a few dozen to over 200, as well as the communities covered, the answers offered to the second and third issues are noteworthy. Basically, the communities expressed the lack of any means of dispute resolution, except for the Pacification Police Units – UPPs. In line with what would be ideal, the formal justice system was superficially cited and the answers revolved around the idea that the community can and must create mechanisms for greater participation in managing its own conflicts. In general, the groups found the following factors to be essential:

- the community has sufficient information to enable it to exercise citizenship;
- there is dialogue; and
- the community has a voice, and it can express itself through its representatives.

What was surprising were the responses to the third question, regarding what would be a fair means of conflict resolution. The communities considered the same three key activities undertaken by Community Agents in the Community Justice Programme, namely: rights education; community mediation; and mobilisation of social networks as absolutely essential.

After a brief presentation on the operation of the Community Justice Programme of the TJDFT, good group dynamics indicated that the participants could identify with the role played by the Community Agents; in particular the use of community mediation techniques as a means to effect dispute resolution. Bringing community justice to Rio de Janeiro means facing several obstacles due to current conditions in the city, but there are sincere efforts to integrate the 'divided city'. Projects that are successfully developed in this process – from the initiative of different public and private entities – are important references to encourage the development of public policies that seek to unify these principles at a national level, however subject they may be to local peculiarities.

Community justice in practice

The complexity of community justice is its greatest asset: the idea cannot be built without participation and diversity. Each community has its own trajectory that makes it unique and this experience precedes any external effort because only the community itself is able to legitimise its own transformation and development process. The heterogeneity observed in the meetings and in the workshops suggests that there can be an even greater community participation in Rio de Janeiro, so that all these differences are not only respected but also valued.

If one could sum up all the experience obtained in this extremely collaborative process, it would be that the greatest desire of all communities – regardless of their valuable differences – is the need to 'have their own voice' and to be respected not only as the recipients of public policies already drafted in the offices of the state, but as co-authors and protagonists of their destinies. This wish corresponds to the principles of the Community Justice Programme, which stimulates a journey for greater citizenship, greater involvement and greater democracy in the realisation of justice.

Bringing the Programme to Rio de Janeiro, in the context of deep transformation in some of the regions historically marked by violence, reveals the political courage of state representatives who have adopted it and of the communities that welcomed them. Although projects may be permeated by political differences, they do need to align in order to ensure the Programme is carried out efficiently. The peace process includes the steps of occupation, policing, social action and local development. All actions that integrate these steps, whether or not they emanate from the state, must be coordinated. Only a collaborative practice will be able to promote justice and peace for those who need it the most.[24] In addition to this initiative, state and community, together in strong partnership – subject to the necessary autonomy of each sphere – should commit all necessary efforts to ensure that this experience is successful. Such collaboration will ensure the consolidation of community justice as a public policy based on citizenship and peace.

Final considerations

The experience of the Community Justice Programme shows that it is possible in practice to extend the concept of justice, while reducing social tensions and building networks of solidarity from the articulation of common projects with social movements and the creation of autonomous means of dispute resolution. A cohesive community presupposes the co-responsibility of its members to solve their conflicts, articulated under a sense of identity, otherness and belonging. Community justice arises as a suitable instrument to promote this cohesion, as it develops community resources aimed at democratising access to information, building consensus and strengthening social networks.

Efforts to modernise the judicial system's resources – human, material, legal and technological – will not have the ability to respond to the phenomenon of violence and rising of litigation claims if there is not also a profound transformation in the concept of the role of the judiciary in order to go beyond quick and efficient adjudication. The increase in litigation is revealing an adversarial trait in Brazilian society. It also shows that Brazilians are increasingly conscious of their rights. However, the absence of institutional spaces in which people can discuss their conflicts means that Brazil does not offer public services with appropriate techniques to promote access to information and to encourage dialogue between the parties to the conflict. Faced with this deficit, people use the means of dispute resolution that are available, that is, the application of 'survival of the fittest', from a physical, armed, economic, social or political point of view. This generates violence, oppression and resignation, which leads to either disbelief and disappointment, or resorting to the judiciary

24 Gláucia Falsarella, 'Justiça Comunitária. Opinião' (*O Globo*, 11 October 2011).

Access to the judiciary in Brazil is far from universal.[25] Those who have access to the courts face the difficulties inherent to a system that is organised under adversarial logic. Legal professionals, due to their graduation studies, tend to apply excessive persuasive techniques which compromise the quality of agreements reached, as this does not always meet the needs of the parties. Accordingly, for the system to operate efficiently, it is necessary for the state to promote public policies for peace and social cohesion, in order to complement judicial litigation.

Although the experience described has been designed at the initiative of a state entity – the TJDFT – the model developed is essentially based in the community because, in addition to having members of the community as its main operators, it is exactly at the community level, where life happens, providing the *locus* of the Programme. In short, justice is carried out *by*, *for* and *in* the community. The emancipatory character of a project is not defined by the nature of the entity that has implemented it, but by the principles with which it operates. Therefore, there is no reason to assert that only community justice programmes carried out by non-state entities are legitimate. If there is a prevalence of dialogue at the expense of persuasive rhetoric, force and vertical bureaucracy; if local knowledge is respected as part of the learning process; if the conflict is transformed into an opportunity for individual and social empowerment; and if activities are geared to transform social tension into the possibilities of creating solidarity and social peace, then justice is of the community type and can claim to be a transformative practice.

Finally, it should be noted that although community justice is sometimes classified as an 'alternative' dispute resolution method, the model illustrated in this chapter does not intend to assert itself as a replacement for the official judicial system. Rather, the assumption adopted is that the courts prove to be a suitable instrument to protect rights and ensure the realisation of justice, especially in extreme situations in which the circumstances of the conflict lie in violent acts and in the absence of dialogue, between the parties in conflict. In this sense, community justice is to be interpreted as complementary to the official system. On the other hand, considering its vocation to promote peace and social cohesion in the spheres of the community where conflicts in general are not taken to the courts, community justice is an important instrument for achieving justice, as it is able to integrate an emancipating project that recreates law and articulates it under a new relationship between ethics and justice.

25 Nancy Andrighi and Gláucia Falsarella Foley, 'Sistema Multiportas: o Judiciário e o consenso. Tendências e Debates' (*Folha de São Paulo*, 24 June 2008).

CHAPTER SIX

The Brazilian Model of Legal Aid: Characteristics of the Public Defender's Office since the Constitution of 1988

Carlos Weis

Introduction

Brazil is rarely associated with technological innovations, even less so with the development of progressive legal solutions in the field of access to justice. Nevertheless, the model of legal aid in Brazil is one of the most advanced on the planet when one considers the sheer scale of formal conflict resolution conducted in the country.

A network of 25 State Public Defender's Offices (PDOs) and a Federal Public Defender's Office has been established to provide free state-sponsored legal aid to those who cannot afford to hire their own lawyers. Legal aid in Brazil is not confined to the provision of criminal defence, but extends to areas of economic, social, cultural and environmental rights, as well as those more narrowly defined as civil and political. Legal aid can also be provided to help organise and consolidate actions that promote and defend collective or group rights. PDOs also act as educational centres by giving rights-awareness programmes to the poor, promoting extrajudicial methods of conflict resolution, maintaining dialogue with civil society organisations and, in some cases, providing mechanisms to allow civil society to participate in and oversee their operations.

Although substantially under-resourced, when compared to judges and the Ministerio Público (Public Prosecutor's Office), public defenders are playing an increasingly important role in protecting human rights in Brazil. This chapter briefly outlines the history of the constitutional protection of the right to a public defence in Brazil before locating this within international human rights jurisprudence, as established by the Inter-American system. It then provides an overview of the Brazilian model of the PDO, explaining some of its particular characteristics and describing some of its caseload. The particular importance of its institutional independence is also discussed. This is followed by a discussion of the role of the mechanisms that have been established for holding the PDOs themselves to account and involving civil society in their work. In particular the General Ombudsman, which provides an oversight of the PDO in São Paulo, and the State Conference, which directly involves civil society in the organisation's strategic planning, are examples of good practice which could be replicated both within Brazil and elsewhere.

The provision of legal aid to the needy in Brazil, based on a public and direct model, is still under construction and the demand for services far outstrips supply. However, there are important lessons to be learnt as to how the model is currently developing within Brazil, which could prove useful for other countries with similar legal systems that are in the process of developing their own mechanisms of state-provided free legal assistance.

Brief history of the constitutional protection of the right to a public defence in Brazil

The first Brazilian Federal Constitution to address the issues of free legal assistance was adopted in 1934 following the Constitutional Revolution of two years previously. A Constituent Assembly was elected after the new government had consolidated itself with the suppression of clashes between the State of São Paulo and the forces of the national army. This Assembly adopted the Constitution, which included among its provisions that 'the Union and the States will confer judicial

assistance to the needy, to this effect creating special organs and securing exemptions of taxes and fees.'[1] Unfortunately, the new Constitution was short-lived as President Getúlio Vargas then staged an 'auto-coup' in 1937 and introduced a new Constitution, which established a dictatorship. Issues regarding legal aid were only considered again during the preparations for the Brazilian Constitution of 18 September 1946, which took place after the Allied victory in the Second World War and the end of Getúlio Vargas's dictatorship (1937–1945).

The 1946 Constitution stated that 'the Government, as provided by law, will grant legal aid to those in need'.[2] Accordingly in 1950, Federal Law No 1,060 was issued to establish the provision of legal aid to any individual whose economic circumstances prevented him or her from bearing such legal costs without the support of himself, herself or family members, and exempting them from paying courts' fees and other legal fees for the services of lawyers or relevant experts. Although this law produced some improvements, it failed to solve the fundamental issues relating to how the individual would be represented in court, that is, how the person would obtain free legal aid and who would pay the lawyer's fee.

Some solutions began to emerge in certain Brazilian states. For example, in São Paulo, the Office of Legal Assistance (PAJ) was created in 1947 under the State Attorney General's Office,[3] and operated until 2006 when it was replaced by the PDO. In Rio de Janeiro in 1954, public defenders were initially placed within the Ministerio Público. Over time, the PDO became a distinct and recognisable body within this until it evolved into a completely separate and independent institution in 1981. Minas Gerais also established a PDO in 1981, followed four years later by Bahia in 1985. In some Brazilian states, including São Paulo, agreements were reached with the Ordem dos Advogados do Brasil – OAB (Brazilian Bar Association) to ensure that the state would pay the fees of lawyers, nominated by the Association, to assist people who could not afford a lawyer of their choice. However, most states did not establish PDOs until much later.

The Constitution of 1967, enacted after the military coup of three years previously, adopted a text that had been drafted by the dictatorship itself. This briefly mentioned that there 'will be granted legal aid to the needy, according to the law',[4] but there was little attempt to address the issue seriously. It was not until 1988, when the current Brazilian Constitution came into force, following a period of democratisation that effectively ended the military regime, that the subject was properly addressed.

The 1988 Constitution is often known as the 'Citizen's Constitution' because it provides for a significant extension and protection of fundamental rights, elevating these guarantees to a prominent place in the new legal system. In the field of access to justice, it enshrines the provision of legal assistance as a fundamental right. It also, for the first time, creates an institutional legal aid framework through the establishment of a state agency specifically designed for the provision of free legal advice and defence. Article 5, paragraph LXXIV provides that, 'the State will provide

1 Constitution of 1934 Article 112, paragraph 32.

2 Article 141, paragraph 35, Federal Constitution of 1946.

3 The State Attorney General's Office is the body responsible for providing legal advice to the departments of state government and defending it in court.

4 Article 153, paragraph 32.

comprehensive and free legal aid to those who can prove they have insufficient resources.' Article 134 establishes that, 'the Public Defender's Office is an institution that is essential to the judicial function of the state, offering legal advice and defense at all levels to the needy.'

The Constitution provides for the enactment of legislation to establish PDOs in Brazil's various states and at the federal level.[5] This was established by Lei Complementar No 80 de 12 de janeiro 1994 (Complementary Law No 80 of 12 January 1994), which laid down general provisions for the creation of PDOs in every state and at the federal level. Most other states did not create PDOs until after the passage of the 1994 law. Two of Brazil's most populous states, Rio Grande do Sul and São Paulo, did not establish PDOs until 2005 and 2006, respectively. Goiás and Paraná only enacted the legislation to establish PDOs in 2011 and these bodies only started functioning in 2012. As is discussed further below, the State of Santa Catarina has not yet passed legislation to create a PDO.

The Constitution laid the foundation for the Federal Public Defender's Office and the creation of a PDO in each of the 26 states and in the Brasília Federal District. It also created mechanisms to ensure that the PDOs, especially those operating in the states, could work independently to defend the legal interests of their clients and even in their own claims against public bodies. These mechanisms were to safeguard the public defenders' functional, administrative and financial autonomy and are discussed further below. It is first necessary to explain how and why the right to legal assistance has become increasingly recognised as a fundamental element of human rights protection in international law.

The right to legal aid in international human rights law

The right to legal aid is a concept inherent to the effective implementation of international human rights and is perhaps one of the most rapidly evolving areas of international human rights law and jurisprudence. The transition of the right to defence in criminal cases as a simple proposition, into a genuine human rights protection that safeguards the provision of legal aid, consolidated the notion that effective access to justice is a state obligation as a means of securing the full spectrum of human rights.

The roots of such views can be found in the Preamble of the Universal Declaration of Human Rights,[6] which asserts the need to protect people's rights by the 'rule of law'. Combining natural law and positivism (or normative law), the Declaration noted that human rights could only receive effective protection if they were incorporated into national justice systems and entrenched in domestic laws. This would promote citizens' access to the courts, allow the public to assert their human rights and ultimately lead to the full recognition, protection and realisation of those fundamental rights. However, when the International Bill of Human Rights and the Covenants of 1966 were drafted and entered into force, the expansive approach set out in the Declaration was restricted as it emphasised human rights protection only in the context of criminal proceedings and

5 Constitution of Brazil, Article 134.

6 Drafted and adopted by the Resolution 217 A (III) of the UN General Assembly on 10 December 1948, signed by Brazil at the same date.

the right of defence. This was enshrined in Article 14 of the International Covenant on Civil and Political Rights,[7] which relates to the establishment of due process and other safeguards designed to protect individuals from the state's abuse of power and the deprivation of liberty.

In particular, Article 14 (3)(d) provides that in the determination of any criminal charge, everyone shall be entitled 'to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if does not have sufficient means to pay for it'. This was elaborated in the context of a constitutional appeal by the Human Rights Committee, which held that 'where a convicted person seeking constitutional review of irregularities in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State'.[8] Similarly, Article 6 (3)(c) of the European Convention on Human Rights provides for the right of a person not having 'sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

Article 8 (ii) of the American Convention on Human Rights establishes the fundamental judicial safeguard for criminal defendants: 'the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel'.[9] However, unlike the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), the American Convention refers back to the provisions of national law with respect to the provision of legal aid. Article 8 (ii) (e) provides for 'the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law'. In order to consolidate the notion of access to justice in the Inter-American system, the Inter-American Commission and Court have adopted an expansive approach in interpreting the right to legal assistance as a fundamental element of the right to a fair trial and as a means of guaranteeing the full spectrum of human rights protection.

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7 14.(3).(d) 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality (…); to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it'. Adopted by the Resolution 2.200-A (XXI) of the UN General Assembly of 16 December 1966, Brazil's ratification on 24 January 1992.

8 Communication No 707/1996, *P Taylor v Jamaica* (views adopted on 14 July 1997) in UN doc GAOR, A/52/40 (vol II) 241, paragraph 8.2.

9 Article 8 (2)(d).

The first major contribution to these issues by the IACHR was articulated in Advisory Opinion (AO) No 11 issued on 10 August 1990,[10] which examined whether the Commission could consider a complaint made by an individual who did not first exhaust all the domestic remedies available to him/her because he or she lacked the resources to do so. In its Advisory Opinion, the IACHR began to outline the state's obligation to provide legal aid services, linking the individual's fundamental right to legal aid to the state's duty to respect and guarantee human rights. The right to legal aid was considered to be attached to the state's responsibility to adopt necessary measures through national law to protect rights under the Treaty, in accordance with the provisions in Articles 1.1 and 2 of the Convention. Therefore, the Commission decreed:

> '23. [P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1(1) imposes on the States Parties, implies, as the Court has already stated, the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (*Velásquez Rodríguez Case, Judgment of July 29, 1988*. Series C No 4, para. 166; *Godínez Cruz Case, Judgment of January 20, 1989*. Series C No 5, para 175).
>
> '24. Insofar as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between accusations[s] of a criminal nature and procedures of a civil, labor, fiscal, or any other nature. Although it provides that [e]very person has the right to a hearing, with due guarantees… by a… tribunal in both types of proceedings, it spells out in addition certain minimum guarantees for those accused of a criminal offense. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those minimum guarantees. By labeling these guarantees as minimum guarantees, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.'

This notion was further developed in Advisory Opinion No 18 of 17 September 2003, when the Court extended the state's duty to cover undocumented migrants. Despite the apparent irregularity of their circumstances, undocumented migrants are human beings and therefore have the right to due process, which includes the provision of a free public service of legal defence. The Court stated that this was a right that is enforceable in the courts. Accordingly, the Court sent out a clear signal to states that access to justice must be genuine and not merely formal.

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10 'The Commission, in addition to the judicial function, acts as a consultative body of the OAS member states and some of the bodies of that Organization, in line with the content of Article 64 American Convention on Human Rights: 1. The member states of the organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court. 2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.'

It is interesting to note that in the Advisory Opinion 18/03, the Court brought together several concepts that had been examined in other opinions and decisions, such as the obligation to respect and protect fundamental rights, the right to liberty, the notion of due process, the violation of non-discriminatory right of vulnerable groups and as a result, the right of effective access to justice. Furthermore, Advisory Opinion 18/03 consolidated the concept of public legal aid as every citizen's undeniable right of access to justice. That is, if every citizen is entitled to have judicial access to enforce his or her rights (as provided for in Articles 8 and 25 of the American Convention on Human Rights), yet some cannot exercise this right because they are unable to afford a lawyer, then it is the state's duty to create a legal aid service. Failing to do so would subject such persons to inequality, perpetuating unacceptable discrimination.

The Court stated that the state's responsibility to 'ensure in its national legal system that every person has access, without any restriction to a simple and effective way to sustain the determination of his rights, regardless of their immigration status', and considered that 'the obligation mentioned is applicable to all the rights provided by the Inter-American Human Rights Convention and the International Covenant on Civil and Political Rights, including the right to a fair trial'. This approach would preserve the right to justice for all, giving it a more concrete and 'effective way to protect the right of access to justice'.

The Court went on to state that if 'the right to judicial protection and judicial guarantees are violated for any reason', including the refusal to provide free legal aid for a person in need, that person would be essentially barred from exercising his or her right in court. The Court concluded: 'In this respect, the State must guarantee that access to justice is genuine and not merely formal.' Finally, the Court also examined the 'horizontal' scope of the right of access to justice and due process. Here the Court considered that 'a set of requirements must be observed in procedures so that people are able to defend properly their rights against any act of the state that may affect them. That is, any act or omission by the state in a legal proceeding, whether administrative or judicial, must respect the due process of law.' Furthermore, the Court identified a list of minimum due process guarantees to be applied in cases of 'civil, labour, fiscal, or any other character' in the determination of the citizen's rights and obligations, confirming that due process guarantees are not only applicable to criminal legal proceedings.

Going far beyond the original duty of the state to provide a lawyer for the defence of indigent criminal defendants, the Inter-American Human Rights System also established the notion that due process confers positive obligations on the state, giving birth to a true right of access to justice, consolidating the second dimension of human rights – namely economic, social and cultural rights. Moreover, the Court proceeded to outline the kind of provisions that states would be expected to fulfil in order to ensure effective access to justice for people without resources, meaning a free and public service and not merely dependent on making payments to private attorneys on behalf of the poor.

In September 2004, the Court confirmed this interpretation in the case of *Instituto de Reeducação do Menor v Paraguai*,[11] which strengthened the notion that the duty to provide legal assistance goes beyond the state under so-called *judicare* model (which only provides for legal aid in court proceedings).[12] As emphasised by Judge Antônio Augusto Cançado Trindade, 'The Inter-American Court recognizes the importance of the right of access to justice, so much so that, from its Judgment of 11.03.1997 (paragraph 82), in the case of *Castillo Páez v Peru*, to date, it has repeatedly noted that the right of all persons to access to prompt and effective access to judges or courts that support their fundamental rights (Article 25 of the Convention) "constitutes one of the pillars not only of the American Convention, but the very rule of law in a democratic society in the sense of the Convention"'. Judge Trindade went on to establish that 'the right to a judicial decision – the right to the law – only emerges through the observance of the due process of law and its basic principles. It is the faithful observance of these principles that leads to the realization of justice, ie, the fullness of the right of everyone to access to justice.'[13]

Following on from the repeated insistence of the Inter-American Court for Human Rights, the public, free and full legal assistance model was endorsed by the General Assembly of the Organization of American States on 7 June 2011 through Resolution No 2656, entitled 'Guarantees for access to justice. The role of official public defenders'. Considered a landmark pronouncement on the issue, the Resolution affirmed the 'fundamental importance of free legal aid service for the promotion and protection of the right to access to justice for all people, especially those who are especially vulnerable' and 'that access to justice, a fundamental human right, makes it possible to restore the rights that have been ignored or violated'.[14] Accordingly, the General Assembly decided 'to encourage member states that do not yet have institutions akin to public defenders to consider the possibility of creating one in their legal systems' and recommended 'to member states that already have a free legal aid service to adopt measures to ensure that public defenders officers enjoy independence and functional autonomy'.

Finally, it is also important to take into account the Inter-American Court's reform of its Rules of Procedure. This reform provides that litigants who lack their own counsel should be assisted by public defenders due to the cooperation agreement the Court had concluded with the Inter-American Association of Public Defenders (AIDEF) which provides that, where necessary, two public defenders are appointed to serve in human rights cases and support victims who have suffered an infringement of their fundamental rights. In this way, the Inter-American Human Rights system evolved from a judicare model to a public system of direct legal assistance.

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11 Decision of 2 September 2004, available at: **www.corteidh.or.cr/docs/casos/votos/vsc_cancado_112_esp.doc** accessed March 2012.

12 Which is the appointment of private lawyers on a case – paid by the state or paid for court costs. Regarding the models for the provision of legal assistance, notably in Canada, Britain and the United States, see Roger Smith, 'Assistência jurídica gratuita aos hipossuficientes: modelos de organização e de prestação do serviço' (2011), in 'Revista da Defensoria Pública' 4 - n 2 - Jul/Dec 2011. São Paulo State Public Defender's Office School, 2011, 9–36.

13 Quoted in Cesar Barros Leal, 'A Defensoria Pública como Instrumento de Efetivação dos Direitos Humanos' (2009) in 'Instituto Brasileiro de Direitos Humanos Magazine', V 9, No 9, Fortaleza, Ceará 63–66.

14 According to **www.anadep.org.br/wtksite/cms/conteudo/11698/AG_RES_2656_pt.pdf** accessed 14 November 2011.

Overview of the Brazilian model of the Public Defender's Office

In light of these developments, it is clear that the creation of the PDO in Brazil by the 1988 Constitution was intended not only to enable people in need to have access to legal aid, but also to ensure the full realisation of all human rights established nationally and internationally under Brazilian law. This is because the Constitution itself establishes human dignity as a foundation of the Federal Republic of Brazil,[15] and specifies that one of the state's national objectives shall be 'to build a free and fair society; eradicate poverty and marginalisation, to reduce social and regional inequalities; and to promote the good of all, irrespective of origin, race, sex, color, age and other forms of discrimination'.[16] These standards, which formed the new legal model of the Brazilian State from 1988, serve as guidelines for the operation of all public bodies, and that the formulation of their policies should aim to achieve the objectives as set forth in the Constitution.

The 1988 Constitution contains attributes and prerogatives that serve, theoretically at least, to ensure that public defenders can function independently and autonomously, and to shield them from external pressures and interferences.[17] Further, the institution can implement its own agenda of operations without the government or other third parties, which means that the public defenders in Brazil are independent from the government.

Although public defenders are civil servants, the PDO is not hierarchically subordinate to the Executive. Public defenders are selected by a competitive public examination, after which they gain permanent tenure, facing dismissals only in the most exceptional situations, and are prohibited from practising law outside these institutional parameters. In this way, the Constitution aimed to create a stable and reliable network of public defenders, comprised of qualified legal professionals who devote themselves exclusively to the provision of legal aid to the poor and empowered to act even against the interests of other government agencies or government if necessary. The autonomy of the PDO has been further strengthened by Constitutional Amendment 45, enacted in 2004.

Legally speaking, Article 134 of the 1988 Constitution provides that: 'The Office of Public Defenders is an essential institution to the State's judicial function and is responsible for the judicial guidance and the defence, at all levels, of the needy, under the terms of [A]rticle 5, LXXIV.' Accordingly, the PDO was created as a separate organ of the Brazilian judicial system and was attributed with the same recognition as the other justice institutions, including the judiciary, prosecutors and lawyers.[18] The PDO has an inherent institutional guarantee to maintain the fundamental right of access to

15 Article 1, III.

16 Article 3.

17 Article 134 of the 1988 Constitution, paragraph 1 – A supplementary law shall organize the Public Legal Defence of the Union, of the Federal District and the Territories and shall prescribe general rules for its organization in the states and recruitment, by means of a civil service entrance examination of tests and the presentation of academic and professional credentials, with the guarantee of irremovability being ensured to its members and the practice of advocacy beyond the institutional attributions being forbidden.
Paragraph 2. The Public Legal Defense of the States is ensured functional and administrative autonomy and initiative of budget proposal within the limits determined by the law of budgetary directives and observance of the provisions of Article 99, paragraph 2.

18 For public advocacy means the public agencies that provide the activities of legal consultancy and assistance of the Executive branch, namely the Attorney General's Office, the Attorney General of the State and City Attorney General.

justice for the needy as established in Article 5, paragraph LXXIV of the Constitution. Therefore, to define the parameters of the PDO's functional capabilities, the Constitution provides that the Office shall act in all areas of law, as it is intended not only to provide legal defence and promote rights in court, but also to educate people about their rights, including extrajudicial methods of conflict resolution.

The legislation that organises the functioning of the PDO, is contained in the Lei Complementar No 80 de 12 de janeiro 1994 (LC 80/1994),[19] which establishes 22 functions, including: conflict resolution; raising awareness of human rights, citizenship, and the law; the promotion of public, civil and other actions in order to adequately protect group rights;[20] the promotion of the 'broader fundamental rights of the needy, including their individual rights, collective, social, economic, cultural and environmental rights', including appeals procedures to international human rights tribunals; the protection of vulnerable social groups such as children and adolescents, the elderly, the disabled, women, victims of domestic violence; to work within police stations, prisons and detentions for adolescents, to ensure that any relevant persons can fully exercise their fundamental rights and guarantees; and also to preserve and maintain the rights of victims of torture, sexual abuse, discrimination or any form of oppression or violence and to provide monitoring and the full range of services for victims.

As may be expected, the role of public defenders in defending the interests of those in need has both a horizontal and vertical scope and function, that is to say, they must operate in all areas of the law and cover the full horizon of rights protection; while also operating vertically, providing legal aid to litigants all the way to international human rights tribunals.[21] In 2008, the public defenders undertook 10 million legal consultations in Brazil,[22] in which 75 per cent of those consultations were civil, and the rest criminal. In that same year, the public defenders filed 1,266,818 claims and attended 1.3 million hearings.

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19 See **www.planalto.gov.br/ccivil_03/leis/LCP/Lcp80.htm** accessed March 2012.

20 A Public Civil Action is, under Brazilian law, the main form of judicial protection of collective rights, and is regulated by Law No 7,347 of 24 July 1985, and is especially useful to seek judicial protection of economic, social and cultural rights in the form of obligations to public bodies.

21 Brazilian law does not define a person in need, so that each PDO sets its criteria, ranging from a mere statement of the person concerned, to a detailed analysis of their equity. In the case of São Paulo, for example, the general rule is that the person has a family income of up to three minimum wages (currently R$1,866 or about US$1,100). But the concept of a legal person in need can be seen beyond the economic aspect, in line with the thinking of the Brazilian jurist and professor of procedural law at the University of São Paulo, Ada Pellegrini Grinover, who coined the phrase 'organisational need'. This is defined as: 'That's because there are those who are economically needy, but there are also those in need of an organizational standpoint. That is, all those who are socially vulnerable: consumers, users of public services, users of health plans, those who want to implement or oppose public policies, such as those relating to health, housing, sanitation, the middle environment, etc' (**www.anadep.org.br/wtksite/cms/conteudo/4820/Documento10.pdf**) accessed March 2012.

22 Excluding legal consultations made eventually by lawyers paid through agreements (*judicare* system).

According to the Third Public Defender's Diagnostic Report published by the Ministry of Justice in 2009, although there are PDOs in 23 out of the 26 states of Brazil, they only effectively operate in 42.72 per cent of the country's county or judicial districts, usually the larger cities or urban areas of each state.[23] Three Brazilian states do not have an operational PDO at all, although two are in the process of establishing offices, and only one, Santa Catarina, has, so far, chosen to continue using the *judicare* system. This 'option' is being challenged at the Supreme Court, which must decide whether Santa Catarina is required to create its PDO or keep the current system. Given the precedents already established by the Court, the expectation is that Santa Catarina's refusal to establish a PDO will be declared contrary to the Constitution of 1988.

In addition, the Federal Public Defender's Office is responsible for providing legal aid to those who have to use the Federal Courts. As is described in the first chapter of this book, most criminal law is federal but most criminal cases take place at the state level, and so state PDOs act as public defenders in most criminal cases. Conversely, most cases relating to federal social security and employment law take place at the federal level and these cases are particularly important for people on lower incomes.

The number of public defenders in Brazil is not sufficient to provide the full range of legal services that the Constitution demands. Today there are approximately 5,000 public defenders,[24] 12,000 prosecutors and 16,000 judges. This translates to 1.48 public defenders per 100,000 of the population, which is far fewer than the proportion of judges and prosecutors – 4.22 and 7.7 respectively.[25] Given that Brazil has a population of about 140 million, this means that the average number of persons per public defender was 32,044.55 in 2008.[26] The PDO's budget is also much smaller than that of the judiciary and Ministério Público, which receive, respectively, 5.34 per cent and 2.02 per cent of the Federal Government's resources, while the PDO only receives 0.40 per cent of the funding. However, as is described in the final chapter of this book, there have been some positive developments as these numbers have changed significantly in recent years and these changes should be reflected when the Fourth Diagnostic Report on Public Defenders is performed by the Ministry of Justice. Several states are in the process of expanding their PDOs, recruiting more public defenders through public examinations and allocating more resources to their offices.

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23 'Third Diagnosis of the Public Defender Office in Brazil' (Brasília: Ministry of Justice, 2009) 104.

24 According to the Ministry of Justice, there were 4,515 active public defenders in July 2009; 'Third Diagnosis of the Public Defender Office in Brazil' (Brasília: Ministry of Justice, 2009) 104.

25 Conor Foley, *Protegendo os brasileiros contra a tortura: Um Manual para Juízes, Promotores, Defensores Públicos e Advogados* (Brasília: International Bar Association (IBA) / Ministério das Relações Exteriores Britânico e Embaixada Britânica no Brasil, 2011) 89.

26 See 'Third Diagnosis of the Public Defender Office in Brazil' 107. The study considers every resident in Brazil over ten years of age, with an income of up to three minimum wages, to be entitled to the service.

The importance of independence

As is discussed above, the PDO is an independent institution, empowered to act against the government, or other government agencies, and protected from interference or reprisal when they challenge powerful vested interests. Public defenders cannot be sacked or removed from office simply for doing their jobs, and the PDO enjoys functional and administrative autonomy on an institutional level.

The 1988 Constitution specifically established mechanisms to protect the Office from external pressures, especially pressures arising from other state agencies or government agents. This level of protection is justified not only because the PDO is a body specifically created to promote and defend human rights, but also because the state is obliged to guarantee human rights and to create policies that apply economic, social and cultural rights. Indeed, if it was only to work in the *judicare* system, then the PDO would not require such protection from undue intervention. This is even more important when one considers how the human rights defence of the poor frequently involves other public institutions outside the judiciary.

One example was the recent action of the São Paulo PDO in the defence of drug users living in an area of São Paulo nicknamed 'Cracolândia' because of its notoriety for the sale and use of drugs. On 3 January 2012, the police, accompanied by 150 soldiers, stormed the area to expel groups of hundreds of drug users. They used tear gas, rubber bullets and excessive physical force, allegedly to curb drug-trafficking and facilitate the operations of local social care and health officials. Alarmed by the extent and intensity of the operation, and the serious risk of the police violating the rights of the people, the Specialized Division for Citizenship and Human Rights of the São Paulo State PDO sent public defenders to the area the next day, even confronting the police in various situations, educating the public about their rights (including the right to remain peacefully) and accompanying several people to police stations to document complaints of mistreatment and torture.

Another interesting example is the public defenders' provision of legal aid for the homeless population, which has already been conducted successfully in the states of Bahia, Rio de Janeiro and São Paulo, reaching some of the 50,000 people living in extreme poverty in Brazil.[27] In addition, there are numerous other examples of successful practices developed by public defenders in Brazil, ranging from serving indigenous peoples (in Mato Grosso do Sul) and the remnants of Quilombo[28] communities (Bahia), to organising the administrative arrangements for the supply of medicines and medical equipment from the government of the State of São Paulo, avoiding thousands of potential cases.[29]

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27 The data on the homeless population in Brazil is still precarious. Existing studies can be accessed at **www.defensoria.sp.gov.br/dpesp/Default.aspx?idPagina=5452** accessed March 2012.

28 Quilombos were fortified villages of black slaves who escaped from captivity in Brazil.

29 For an understanding of successful consulting practice, see: **www.anadep.org.br/wtk/pagina/secao?codSecao=praticas_exitosas** accessed March 2012. In addition, Institute Innovare aims to develop research projects and promote modernisation of the Brazilian courts. It gives the prestigious 'Award Innovare', a category created to highlight the role of public defenders, with several success stories, which can be found at: **www.premioinnovare.com.br/busca/?csrfmiddlewaretoken=e24acf7975786d2b5bd055dcd2c5bb45&edicao=todas&categoria=defensoria-publica&estado=todas&situacao=todas&keyword=Palavras-chave** accessed March 2012.

The role of the PDO has also been important in the area of housing and urban development, where they seek to resolve conflicts involving irregular occupation by poor people, such as the infamous case of 'Pinheirinho' in São Paulo in late 2011 and early 2012. Around 1,600 poor families (6,000 people) were evacuated by the military police force in compliance with a court order in the city of São José dos Campos. These evictions were carried out with well-documented extreme violence. Backed up by armoured cars and helicopters, some 1,800 state and municipal police descended on the site without warning, using tear gas, rubber bullets and truncheons to disperse frightened residents. In images widely circulated by Brazilian social media, some residents resisted the violent occupation with improvised weapons and homemade body armour. Numerous videos posted on YouTube captured incidents of police brutality. Reports indicate scores of injuries and at least 30 arrests, with unconfirmed rumours of up to seven deaths.[30] The action resulted in over 1,800 individual claims of violations of human rights against the state.[31] The PDO of São Paulo tried to halt the eviction in court and has since taken up the cases of those evicted, demanding social care of those persons and compensation for lost assets.

The PDO in São Paulo

São Paulo is the most populated and developed state and the PDO was only created in 2006, by Complementary State Law No 988 of 9 January 2006 after a widely supported and extensive campaign by civil society. According to the Ministry of Justice, the São Paulo PDO must serve 28.7 million people. It currently has 500 public defenders – compared to about 1,750 public prosecutors and 2,000 judges – and is operational in 29 of the roughly 300 counties in the state (including the capital). Considering the 500 defenders currently in office, one defender is serving 57,400 poor citizens, while the national average is about 32,000.

In 2007, São Paulo public defenders conducted an average of 920 legal consultations per year, and in 2008 this number increased to 1,607. In 2010, the average number of legal consultations per defender jumped to 1,921. In 2010, 17,700 habeas corpus writs were filed in São Paulo's State Court of Justice, whereas only 7,000 writs were filed in the Superior Court and Supreme Court. Approximately 60 per cent of cases were wholly or partly successful in the Superior Court of Justice, and the defenders of São Paulo were responsible for 20 per cent of all these habeas corpus proceedings. In 2010, about 850,000 legal consultations were conducted (including court proceedings) in all areas of law: civil; family; childhood and youth; criminal; criminal enforcement; and collective rights – which include consumer rights, housing and health, among others.

In 2009, São Paulo public defenders conducted 3,915 civil settlements, a figure that jumped to 5,814 in 2010. Finally, in prisons, the PDO in 2010 handled over 40,000 cases. In the State of São Paulo, there are roughly 160,000 prisoners and over 80 per cent of them had hired lawyers and used free legal aid. In counties where it is unable to deploy public defenders directly, citizens are served by private lawyers paid by the PDO through an agreement with the Brazilian Bar

30 'Mass Evictions at Pinheirinho: Favela Residents Confront Brazil's Development Boom' *The Independent* (London, 1 February 2012).

31 'Pinheirinho: violência policial é atestada; dois mil abusos', *Correio do Brasil* (Rio de Janeiro, 13 March 2012).

Association. However, the Supreme Court ruled on 29 February 2012 that such an agreement was unconstitutional in nature, noting that there should be a gradual replacement of such an arrangement with a new model involving the employment of public defenders.[32]

Mechanisms for increasing democracy and transparency within the work of the PDOs

The law that established the PDO in São Paulo required it to create a General Ombudsman, which is responsible for receiving complaints about the operation of the institution and to propose measures and actions aimed at improving services. The General Ombudsman is staffed separately from the PDO, chosen from citizens of 'unblemished reputation', who are not public defenders, nominated from a list of three names drafted by civil society. They serve for a two-year mandate and are allowed to stand for one re-election.

The Ombudsman is also responsible for establishing a means of direct communication between public defenders and society, receiving suggestions and complaints and contributing to the spread of popular participation in the monitoring and review of the services performed by the public defender. For this purpose, the PDO is obliged to finance the Ombudsman and to provide the General Ombudsman's Office with the staff necessary for operations. The Ombudsman may even participate in the Superior Council of the State Public Defender, which is the organ responsible for establishing rules in relation to the operation of the PDO. The General Ombudsman is chosen by the State Council of Human Rights Defence, ensuring a closer relationship with NGOs and related organisations for human rights in the state. Furthermore, the General Ombudsman of the São Paulo Public Defender's Office has its own Council, which meets monthly to assess the progress of policy actions of the PDO.

The success of the General Ombudsman in São Paulo has inspired new federal legislation, Complementary Federal Law No 132, 7 October 2009 (LC 132/2009), to replicate its establishment elsewhere. External Ombudsmen currently exist in the states of Acre, Bahia, São Paulo, Rio Grande do Sul, Ceará and Mato Grosso; Maranhão is in the process of choosing one.

The São Paulo PDO also organises a State Conference every two years, from which action plans are drawn. These action plans are to be followed by the PDO in its policy formulations. The conference is a large public hearing, which is open to the general public and whose delegates have been elected previously in meetings held in every city where public defenders operate. This ultimately results in greater social control in the policy formulations of the PDO.

The operations of the General Ombudsman of the São Paulo Public Defender's Office have been instrumental in sustaining and maintaining dynamic links with society at large. The very creation of the Ombudsman was only possible because of intense social pressure that arose in 2001. The mounting social pressure finally compelled the state government to create the body five years later. Thus, it can be said that the São Paulo PDO was in fact born from civil society, and the

32 Direct Action of Unconstitutionality No 4,163, proposed in 2008 by the Attorney General's Office.

public at large may maintain close control and participation in the management of the office's activities.[33]

Furthermore, it is important to consider how power is organised within the PDO. The Superior Council conducts advisory, policy and decision-making activities, almost like a mini-parliament, as the majority of its members are composed of elected public defenders. The elected positions of the Public Defender-General, Ombudsman-General and the Internal Affairs Officer within the Superior Council also lend it a somewhat parliamentary atmosphere.

Similarly, the State Public Defender-General must be directly elected by all public defenders. The public defenders generate a list of three candidates, which is then forwarded to the Governor who makes the final selection.[34] This ensures that the entire institution can participate in the selection of important senior positions.

Conclusion

The provision of legal aid to the needy in Brazil, based on a public and direct model, is still under construction. However, it has undoubtedly shown much dynamism and introduced many innovations that deserve a thorough examination. In time, it will be possible to verify whether the Constitution of 1988 and subsequent legislation will have successfully secured effective access to justice for the vast proportion of the population that still lacks quality public services.
Although still far from providing the country with a sufficient number of public defenders to satisfy all the existing demand (given that many cases are not even able to reach formal mechanisms of dispute resolution), one is able to see the public defenders' role for securing human rights in Brazil and bringing effectiveness to the law.

33 On the establishment of the Public Defender's office of the State of São Paulo, as well as its particular mode of management, see Luciana Zaffalon Leme Cardoso, '*Uma fenda na justiça: A Defensoria Pública e a construção de inovações democráticas*', (São Paulo: Hucitec, 2010). Also interesting is Eneida Gonçalves de Macedo Haddad (Ed), *A Defensoria Pública do Estado de São Paulo: por um acesso democrático à Justiça* (São Paulo: Letras Jurídicas, 2011).

34 This kind of choice seems to violate the administrative autonomy under Article 134, § 2 of the Federal Constitution of 1988, but has not been the subject of judicial inquiry.

CHAPTER SEVEN

The International Committee of the Red Cross in Brazil and its Work in Rio de Janeiro's Civil Police Lock-ups

Felipe Donoso

Introduction

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organisation whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.[1]

ICRC's activities in Latin America developed mainly after the Second World War and in the context of the Cold War, during which Central America in particular became an important theatre of dispute. It addressed humanitarian needs in countries under the rule of dictatorships and military regimes, where political strife, repression and sometimes armed subversion led in many contexts to situations of non-international armed conflict. In over six decades working in Latin America, however, there have been very few situations of international armed conflicts, during which the ICRC exerted its humanitarian mandate in the light of the Four Geneva Conventions. These include the Malvinas/Falklands War in 1983 between Argentina and Britain – which was the first time that the Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea would be applied on a large scale – and the short Cenepa War between Ecuador and Peru in 1995.

Since the return to democracy in most Latin American countries in the 1990s, the ICRC has mainly pursued prevention programmes in the region, as well as targeted detention activities and interventions. Today, the ICRC addresses the humanitarian consequences of past and present conflicts, as well as other situations of violence. ICRC's main geographical priorities in Latin America and the Caribbean are focused on the conflict in Colombia and its consequences into some neighbouring countries, where over 50 per cent of its regional resources are allocated.

Assisting and protecting victims, very often vulnerable migrants, suffering from the armed violence in Mexico and Central America is also very high on the organisation's agenda. In particular, the ICRC strives to address the plight of the missing and their families, and works to improve the conditions of detainees. During the last ten years, in several Latin American contexts, the National Red Cross and Red Crescent Societies and the ICRC have increasingly responded to consequences of situations of violence that do not reach the threshold of an armed conflict; many of these in urban settings.

1 International Committee of the Red Cross, official mission statement.

The ICRC has regional offices in Colombia, Brazil, Haiti, Mexico, Peru and Venezuela. It totals 23 structures in 16 countries. This chapter outlines the ICRC's specific protection approach in the region and then details the development of its work in Rio de Janeiro, in particular relation to detention visits.

The ICRC in Brazil

The ICRC has been present in Brazil for more than two decades, supporting the authorities in prevention activities, aiming to consolidate the incorporation of international humanitarian law (IHL) in its national laws and into the doctrine and training of its armed forces. In addition, since 1998, the ICRC has also supported the authorities of ten Brazilian states to integrate international standards on the use of force according to relevant human rights norms and instruments applicable to security forces in times of peace.[2]

The ICRC regional delegation for the Southern Cone, covering Argentina, Brazil, Chile, Paraguay and Uruguay was established in 1975, in Buenos Aires, and was transferred to Brasília in late 2009.

The region's National Societies receive training, financial and material support from the ICRC, in coordination with the International Federation of Red Cross and Red Crescent Societies (IFRC). The aim is to strengthen the Red Cross Societies' structures and their operational capacities, including reinforcing their ability to deal with situations of violence with a view to implementing, for example, community first-aid training, or increase their disaster response capacity. Following the heavy rains of January 2011 and landslides in Rio de Janeiro's mountainous region and the February 2010 earthquake in Chile, the ICRC helped the National Red Cross Societies to restore family links and provided other vital assistance.

The ICRC regional delegation continues to work from Brasília with the region's armed forces on integrating IHL into their doctrine, training and operations, with IHL manuals published or being prepared in Argentina, Brazil and Chile. UN peacekeeper contingents from the region's armed forces are also briefed on ICRC activities elsewhere, particularly in Haiti. In Paraguay and Chile, the ICRC has renewed its cooperation with the Ministry of the Interior and the National Police, and with Carabineros de Chile with a view to reinforcing the incorporation of human rights norms into police education, doctrine, training and control proceedings.

2 Secretaria de Segurança Pública do Rio de Janeiro; Secretaria de Defesa Social de Pernambuco; Secretaria da Segurança Pública e da Defesa Social do Rio Grande do Norte; Polícia Militar do Pará; Polícia Militar do Piauí; Polícia Militar de Rondônia; Polícia Militar do Mato Grosso do Sul; Polícia Militar do Distrito Federal; Polícia Militar do Maranhão; e Polícia Militar de São Paulo.

The ICRC in Rio de Janeiro

In 2008, the ICRC took the initiative to propose to the Brazilian authorities and to the Brazilian Red Cross (BRC) the establishment of a Pilot Project in Rio de Janeiro, to try to address the humanitarian consequences of urban armed violence prevailing in many of the city's favelas, in partnership with national institutions. As a neutral, impartial and independent international humanitarian organisation, accustomed to working with a wide range of stakeholders and communicating with all kinds of weapon bearers, the ICRC believes it is well placed to offer its services in order to help people affected by this particular type of violence, which unfortunately characterises an increasing number of urban settings worldwide. It hopes that 150 years of experience on all kinds of battlefields can be put to use to contribute towards shaping tailor-made humanitarian responses for certain groups that are routinely exposed to armed violence. At times, these groups are facing consequences similar to those in an armed conflict, although legally speaking they are not. It is important to stress that the ICRC's decision to offer its services in such situations is based on its right of initiative, as defined in its Movement statutes. It operates with the consent of the respective authorities in seven of the city's neighbourhoods: Cantagalo/Pavão-Pavãozinho, Cidade de Deus, Complexo da Maré, Complexo do Alemão, Parada de Lucas, Vigário Geral and Vila Vintém, which together contain over 600,000 inhabitants.

In 2009, the ICRC President launched this Pilot Project during a series of high-level meetings in Brasília with the Ministers of Justice, Defence and Foreign Affairs, who all gave their consent.

The ICRC focuses its efforts on the most socially vulnerable and on those who are most exposed to violence. Most of this work is carried out in cooperation with the national authorities, public institutions, the BRC and local non-governmental organisations (NGOs).

Through a combination of assistance, protection and prevention activities, the ICRC is:

- training residents of favelas in first aid and establishing more efficient chains of evacuation for medical emergencies, in cooperation with the BRC;
- improving access to primary health care, in particular through the support to health professionals from the programme Saúde da Familia (PSF);
- supporting the municipal authorities to develop adapted mental health care services to victims of violence;
- providing psychosocial assistance to teenage mothers and their children through regular home visits and group activities jointly carried out with municipal health authorities;
- protecting students from intermediate schools from the effects of violence through the implementation of the project Abrindo Espaços Humanitários ('Creating Humanitarian Spaces') in partnership with the State Secretariat of Education;
- supporting the State Secretariat of Security for the inclusion of international standards of human rights and on the use of force in the education and training curricula of military and civil police academies;

- limiting the impact of armed violence on the population and granting safe humanitarian access to the victims through regular confidential dialogue, at field level, with the police, the armed forces and Rio's armed gangs; and
- seeking to improve treatment of detainees and living conditions in places of detention under the responsibility of the State Civil Police of Rio de Janeiro, discussed further below.

So far, the experiences have been very encouraging. The ICRC is well accepted by both the inhabitants and the armed actors in the seven neighbourhoods where it works every day. Teachers in the schools supported by the ICRC feel better equipped to cope with the day-to-day struggles their work entails, as do the healthcare workers who have taken part in the ICRC's 'Safer Access' workshops.[3] More generally, the public institutions with whom the ICRC works have become increasingly aware of the fact that areas of the city chronically affected by armed violence need specific strategies and tailor-made approaches that guarantee the population access to basic services to which they are entitled.

The activities, jointly led by the ICRC and the Secretaria Municipal de Saúde e Defesa Civil – SMSDC (Municipal Secretary for Health and Civil Defence) or the Secretaria de Estadual de Educação – SEEDUC (State Secretary for Education) in the area of access to primary healthcare and education, are very illustrative. Traditionally, state servants such as medical personnel or school teachers struggle to access neighbourhoods affected by armed violence and residents are often living in precarious situations. Most have been continuously exposed to armed violence. There is a great sense of powerlessness among both those directly injured and those who frequently witness violence on their doorstep. As well as the visible physical wounds, the day-to-day battles with stress and anxiety, and the death of loved ones, or the fear of losing them, take a mental toll. In such an environment, the first important step is therefore to improve the community's coping mechanisms and to help them to verbalise daily violence, helping them to overcome their fear and shame. It is only once violence loses its taboo status and becomes something people talk about, that it can be dealt with properly.

That is why most partners working with the ICRC on the field, be it health and education professionals, or BRC volunteers, are always trained in 'Safer Access' or 'Safer Behaviour' activities, that is, specific training inspired by the ICRC's own safety standards and procedures applied worldwide, in order to increase their resilience and enhance their ability to protect themselves from threats to their safety and dignity. By better recognising armed violence-related threats and adopting behaviours that improve their security, people living and working in favelas affected by violence significantly reduce their vulnerability to armed violence and its numerous direct and indirect consequences. This is true for students going to school, for health agents from the PSF carrying out home visits to provide primary healthcare services, or for first aid instructors trained by the ICRC and the BRC attending emergency cases when the Fire Brigade or the Serviço de Atendimento Móvel de Urgência – SAMU (Emergency Ambulance Services) do not have access to a favela due to armed violence.

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3 See, 'Brazil: mitigating the effects of armed violence', Interview with Stephan Sakalian, head of the Rio project, 16 September 2011, **www.icrc.org/eng/resources/documents/interview/2011/brazil-interview-2011-09-01.htm** accessed March 2012.

Engaging in dialogue with armed actors

In Rio de Janeiro, as in any other contexts where the ICRC operates, assistance and protection activities go hand in hand with a dialogue with armed actors. Capitalising on its strictly humanitarian mandate, and on its fundamental principles of neutrality, impartiality and independence, the ICRC tries to develop, whenever possible, a confidential dialogue with all armed actors in order to share its humanitarian concerns with them and possibly encourage them to take relevant steps aimed at reducing the impact of armed violence. Indeed, it is important not only to help those affected, but also to talk to all weapon-bearers, regardless of whether they belong to the police and national army, or to armed gangs. It is also important to guarantee security and enhance acceptance of ICRC's own staff members.

For many years, Brazilian police officers countrywide, have benefited from a new e-learning module on human rights norms introduced by the National Secretariat of Public Security, with ICRC support. An evaluation by external consultants in four states confirmed the need to follow up the integration of human rights norms into training in all states where work had been initiated. It was important to simultaneously concentrate efforts with the military police and security forces in a few states (Rio de Janeiro and São Paulo), with the aim of fully integrating human rights norms into doctrine, training, operations and control procedures.

More recently, in 2010, the ICRC signed a partnership with the State Secretariat of Security of Rio de Janeiro, which started an unprecedented reform of the police education and training system. The ICRC's role is principally to share its expertise with the authorities in order to ensure that international human rights standards are incorporated into the teaching, policies and training of the military and civil police. Through this approach, the ICRC promotes greater awareness and better understanding of human rights, as well as greater respect for the international standards governing the use of force and firearms. It is also a way of sensitising the police and security forces to humanitarian values.

This long-term commitment aimed at improving police education and training, is led in parallel with a more operational dialogue on the ICRC's humanitarian concerns related to the favelas where it operates. In particular, confidential meetings regularly take place with military and civil police forces in order to discuss humanitarian problems observed by the ICRC in areas affected by armed violence. As a matter of priority, issues such as the need for medical personnel and school teachers to carry out their work in safety, for the injured to receive urgent medical attention, and for the dead to be handled with respect are evoked whenever needed. A similar dialogue took place with military forces involved in operations of law enforcement, such as the Força de Pacificação (Pacification Force) present in Complexo do Alemão and Complexo da Penha since December 2010.

One important characteristic of the ICRC's work in Rio de Janeiro is its attempt to also develop a dialogue with armed gangs controlling certain areas of the city. Although these groups have no official legitimacy, the ICRC tries to engage them for purely humanitarian purposes and as a mean to secure the safety of its teams when carrying out their activities. To achieve this, it is extremely important to make clear to all inhabitants, leaders and institutions present in the field what the ICRC is doing, and why. This makes it easier for the armed gangs and militias

within the communities to accept the ICRC's presence. However, it takes time to build up the trust necessary for a constructive dialogue. As always, the ICRC treats these discussions as confidential and never publicly discloses the sensitive matters addressed with its interlocutors. Confidentiality is a fundamental working modality that enables the institution to safely reach the people affected by violence. It is noteworthy that this humanitarian dialogue does not only occur in areas controlled by the drug gangs but also in places of detention monitored by the ICRC, where many drug-traffickers and other members of armed groups are detained.

Principles governing visits to places of detention worldwide

Visits to persons deprived of their liberty form the basis of the ICRC's approach to detention monitoring, which is carried out as a 'protection' activity. The change from being a free individual to being a detainee means the loss of all points of reference, and a sudden plunge into an unknown world where all the rules are different and values are unfamiliar. An individual, suddenly deprived of freedom, becomes extremely vulnerable and markedly dependent on detaining authorities. Imprisonment constitutes a fundamental change for all individuals, even if they are prepared and resilient. The ICRC recognises that the intrinsic vulnerability of all detainees can be exacerbated by a number of factors: the personal characteristics of detainees; the prevailing political and military situation; and the practices of authorities and other actors.

The visits are carried out in accordance with established ICRC practice that is uniformly applied and has to be accepted beforehand by authorities and other actors concerned. There are five main pre-conditions governing ICRC visits:

- access to all detainees;
- access to all premises and facilities used by and for detainees;
- authorisation to repeat the visits;
- the right to speak freely and in private (without witnesses) with detainees of the ICRC's choice; and
- the assurance that the authorities will give the ICRC a list of the detainees within its field of interest or authorise it to compile such a list during the visit. The ICRC can then at any time check on the detainees' presence and monitor them individually throughout their detention.

Visits across the world follow a standard pattern: an introductory meeting with the detaining authorities in charge in order to hear from them their perspective on their place of detention and agree on the modalities for the unfolding of the visit; followed by a tour of all premises used for detention, usually together with the authorities in charge. Private and confidential talks with the person(s) deprived of liberty are undertaken thereafter in order to complement the ICRC's own observations of the place of detention with the perspective of the detainees. The visit is concluded with a second meeting with the authorities in order to share the ICRC's findings and recommendations.

The ICRC's methods guarantee professionalism and credibility and enable the ICRC to assess the situation as accurately as possible, while safeguarding the interests of detainees. They make it

possible to analyse specific systemic issues, identify problems, assess conditions of detention and carry on a dialogue with detainees and detaining authorities. They can also have a dissuasive effect on the commission of violations and be of value, in psychosocial terms, to detainees. Procedures of this nature proved their worth and served as a model for several international and national mechanisms that were subsequently established, in particular the European Committee for the Prevention of Torture (CPT).

The ICRC deals specifically with the vulnerability of certain detainees, for reasons of: age; gender; because they are under sentence of death; owing to their status as detained migrants; etc. The ICRC insists – in all contexts – on preserving its independence in determining which categories of person deprived of their liberty it is interested in. Negotiations for access to detainees must ensure that no category of detainee is excluded and that the ICRC will be permitted the greatest latitude possible in its work.

Besides its responsibilities under IHL, the ICRC acts primarily to benefit persons deprived of their liberty in relation to situations that trigger its intervention. Broadly speaking – and as dictated by circumstances – the ICRC concerns itself with detainees who have no effective means of protecting themselves from abuse or arbitrary acts, who are neglected, who have never had or who no longer have access to the most basic services they are entitled to receive from the authorities, or who are subject to the arbitrary behaviour of those exercising power over them. In situations other than those in which the ICRC is expressly mandated to act on behalf of persons deprived of their liberty, the organisation's decision to offer its services is determined by the gravity of humanitarian needs and by the urgency of responding to them, whatever the causes of the protection problems or the reasons for detaining the persons concerned.

The ICRC's principal concerns in relation to detainees are: the behaviour and actions of those responsible for making arrests, conducting interrogations and taking decisions related to detention; the material conditions of detention; access to medical care; and the management and care of persons deprived of their liberty. Worldwide, its interventions focus on certain protection problems and violations such as: enforced disappearances and undisclosed detention; summary executions; torture and other forms of ill-treatment; and problems created by violations of the physical or moral integrity of detainees and of their dignity and of the obligation to provide the essential necessities for their survival. For example, all detainees should be provided with: adequate food and water; personal hygiene and sanitation facilities; access to medical care; adequate material conditions of accommodation; the right to maintain contact with their families; and the right to legally challenge both their detention itself and the conditions in which they are being held.

In view of the needs observed, the ICRC can thus prevail upon the authorities concerned to assume responsibility and can make recommendations and exert pressure by mobilising influential external factors of change. However, if the situation is serious and requires urgent intervention, the ICRC can also implement its own operational capacities in order to restore a satisfactory state of affairs. Whenever measures taken in a place of detention reveal that some of the detainees are suffering from severe malnutrition, for instance, the ICRC can carry out a therapeutic feeding programme to ensure their survival. This will give the concerned authorities time to equip themselves with the means of taking action in the longer term. Finally, the ICRC can opt to provide structural assistance or to support relevant projects that the authorities design and conduct. In concrete terms, this can

include the following, depending on the circumstances:

- advice in connection with normative issues (such as the law on prisons or regulations on the organisation of prisons, etc);
- advice, sometimes accompanied by material assistance, concerning the establishment and organisation of administrative structures;
- the creation of special training courses for the law enforcement bodies (police forces, security forces and armed forces), for prison staff or for specialists working in a prison environment (such as medical staff or the staff in charge of water supply and sanitation facilities);
- organisation of interdisciplinary workshops for professionals from various trades and occupations involved in identical issues;
- action to put the authorities in touch with organisations specialising in fields where the ICRC does not profess to have special knowledge; and
- organisation of the exchange of family news between detainees and their relatives (in the form of Red Cross messages).

Monitoring places of detention in Rio

As in many other contexts, urban armed violence dynamics not only affect communities but also generate humanitarian and security concerns within the detention system. The Civil Police of Rio de Janeiro, recognising the ICRC experience in detention activities,[4] invited the ICRC to monitor the treatment and conditions of detention of people deprived of freedom in police lock-ups under its responsibility. The two institutions engaged in a confidential dialogue on required improvements in the areas of material and psychological conditions, as well as judicial guarantees.

It is widely known that serious overcrowding, appalling material conditions and lack of medical care have been some of the major problems in Civil Police lock-ups in Rio de Janeiro State. Since February 2011, ICRC delegates have been visiting these detention centres frequently to monitor conditions and to speak confidentially with the detaining authorities, with a view to resolving any humanitarian issues that have been identified. The ICRC is the only international body to regularly visit places of detention under Civil Police authorities in Rio de Janeiro.

During 2011, the ICRC conducted 18 visits to 1,683 detainees held in five police lock-ups (Duque de Caxias, Grajaú, Magé, Neves, Pavuna) in the State of Rio de Janeiro, according to its standard procedures as described above. These procedures enable the ICRC to preserve its neutrality, impartiality and independence. It is worth mentioning that most of the detainees are active gang members of the different factions and most have a modest educational background. The findings of its visits remain confidential and this enables the ICRC to engage in a constructive dialogue with the authorities. This is quite different from the public 'documenting and denouncing' of violations by many human rights organisations and, indeed, by recent Commissions of the Brazilian Parliament and the *mutirões* carried out by the National Justice Council. However, the ICRC believes that the two strategies are complementary in bringing about progressive reform.

4 In 2011, the ICRC visited 540,828 persons deprived of freedom worldwide of which 28,949 were individually followed; in addition to this, 5,204 detention visits were carried out in 1,869 different places of detention in 75 countries and five international courts. The ICRC also visited 150 Prisoners of War (PoWs).

The ICRC also adopts a comprehensive approach, focusing on both individual and structural problems and trying to bring the various actors together to tackle them holistically. For example, detainees in places that the ICRC visits are quite likely to be in need of material, medical as well as legal assistance, but most visiting organisations are only mandated to provide one type of assistance. As well as the health initiatives discussed in more detail below, the ICRC has also organised several meetings with state bodies, such as the Prosecutor's Office, the Public Defender's Office, or judges, to discuss the humanitarian consequences of overcrowding. Many of the problems that detainees face are also problems for the detaining authorities and so the ICRC attempts to create a constructive dialogue about how the two 'parties' can work together to tackle such problems. The ICRC's independence can facilitate such a dialogue by focusing on exclusively humanitarian objectives.

The ICRC tries to ensure that its recommendations are always practical, realistic and culturally appropriate, focusing on measures that could be taken that do not necessarily involve increased budget or extra efforts. Furthermore, the specificity of the ICRC's approach lies in its refusal to assess a situation according to pre-established standards, and instead to study each case from a broader angle, taking into account all the factors involved.

Finally, the ICRC's knowledge of the dynamics of the context of the violence outside the places of detention that it visits helps to guide its monitoring activities and approach. Many of the detainees belong to armed gangs and the ICRC's dialogue with these gangs on humanitarian issues, both within the places of detention and the communities in which it works, helps to create a better acceptance of the ICRC's presence. Clearly such a dialogue is only possible on the basis of the humanitarian principles of neutrality, independence and impartiality outlined above.

Preliminary results of visits to Civil Police lock-ups in Rio de Janeiro State

While these visits only started in February 2011 and had to be reviewed in light of the ongoing closure of lock-ups in Rio de Janeiro State (following the Joint Resolution of the State Secretariat of Penitentiary Administration and the State Secretariat of Security No 24 of 14 March 2011), the ICRC believes that its project involving visits to places of detention has had some tangible results. The Civil Police of the State of Rio de Janeiro (CPSRJ) have shown a great deal of receptiveness and openness during ICRC visits and bilateral meetings with the delegates, which contributed to the establishment of a frank and constructive dialogue. Visits, moreover, have always been carried out in full respect of the ICRC standard procedures.

As a result of these constructive, confidential discussions, and based on the ICRC's findings and recommendations, in some instances the detaining authorities have taken steps to improve detainees' access to fresh air (ie, to the exercise yard) and general hygiene conditions. In a bid to support the authorities' efforts to improve material and psychological conditions of detention, the ICRC distributed material assistance to the detainees. This mostly consisted of items for their personal hygiene, material to help clean out cells and items such as mattresses, blankets, games and other leisure items. A total of 1,387 detainees benefited from this assistance.

The ICRC has also helped the state and municipal health authorities to carry out a baseline survey to identify and address health needs of detainees in one of the detention facilities visited. Moreover, the ICRC distributed medical material and equipment to this lock-up in order to facilitate the work of the doctor from the Municipal Secretariat of Health working there on a weekly basis. Furthermore, several detainees who needed urgent medical care were transferred by the detaining authorities to penitentiary or civilian hospitals, following the ICRC's recommendations.

As a recognised, international body expert in the area of penitentiary health, the ICRC was also invited to the 'First Seminar on Integrated Planning of Penitentiary Health in the State of Rio de Janeiro', organised by the State Secretariat of Health, where it could present its independent point of view on health issues in police lock-ups.

Last but not least, through their repeated visits and their willingness to listen with empathy, the ICRC delegates have helped to provide detainees with a touch of humanity. The visits provide them with an opportunity to speak openly about their concerns with an outsider; someone who belongs to neither the detaining authorities, nor the judiciary, nor their fellow detainees. The conditions in which many detainees are being held, and the threats of violence that many of them live under, take psychological as well as a physical toll. The importance of having someone from the outside world willing to listen, someone who shows an interest in their plight, is incalculable and helps detainees restore their dignity and self-respect. This explains why so many detainees readily describe what they have been through to ICRC delegates, even when they are told that the information will serve as a basis for pre-emptive future, rather than retrospective, action.

Conclusion

Although the Rio Project is still at an early stage, the ICRC believes that there are already some important lessons to be learnt for guiding future work and activities, both in Brazil and in other countries. The violence that has blighted Rio de Janeiro in recent decades can also be found in many other large cities around the world marked by social inequality, and where highly organised and armed gangs operate. Hopefully, the good practices the ICRC believes its project has been able to develop could, therefore, have wider international relevance and applicability.

To assist and protect people affected by other situations of violence, including in the detention system, the ICRC is making sure that its humanitarian expertise and modus operandi are well understood and recognised as a real humanitarian value by governments and civil society. The ICRC does not pretend to intervene as a standalone humanitarian actor in the different contexts it covers, as the volume and complexity of the humanitarian challenges, including in the detention system, are far beyond the ICRC's capacity in such situations. The ICRC's Rio de Janeiro Pilot Project is contributing, through the implementation of its multidisciplinary approach in response to needs, to the mobilisation of national operational partners and authorities. Without letting aside efforts to better access cross-cutting humanitarian issues in the affected communities and the detention system, it brings together solutions based on trust, confidence and a constructive confidential dialogue.

In a country at peace such as Brazil, for the ICRC the best way to achieve significant humanitarian impact in the detention system is to work in close cooperation with the authorities and in coordination with existing national governmental and non-governmental institutions and networks; including the National Societies of the Red Cross when possible.

In Rio de Janeiro, police authorities requested the ICRC to visit lock-ups. The ICRC modus operandi and transparent humanitarian action carried through confidential dialogue has proven to be valuable in building trust and confidence with the authorities, security forces and detainees alike.

The ICRC's detention activities in Rio de Janeiro, although still modest in terms of scope and outcomes due to being in the early stages of the Pilot Project, is showing encouraging preliminary results and creating a very positive precedent of cooperation, confidence-building and synergies between the local authorities and an international humanitarian organisation, that was known to only a few until recently. In particular, it has demonstrated that beyond politics and bureaucracy, significant improvements are possible when all present stakeholders join their respective experiences and strengths to find solutions together.

Certainly, some of the improvements observed by the ICRC during its visits to Rio de Janeiro's police lock-ups have resulted from the implementation of the aforementioned Joint Resolution No 24 of 14 March 2011, ranging from the progressive decrease of the detained population due to transfers of detainees to the penitentiary system, to the subsequent closure of several lock-ups. In this sense, it will be extremely important for the authorities to ensure that all precautions are taken to prevent the mere 'transfer' of the overcrowding problem and of its many humanitarian consequences from the Civil Police lock-ups to the places of detention under the authority of the Secretaria de Administração Penitenciária – SEAP (State Secretariat of Penitentiary System). In this sense, the *mutirões* carried out by the Brazilian judicial authorities are an effective measure in dealing with overcrowded detention conditions and reflect a best practice that shows how judicial authorities can enhance their coordination. In this matter, the ICRC is convinced that the working collaboration developed with the Civil Police,[5] based on a constructive and confidential dialogue, could be extremely relevant to the SEAP as well, in order to try to resolve some of the numerous humanitarian challenges faced by the state penitentiary system.

5 The ICRC has been authorised to visit detainees in lock-ups under the responsibility of the Civil Police through a Circular issued by the NUCOP (Ordem de Serviço da Chefia da Polícia Civil), in accordance with its standard visiting procedures.

CHAPTER EIGHT

The International Bar Association in Brazil: Forging Partnerships

Alex Wilks

Introduction

The International Bar Association (IBA) was established in 1947 and is the world's leading organisation of international legal practitioners, bar associations and law societies. Inspired by the vision of the United Nations (UN) and with the aim of supporting the establishment of law and administration of justice worldwide, it now has a membership of more than 45,000 individual lawyers and over 250 bar associations and law societies spanning all continents. The IBA has considerable expertise in providing assistance to the global legal community. It also influences the development of international law reform and shapes the future of the legal profession throughout the world.

Human rights have long been a central theme of the IBA's work. The IBA Human Rights Institute (IBAHRI) was established in 1995 and works across the Association to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide. The IBAHRI has undertaken a range of capacity-building activities aimed at improving the ability of lawyers to act independently and protect human rights in their respective jurisdictions. It also produces an annual report on its activities.

The IBAHRI helped to establish Afghanistan's first bar association which now licenses lawyers independently from the government and runs a variety of access to justice programmes. Other institutions established by the IBA include the Southern Africa Litigation Centre and the International Legal Assistance Consortium. The IBAHRI also conducts missions to evaluate the independence of the judiciary and the state of the administration of justice in countries where it is under threat. These missions show solidarity with the judges and lawyers in those jurisdictions who are often working courageously in extremely challenging circumstances. The missions also help to mobilise the international legal community in advocacy campaigns, by publishing reports of their findings and recommendations. In 2011, the IBAHRI released reports on Venezuela, Zimbabwe, Egypt and Syria.[1]

A major aspect of the IBAHRI's work is the training of judges and lawyers in human rights law. Over 15 years it has trained judges and lawyers in various aspects of international human rights law in 15 countries, from Afghanistan to Zambia. The IBAHRI has implemented many trainings focusing on combating torture using the *Combating Torture: A Manual for Judges and Prosecutors*, which was jointly published by the University of Essex and the UK Foreign and Commonwealth Office (FCO).[2] The IBAHRI has also published *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, in collaboration with the UN Office of the High Commissioner for Human Rights (OHCHR), which is part of the UN Professional Training.[3]

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1 See **www.ibanet.org/IBAHRI.aspx** accessed March 2012.

2 Conor Foley, *Combating Torture: A Manual for Judges and Prosecutors*, University of Essex and the UK Foreign and Commonwealth Office, 2003, **www.essex.ac.uk/combatingtorturehandbook** accessed March 2012.

3 'Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers' OHCHR / IBA Professional Training Series No 9. Portuguese translation launched at the Federal Council of the Brazilian Bar Association in April 2011. Available for download at: **www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Training.aspx** accessed March 2012.

Lawyers and human rights

In recent decades, international human rights law has had an ever-growing impact on domestic legal systems throughout the world and consequently on the daily work of judges, prosecutors and lawyers. Human rights is no longer a 'fringe activity' but 'an area of law… which permeates all legal activity, economic and social, in public law and private'.[4] In international human rights law, state responsibility is strict. States are responsible for violations of their treaty obligations even when they were not intentional and states cannot invoke the provisions of their internal laws to justify their failure to perform their international legal obligations, which must be performed in good faith.[5] In several countries, including Brazil, international human rights norms have constitutional status and are therefore justiciable domestically.[6]

The legal profession plays a crucial role in any modern constitutional democracy in ensuring the effective implementation of the state's international human rights obligations. The well-established principle of the independence of the judicial branch was obviously not invented for the personal benefit of judges themselves, but to protect individuals against abuses of power. It follows, therefore, that judges cannot act arbitrarily by deciding cases according to their own personal preferences, but that their duty is to apply the law. In the field of protecting the individual, this means that judges have a responsibility to apply domestic and, whenever relevant, international human rights law. A legal system based on the rule of law also needs prosecutors willing to investigate and prosecute even if the crimes or abuses may have been committed by state agents. Public defenders and lawyers play an equally important role in defending fundamental rights by using the national and international human rights instruments available to them in their casework and litigation.

Given the essential role of judges and lawyers as agents of the administration of justice, it is a widely-held assumption that training them in international human rights law will better protect human rights in their own country. There is, however, a significant lack of concrete evidence to show that such trainings actually make a difference, which is surprising in view of the many national and international organisations working in the field. Measuring the impact of such trainings and the methodologies involved is an area of considerable academic discourse in the international development community, especially following the massive growth in overseas development assistance in legal and judicial capacity-building and reform over the past 20 years.[7]

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4 *Ibid*, 25.

5 Vienna Convention on the Law of Treaties 1986, section 46.

6 EC No 45, 30 December 2004. In Brazil, international human rights norms have constitutional status provided that they have been approved in a legislative proceeding by proper majority, equivalent to the one required for the approval of any constitutional amendment. The Amendment created the possibility of 'federalizing' certain cases – taking them from state to federal courts where they involve serious human rights violations.

7 See 'Monitoring Performance of Legal and Judicial Reform in International Development Assistance' L Armytage, Centre for Judicial Studies, presented at International Bar Association Chicago Showcase September 2006; 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt' Social Development Papers No 37, 2006.

What is striking about the body of literature that exists on monitoring the performance of such capacity-building work is that there is very little concrete evidence or proof that human rights trainings actually reduce human rights violations or improve the rule of law in a particular jurisdiction. In fact, many commentators have expressed mounting concern about the 'underwhelming evidence of success' in such programmes and the need to develop a more serious research-based understanding of what works and what does not.[8] There is also a growing concern that 'human rights training' can sometimes resemble 'missionary activity' in which international experts seek to impose standards developed in the rich countries of the global North on poorer ones in the global South.

This chapter first describes the IBAHRI's work in Brazil, including the establishment of a pilot training project in 2011. It then outlines three specific areas where international human rights jurisprudence is of specific relevance to the Brazilian criminal justice system. It concludes with a wider discussion about Brazil's role as an active participant in the debate about how international mechanisms can be used and good practices can be disseminated to combat violations and promote access to justice. As highlighted in a number of other chapters of this book, Brazil is currently developing a series of innovative practices in the area of judicial reform and developing a programme of dialogue and debate in which the role of actors in the global South is explicitly recognised. Many of the partnerships that are being created are in the very early stages of formation, but they point towards a far richer discussion about the universality, interconnectedness and indivisibility of human rights in a truly global context.

The IBAHRI pilot project in Brazil

The problems affecting the Brazilian criminal justice and penal system have been the subject of numerous reports and studies by UN monitoring bodies as well as national and international human rights organisations. The *Combating Torture* manual published by the University of Essex and the FCO, for example, was directly inspired by the visit to Brazil carried out by Professor Sir Nigel Rodley, when he was the UN Special Rapporteur on Torture.[9]

The IBAHRI published its own report on Brazil in 2010, focused specifically on the issue of pre-trial detention. The report, *One in five: the crisis in Brazil's prisons and criminal justice system*, was launched by Professor Juan Méndez, currently UN Special Rapporteur on Torture, and Márcio Thomaz Bastos, a former Minister of Justice, at the São Paulo State Bar Association.[10] The Report considered many of the historical, socio-political and legal issues surrounding the well-documented challenges facing the Brazilian criminal justice system and made two important recommendations that were to lay the foundations for further IBAHRI activities.

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8 See above note 7, Armytage, 2006, 1–3.

9 Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission on Human Rights resolution 2000/43, Visit to Brazil E/CN.4/2001/66/Add.2, 30 March 2001.

10 *One in five: the crisis in Brazil's prisons and criminal justice system*, IBAHRI Report, February 2010. Available for download (English and Portuguese) at: **www.ibanet.org/Human_Rights_Institute/Work_by_regions/Americas/Brasil.aspx** accessed March 2012.

First of all, it endorsed the repeated calls for the Defensoria Pública, the constitutionally mandated body to provide free legal assistance to those who cannot afford it, to be strengthened. Secondly, it recommended that more effort needs to be put into making the existing system work better rather than simply creating new laws or institutions.[11] It also noted the impressively dynamic efforts within Brazilian civil society to address these problems and the very real commitment among those working within federal and state justice institutions to address the challenges that exist.

In October 2011, the IBAHRI launched a manual specifically for use by Brazilian legal professionals, *Protecting Brazilians against Torture: A Manual for Judges, Prosecutors, Public Defenders and Lawyers*,[12] and implemented a series of related trainings in collaboration with key federal and state justice institutions. Over 130 judges, prosecutors, public defenders and lawyers were trained in national and international human rights standards.

The initiative was undertaken with the collaboration and endorsement of several key federal justice institutions including the Ordem dos Advogados do Brasil – OAB (Brazilian Bar Association), Escola Nacional de Formação e Aperfeiçoamento de Magistrados – ENFAM (National Judges' School), Conselho Nacional de Defensores Públicos Gerais – CONDEGE (National Council of Federal Public Defenders), Defensoria Pública da União – DPU (National State Public Defender's Office), Escola da Defensoria Pública do Estado – EDEPE (National Public Defenders School), Defensoria Pública do Estado de São Paulo (São Paulo Public Defender's Office), Escola da Magistratura do Estado do Rio de Janeiro – EMERJ (Rio de Janeiro State Judges' School), Conselho Nacional do Ministério Público – CNMP (National Council of Public Ministry), Conselho Nacional de Justiça – CNJ (National Council of Justice), the Ministry of Justice Secretariat for Judicial Reform and the Secretariat of Human Rights, as well as civil society organisations. A series of pilot courses using the Manual and a specifically-developed training curriculum for judges, prosecutors, public defenders and lawyers was planned through a working group of those federal justice institutions in Brasília, a group which was formalised by the signing of a technical cooperation agreement at the launch of the Manual at the Federal Council of the Brazilian Bar Association in October 2011.

Judges, prosecutors, public defenders and lawyers received official invitations to attend the trainings by their respective regulatory or educational institutions and received academic credit for doing so. These justice institutions divided between them the hosting of the trainings around the country with four courses taking place in Brasília at the Federal Council of the Brazilian Bar Association, in São Paulo at Escola Superior do Ministério Público do Estado de São Paulo (São Paulo State Prosecutor's School), in Fortaleza in the Ceará State Public Defender's Office and in Rio de Janeiro in the historic Sala Tribunal do Jurí, Brazil's oldest courtroom, organised by the Rio de Janeiro State Judges' School (EMERJ).

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11 *Ibid*, 6.

12 Conor Foley, *Protecting Brazilians against Torture: A Manual for Judges, Prosecutors, Public Defenders and Lawyers*, IBAHRI, October 2011. Available for download at: **www.ibanet.org/Human_Rights_Institute/HRI_Publications/HRI_Training_Manuals_.aspx** accessed March 2012.

Each course took place over two days and comprised lectures that focused on the prohibition of international law and its applicability in domestic law, the role of judges in protecting suspects and prisoners against torture, the right to legal assistance and safeguards against torture and prosecuting torture suspects and providing reparations to victims. Lecturers included distinguished Brazilian jurists such as Gilmar Mendes, the former President of the Supreme Court of Brazil. The participants were also split into mixed working groups to undertake practical exercises such as drafting a report to the UN Committee against Torture and analysing concrete case studies, which were facilitated by staff from the Secretariat of Human Rights and fellow judges, lawyers and civil society experts.

The trainings were attended by 20 judges, 18 prosecutors, 48 public defenders, 38 lawyers and 12 civil society members – a total of 136 participants. Each seminar contained a mixed group of judges, prosecutors, public defenders and lawyers, which made for particularly interesting discussions during the workshops. For many lawyers and public defenders, this was the first time they had been able to question and engage with judges and prosecutors on such issues in a formal training course.

The training was undoubtedly well-received. Participants were invited to complete evaluation questionnaires on an anonymous basis and 96 per cent of the respondents found the courses either very useful or useful. In addition to this, 98 per cent of the respondents found the material very relevant or relevant. Approximately half of the public defenders and lawyers had attended a human rights course as part of their professional development training. However, it is striking that while almost all of the judges found the course very useful, only three had previously attended a human rights course, and in all cases this had been in their under or post-graduate studies and not as part of their professional development training. Only two prosecutors had previously attended such training. In other words, neither judges nor prosecutors in Brazil are receiving courses in human rights as part of their professional training.

Every single one of the participants thought that a better understanding of international human rights law within the Brazilian legal profession would have an impact on the way prisoners are treated. Further, when asked the questions what single practical reform would improve the treatment of detainees in Brazil and how the efficacy of the actors responsible for monitoring places of detention could be improved, three quarters of the judges and over half the participants said that more human rights training was needed. While of course only representing a sample of the legal profession in four major Brazilian cities, this suggests that there is indeed a need for such training, especially among judges and prosecutors.

The issue of better coordination between justice institutions and making sure the existing parts of the system work better together is a common theme in the discussions surrounding criminal justice reform in Brazil.[13] This was reflected in the responses to the question of how the efficacy of the actors responsible for monitoring places of detention could be improved, with the majority of participants responding either that better coordination or better application of the law, in particular Lei de Execução Penal – LEP (Law on Penal Execution) is required. The positive response to the training format suggests that providing judges, prosecutors, public defenders and lawyers

13 See, for example, note 10 above, at 6.

with the opportunity to engage with each other in the same training course under the official auspices of their respective regulatory or educational institutions may contribute to improving this coordination.

It is clear that there is a need for such trainings and the format of training judges, prosecutors, public defenders and lawyers together in the same training course has some value. However, for it to have a real impact, the curriculum needs to be incorporated into the continuing professional development programmes of the relevant justice institutions. The trainings should then be rolled out on a systematic basis by those institutions in every state in Brazil. Implementing such trainings through a coordinated group of such justice institutions would obviously improve the coordination between those institutions, and also probably between the participants in their daily work. Part of the problem is not necessarily the lack of knowledge of human rights law among the judiciary, but rather their reluctance to appear to be 'soft on criminals', combined with the slowness of the Brazilian justice system that extends the period in which people are held in pre-trial detention.[14] However, a coordinated group of Brazilian justice institutions systematically implementing trainings around the country would send a strong signal within the judiciary and the legal profession, as well as to wider society, that their regulatory and educational bodies are serious about protecting Brazilians from torture.

In order to measure whether such trainings would in fact have an impact or make a difference, it is important to first develop a serious research-based understanding of what is needed, as well as an analysis of how the judiciary and legal profession are currently performing. Part of the reason behind the lack of evidence of the impact of legal capacity-building projects is the 'dearth of initial baseline data'.[15] The Brazilian government should invest in a nationwide assessment of the human rights training needs of the judiciary and the legal profession, as well as an analysis of the performance of the judiciary and legal profession in cases involving torture allegations. Then, it would be possible to measure in a meaningful way any impact and have a clearer understanding of what works and what does not. This should be followed by the development of a systematic nationwide official training programme for the judiciary and legal profession implemented by the relevant justice bodies.

International human rights standards and the Brazilian criminal justice system

Although training is no panacea, an independent and well-trained judiciary and legal profession conversant in domestic and international human rights law can better protect human rights and hold the state to account. There are a number of areas where international human rights standards can provide some clear guidance to the Brazilian legal profession. The following section briefly summarises the standards set down governing the right to liberty and the protection of people

14 *Ibid*, at 32.

15 L Bhansali and C Biebesheimer, 'Measuring the Impact of Criminal Justice Reform in Latin America' in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC, Carnegie Endowment for International Peace 2006) 310–318.

who have been deprived of it. Further details can be found in the IBA manual *Protecting Brazilians against Torture: A Manual for Judges, Prosecutors, Public Defenders and Lawyers*.

Everyone has the right to liberty and security of person – including the right to be free from arbitrary arrest or detention.[16] When the state deprives a person of liberty, it assumes a duty of care to maintain that person's safety and safeguard his or her welfare. Detainees are not to be subjected to any hardship or constraint other than that resulting from the deprivation of liberty.[17] These rights are guaranteed by Article 7 and 10(1) of the International Covenant on Civil and Political Rights (ICCPR) which, respectively, prohibit torture and ill-treatment and safeguard the rights of people deprived of their liberty.[18]

The prohibition on torture and ill-treatment applies to all people, all the time. Certain human rights, such as the right not to be subject to arbitrary detention, may under certain circumstances be restricted in a public emergency, but safeguards necessary for the prohibition of torture, such as limiting periods in which people can be held in incommunicado detention, must continue to apply.[19] The duty to treat detainees with respect for their inherent dignity is a basic standard of universal application. States cannot claim a lack of material resources or financial difficulties as a justification for inhumane treatment. States are obliged to provide all detainees and prisoners with services that will satisfy their essential needs.[20] Failure to provide adequate food and recreational facilities constitutes a violation of Article 10 of the ICCPR, unless there are exceptional circumstances.[21]

The general right of those who have been arrested and detained to have access to legal advice is recognised in Article 14 of the ICCPR and a variety of other instruments relating to the right to a fair trial. The UN Human Rights Committee has stressed that the protection of the detainee requires prompt and regular access be given to doctors and lawyers[22] and that 'all persons arrested must have immediate access to counsel' for the more general protection of their rights.[23]

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16 Article 9 (1) International Covenant on Civil and Political Rights; Article 5 European Convention on Human Rights; Article 6 African Charter of Human and Peoples' Rights; Article 7 American Convention on Human Rights.

17 Human Rights Committee, General Comment 21, Article 10 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 33 (1994), paragraph 3.

18 See also, Article 3 European Convention on Human Rights; Article 5 American Convention on Human Rights; Article 5 African Charter on Human and Peoples' Rights; Article 37 Convention on the Rights of the Child; Article 1 Convention on the Elimination of All Forms of Discrimination Against Women; Articles 2 and 4 The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; Article XVI The African Charter on the Rights and Welfare of the Child.

19 Human Rights Committee General Comment No 29, States of Emergency (Article 4), adopted at the 1950th meeting, on 24 July 2001, paragraph 16. See also *Aksoy v Turkey*, ECtHR, Judgment 18 December 1996; *Brannigan and MacBride v UK*, ECtHR, Judgment 26 May 1993; *Brogan v UK*, ECtHR Judgment 29 November 1988; 'Habeas Corpus in Emergency Situations', Advisory Opinion OC-8/87 of 30 January 1987, Annual Report of the Inter-American Court, 1987, OAS/Ser.L/V/III.17 doc.13, 1987; and 'Judicial Guarantees in States of Emergency', Advisory Opinion OC-9/87 of 6 October 1987, Annual Report of the Inter-American Court, 1988, OAS/Ser.L/V/III.19 doc.13, 1988.

20 *Kelly v Jamaica*, (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; *Párkányi v Hungary* (410/1990), 27 July 1992, Report of the Human Rights Committee, (A/47/40), 1992.

21 *Kelly v Jamaica*, (253/1987), paragraph 5.

22 Human Rights Committee General Comment 20, paragraph 11.

23 Concluding Observations of the Human Rights Committee: Georgia, UN Doc CCPR/C/79/Add.74, 9 April 1997, paragraph 28.

Counsel must communicate with the accused in conditions giving full respect for the confidentiality of their communications.[24] The authorities must also ensure that lawyers advise and represent their clients in accordance with professional standards, free from intimidation, hindrance, harassment, or improper interference from any quarter.[25] The Inter-American Commission on Human Rights considers that in order to safeguard the rights not to be compelled to confess guilt and to freedom from torture, a person should be interrogated only in the presence of his or her lawyer and a judge.[26] It has also concluded that the right to counsel applies on the first interrogation.[27]

The Human Rights Committee has also stated that the protection of detainees requires that each person detained be afforded prompt and regular access to doctors.[28] The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment state that 'a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge'.[29] Detainees have the right to request a second medical opinion by a doctor of their choice, and to have access to their medical records.[30] The UN Standard Minimum Rules for the Treatment of Prisoners state that detainees or prisoners needing special treatment must be transferred to specialised institutions or civil hospitals for that treatment.[31] The UN Special Rapporteur on Torture has recommended that: 'At the time of arrest, a person should undergo a medical inspection, and medical inspections should be repeated regularly and should be compulsory upon transfer to another place of detention.'[32]

Article 9 (3) of the ICCPR states that: 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.' The Human Rights Committee has stated that the right to challenge the legality of detention applies to all persons deprived of their liberty and not just to those suspected of committing a criminal offence.[33] This issue has been extensively considered by the Human Rights Committee, the European Court of Human Rights and the African Commission on Human and Peoples' Rights. These have established that the authority in question must be a formally constituted court or tribunal

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24 Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 14 (1994), paragraph 9.

25 *Ibid*.

26 Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA Ser. L/V/11.62, doc 10, rev 3, 1983, at 100.

27 Annual Report of the Inter-American Commission, 1985-1986, OEA/Ser.L/V/II.68, doc 8 rev 1, 1986, 154, El Salvador.

28 Human Rights Committee General Comment 20, paragraph 11.

29 Principle 24.

30 Principle 25.

31 Rule 22(2) of the Standard Minimum Rules.

32 Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001, paragraph 39(f).

33 Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 at 8 (1994), paragraph 1.

with the power to order the release of the detainee.[34] It must be impartial and independent from the body making the decision to detain the person and must also make its decision without delay.[35] The European Committee for the Prevention of Torture (CPT) recommends that 'all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue. . . Bringing the person before the judge will provide a timely opportunity for a criminal suspect who has been ill-treated to lodge a complaint. Further, even in the absence of an express complaint, the judge will be able to take action in good time if there are other indications of ill-treatment (eg, visible injuries; a person's general appearance or demeanour).'[36]

All detained people have the right to equal treatment without discrimination on the grounds of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. Particular allowances should, however, be made for the rights and needs of special categories of detainees including women, juveniles, elderly people, foreigners, ethnic minorities, people with different sexual orientation, people who are sick, people with mental health problems or learning disabilities, and other groups or individuals who may be particularly vulnerable during detention.

It is the responsibility of judges to ensure that defendants, witnesses and victims are treated fairly and that those accused of having committed a criminal offence receive a fair trial. This involves ensuring that their rights are respected at all times, and that only evidence which has been properly obtained should be admissible in court. It also means ensuring that those responsible for upholding the law are themselves bound by its strictures. This may involve taking an assertive role to ensure that all testimony and evidence has been given freely and has not been obtained using coercive means. Judges should at all times be alert to the possibility that defendants and witnesses may have been subject to torture or other ill-treatment. If, for example, a detainee alleges that he or she has been ill-treated when brought before a judge at the end of a period of police custody, it is incumbent upon the judge to record the allegation in writing, immediately order a forensic medical examination and take all necessary steps to ensure the allegation is fully investigated.[37] This should also be done in the absence of an express complaint or allegation if the person concerned bears visible signs of physical or mental ill-treatment.

Prosecutors also have a particular responsibility to ensure that all evidence gathered in the course of a criminal investigation has been properly obtained and that the fundamental rights of the criminal suspect have not been violated in the process. When prosecutors come into possession of evidence against suspects that they know, or believe on reasonable grounds, was obtained through recourse to unlawful methods, notably torture, they should reject such evidence, inform

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34 *Brincat v Italy*, ECtHR, Judgment 26 November 1992; *De Jong, Baljet and van den Brink*, ECtHR Judgment 22 May 1984, 77 Ser. A 23; Concluding Observations of the Human Rights Committee: Belarus, UN Doc CCPR/C/79/Add.86, 19 November 1997, para 10; *Rencontre Africaine pour la défense de droits de l'homme v Zambia*, (71/92), 10th Annual Report of the African Commission, 1996-1997, ACHPR/RPT/10th.

35 *Vuolanne v Finland*, (265/1987), 7 April 1989, Report of the Human Rights Committee, (A/44/40), 1989; *Torres v Finland*, (291/1988), 2 April 1990, Report of the Human Rights Committee vol II, (A/45/40), 1990, paragraph 7; *Chahal v UK*, ECtHR Judgment 15 November 1996; *Navarra v France*, ECtHR, Judgment 23 November 1993.

36 CPT/Inf/E (2002) 1, 14, paragraph 45.

37 *Ibid*.

the court accordingly, and take all necessary steps to ensure that those responsible are brought to justice.[38] Any evidence obtained through the use of torture or similar ill-treatment can only be used as evidence against the perpetrators of these abuses.[39]

As anyone who is familiar with the Brazilian criminal justice system will be aware, many of these rights are routinely violated in practice. There are three areas of particular concern where we believe a legal profession more sensitised to Brazil's international obligations under international human rights law could make a difference to the functioning of the criminal justice system.

Presumption of innocence in pre-trial detention decisions

The principle of the presumption of innocence is well-established in international human rights law and is also reflected in the Brazilian Constitution and the various domestic legal safeguards for detainees.[40]

This means that judges are obliged to treat pre-trial prisoners as innocent until proven guilty and that they should only be detained as a last resort. However, the Brazilian Criminal Procedure Code allows judges to impose 'precautionary measures', including preventive imprisonment, on suspects during police investigations or the discovery stage of criminal proceedings.[41] Preventive imprisonment can only be decreed in three circumstances: to 'uphold the public or economic order'; to allow a criminal investigation to proceed; and to guarantee the future application of the criminal law.[42] The first of these grounds is wide-ranging and subjective, although there are certain factors the judge needs to take into account, for example, whether the defendant has a previous conviction, a steady job, a fixed address and other factors that might make him or her more or less likely to abscond.

These factors make it more likely that a poor defendant will be subject to pre-trial detention than a rich defendant; however such provisions are not in themselves inconsistent with international human rights law. The problem lies in its application in the contemporary social context because the high rates of homelessness in Brazil, together with the large number of people living in informal settlements, such as favelas, which do not have a legal address, means that this provision has had a huge impact on the prevalence of pre-trial detention in Brazil, which has more than quadrupled in the last 14 years.[43]

38 UN Guidelines on the Role of Prosecutors, Guideline 16.

39 The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.

40 Brazilian Penal Code (Law No 2,848 of 1940), Criminal Procedure Code ('CPP') (Law No 3,689 of 1941), Law on Penal Execution (Law No 7,210 of 1984).

41 CPP Article 312.

42 *Ibid*.

43 Conor Foley, *Protecting Brazilians against Torture*, see above note 12, 79.

Brazilian law does not provide for a maximum period for pre-trial detention, which is decided on a case-by-case basis – however the Inter-American Court of Human Rights has established that two or three years in pre-trial detention can violate the American Convention on Human Rights.[44] The long delays in the overburdened Brazilian court system means that many people spend far longer in prison waiting for their trial than they could have expected to serve as sentenced prisoners. The *mutirões*, for example, found many people who had spent five or six years in pre-trial detention. In May 2011, Brazil introduced a new law which amended the Criminal Procedure Code to ensure that pre-trial detention really is only used as a last resort in an effort to reduce prison overcrowding.[45] This provides that suspects accused of crimes that carry a sentence of less than four years should not be detained unless there is absolutely no alternative precautionary measure available and sets out specific alternatives such as electronic tagging, curfews and house arrest.

However, if judges based their pre-trial decisions on the principle in favour of liberty and the presumption of innocence, this would significantly lessen the amount of people being sent to prison and consequently reduce the strain on an already overwhelmed prison system blighted by overcrowding, poor sanitary conditions and lack of resources. Furthermore, it may reduce the growth of criminal gangs inside prisons and consequently the violence on Brazil's streets.

Burden of proof in allegations of torture

International and national law prohibit absolutely the admission of evidence obtained through torture or other forms of ill-treatment – and judges around the world play a crucial role in deciding what evidence should be deemed admissible in the main trial or before a jury where applicable.[46] For example, in 2005 the United Kingdom House of Lords unanimously ruled that evidence obtained from inmates at Guantánamo Bay was inadmissible.[47] Famously tracing the jurisprudence of the absolute prohibition of torture from the Magna Carta onwards and having regard to the fundamental rights to a fair trial and against self-incrimination, as well as the unreliability of evidence obtained under torture, the Lords ruled that apart from treaty law, the prohibition on torture existed as part of customary international law and was an international norm of *jus cogens*.[48]

It is the duty of the judge to ensure that any confession or other evidence has not been obtained by torture or other forms of ill-treatment and even if no complaint is made by the accused, the judge must be prepared to prove beyond reasonable doubt that the confession was obtained voluntarily. In Brazil, Article 156 of the Criminal Procedure Code provides that 'the burden of proving an allegation lies upon whoever has made it, but the judge may, at the evidentiary phase or

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44 *Anthony Briggs v Trinidad and Tobago*, Case 11.815 Report No 44/99; *Neptune v Haiti* Series C No 1980 (Judgment of 6 May 2008).

45 Law No 12,403 / 2011.

46 Constitution of Brazil Article 5 (LVI), Article 157 *Kelly v Jamaica* (253/1987), 8 April 1991, Report of the Human Rights Committee, (A/46/40), 1991; *Conteris v Uruguay* (139/1983), 17 July 1985, 2 Sel Dec 168; *Estrella v Uruguay*, (74/1980), 29 March 1983, 2 Sel Dec 93.

47 *A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department* (Respondent) [2004] UKHL 56 on appeal from: [2002] EWCA Civ 1502.

48 A fundamental principle of international law which is accepted by the international community of states as a norm, from which no derogation is permitted.

before delivering the sentence, issue an ex officio order for the performance of any actions he may deem appropriate in order to clarify any doubts on a relevant issue'. As noted by the UN Special Rapporteur on Torture in his report on Brazil:

> 'According to the President of the Federal Supreme Court, in cases of torture allegations made by a defendant during a trial, there is a reversion of the burden of proof. The public prosecutor would have to prove that the confession was obtained by lawful means and the burden of proof would not lie with the defendant having made the allegations... The President of the Federal Court of Appeal [indicated that] if the judge intends to pursue the prosecution of the suspect, the confession concerned, as well as other evidence obtained through this confession, should not be part of the body of evidence in the original trial. If a confession is the only evidence against a defendant, the judge should decide that there is no basis for conviction.'[49]

However, in his follow-up report published in 2010, the Special Rapporteur on Torture stated that according to non-governmental sources: 'There is no information to suggest that this is being implemented. Allegations of torture are regularly dismissed by authorities at all stages of the criminal justice system.'[50] Nevertheless, it is clear from the President of the Federal Supreme Court, once an allegation of torture has been made the burden of proof switches to the state; an interpretation that is consistent with international human rights law. For example, the European Court of Human Rights found that 'where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation as to the cause of the injury'.[51] The presumption that the injuries suffered were the result of torture or ill-treatment may be rebutted if a plausible explanation exists, but it is for the authorities and alleged perpetrators to prove that the allegations are unfounded. In recognition of the evidentiary difficulties in proving serious human rights violations such as torture, the Inter-American Court of Human Rights ruled in its seminal *Velásquez Rodríguez* judgment that an applicant can establish the victim suffered torture based on 'circumstantial or indirect evidence or even logical inference'.[52]

Therefore, it is crucial that appropriate weight should be given to corroborative evidence and the standard of proof should not be placed so high so that it cannot be realistically met.[53] If Brazilian judges applied international human rights standards in taking into account corroborative circumstantial or indirect evidence when considering whether an allegation of torture is well-founded or not, this would enable them to discharge their constitutional responsibility to protect those deprived of their liberty from acts of torture or other forms of ill-treatment.

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49 See note 6 above, paragraphs 101–102.

50 Report of the Special Rapporteur, Manfred Nowak, Follow-up to the recommendations made by the Special Rapporteur Visits to Azerbaijan, Brazil, Mexico, Cameroon, China, Denmark, Georgia, Indonesia, Jordan, Kenya, Mongolia, Nepal, Nigeria, Paraguay, the Republic of Moldova, Romania, Spain, Sri Lanka, Uzbekistan and Togo, A/HRC/13/39/Add.6, 26 February 2010, 16.

51 *Ribitsch v Austria* ECtHR Judgment 1995; *Aksoy v Turkey* ECtHR Judgment 18 December 1996; *Assenov and others v Bulgaria* ECtHR Judgment 28 October 1998; *Kurt v Turkey* ECtHR, Judgment 25 May 1998, *Çakici v Turkey* ECtHR Judgment of 8 July 1999, *Akdeniz v Turkey* ECtHR Judgment 31 May 2001.

52 I/A Court HR *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Series C No 4 at paragraph 124.

53 See note 12 above, at 74.

Judicial responsibility to combat torture

Despite the persistence of torture in Brazil, there have been remarkably few successful prosecutions under Brazil's torture laws and the majority of cases have been brought against private individuals rather than state officials.[54]

It is for public prosecutors to initiate investigations of allegations of torture, to ensure the evidence in criminal proceedings has been legally obtained and to conduct inspections in accordance with international human rights standards. Public defenders and lawyers play an essential role in protecting fundamental rights by using the national and international human rights instruments available to them in their casework and litigation. However, it is the ultimate responsibility of judges to uphold national and, where relevant, international law, and to preside independently and impartially over the administration of justice so that those accused of having committed an offence receive a fair trial. International human rights law also obliges states to keep under review interrogation rules and practices and arrangements for the treatment of detainees as an effective means of preventing cases of torture and ill-treatment.[55] This means that Brazilian judges should also take a proactive role in monitoring the criminal justice system to ensure it complies fully with international standards, make recommendations for reform where necessary and interpret the law so that it is consistent with international law and best practices.[56]

Politically and operationally, the Brazilian judiciary is probably one of the most independent in Latin America. Judges are therefore extremely well-placed to assert their constitutional responsibilities to protect Brazilians from torture and other forms of ill-treatment. The application of international human rights law can only enhance their status and importance as guarantors of the fair and proper administration of justice.

Working with the authorities

The IBAHRI project consciously sought to work with the Brazilian authorities rather than adopt the type of 'document and denounce' approach towards combating violations that it sometimes adopts elsewhere and that other human rights organisations sometimes adopt towards Brazil. This was a strategic decision by the organisation, partly based on how we work and partly on our own assessment of the current situation in Brazil. It is important to stress that we do not see our own approach of 'strategic engagement' as being counterposed to those organisations who engage in more high-profile public advocacy. Indeed the two strategies can be regarded as complementing

54 Although comprehensive figures of the total number of prosecutions that have taken place since the Law on the Crime of Torture was enacted in 1997 are not available, it is widely agreed that the numbers have been very small. A report published by a group of Brazilian human rights NGOs in 2005, for example, found that in the state of São Paulo, which has the highest prison population in the country, there had only been 12 convictions under the torture law between 1997 and 2004, and that most of these convictions were of private individuals. *Análise do Cumprimento pelo Brasil das Recomendações do Comitê da ONU contra a Tortura*, Programa dhINTERNACIONAL, Movimento Nacional de Direitos Humanos, Regional Nordeste – MNDH/NE e Gabinete de Assessoria Jurídica às Organizações Populares – GAJOP, Julho de 2005, 6.

55 Human Rights Committee General Comment 20, paragraph 11.

56 See note 12 above, at 69.

one another in that both help to enlarge the space within which we can work for progressive change.

Criminal justice reform in Brazil needs a comprehensive, holistic approach and the specific problems relating to Brazil's prisons cannot be considered in isolation from the broader problem of tackling crime in society. However, as described above, training can help to change attitudes and build capacity. Indeed, the IBAHRI sees its own programme as contributing to the Brazilian Government's National Action Plan for the Prevention and Fight against Torture, which envisages the establishment of human rights modules for judges and others working in the criminal justice system. [57] It can also support the government's efforts to implement its obligations under the UN Convention against Torture and the recently ratified Optional Protocol, which envisages the creation of national inspection mechanisms to visit places of detention throughout Brazil.

As part of this approach, the IBAHRI is also publishing a Training Kit, aimed at those who have responsibility for carrying out inspections of places of detention. The Lei de Execução Penal – LEP – specifies that every state should establish a *Conselho Penitenciário* (prison council) and a *Conselho da Comunidade* (community council), The *Conselho Penitenciário* is an expert advisory body of professionals and academics appointed by the state governor. It is responsible for providing recommendations to the judges about whether individual prisoners should be paroled, pardoned or have their sentences commuted and whether and when they should be moved to lower levels of security.

Every judicial jurisdiction should also have a *Conselho da Comunidade* which is composed of, at least, one representative of a commercial or industrial association, one lawyer elected by the OAB (Brazilian Bar Association) and one social worker chosen by the Sectional Delegation of the National Council of Social Workers. The *Conselhos da Comunidade* have the duty to 'visit, at least once a month, penal establishments in the area, interview prisoners, present monthly reports to the penal execution judge and to the prison council, and work towards the acquisition of material and human resources for better assistance for prisoners and detained persons, in cooperation with the director of the establishment'.[58] They should also present monthly reports to both the *Conselho Penitenciário* and the sentencing judge (Juiz da Vara de Execução Penal), who then processes prisoners' requests for parole and other benefits.

The lay element of *Conselhos da Comunidade* is also intended to strengthen ties with local communities and so help the reintegration of prisoners after their release from prison. Ministério Público and the judiciary also have a monitoring role over prison conditions and both bodies are supposed to carry out monthly inspections. In 2009, CNJ passed a resolution requiring all courts to establish a *Conselho da Comunidade* and the IBA would like to develop a project to work with the judiciary in strengthening and supporting them. The Mutirão Carcerário, which is discussed in more detail in the first chapter of this book, provides a potential model of how this could be done.

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57 'Plano de Ações Integradas para Prevenção e Controle da Tortura no Brasil', Permanent Combating Torture and Institutional Violence Commission, Sub-Secretariat of Human Rights, Presidential Office; Brasília, December 2005.

58 LEP, Article 81.

As is described in other chapters of this book, in practice the system of prison monitoring and investigation remains weak and the IBAHRI hopes that its Training Kit will help to strengthen the capacity of these visiting bodies through the production and distribution of leaflets, handouts and training materials. We see this initiative as complementing the work of existing institutions and hope to work with them in developing a training programme.

International partnerships

The final part of the IBAHRI project in Brazil rests on a partnership agreement forged with the Instituto Innovare, whose work is considered in the fourth chapter of this book. In 2010, the IBA and Innovare launched a special prize to reward creative Brazilian access to justice projects as part of its annual awards scheme. The prize was won by Judge Erivaldo Santos' Começar de Novo programme, which beat 36 applications from all over the country. This programme aims to promote the rehabilitation of inmates and former prisoners through job training programmes and citizenship schemes, giving them hope to start a new life, as well as contributing to the reduction recidivism, one of the root causes of many of the challenges faced by Brazil's criminal justice system. As part of the prize, the IBAHRI organised a study visit for Judge Santos to South Africa and Mozambique to exchange ideas and experiences with actors working in the same field.

Começar de Novo began as a small scale-initiative, but has since been scaled-up by CNJ into a national programme. The Mozambican Government is now seeking to create its own version of the programme and the IBAHRI is developing a Brazil–Mozambique technical assistance scheme to promote this. Conversely, having seen in the South African Constitution a time limit for compulsory judicial supervision after arrest, on his return Judge Santos joined with groups, including the Defensoria Pública, to become a prominent advocate for the same in Brazil. There is currently a constitutional amendment before the Brazilian Senate that provides for compulsory judicial supervision 24 hours after arrest.[59] This initiative, therefore, may be viewed as a good example of how a partnership between an organisation that identifies and promotes good practices nationally and one that is able to facilitate contact with the legal community internationally through its existing networks, or help 'build bridges', can make a contribution to penal reform.

The IBAHRI is also continuing to build links with the various justice institutions in Brazil and Brazilian civil society. We see this as part of an ongoing process of international debate and dialogue in which Brazilian actors are likely to play an increasing part. Brazilian legal professionals are playing an increasing role in IBA international missions and running training sessions in other countries. As Brazil becomes an ever more important economic and political actor on the global stage, it is vital that the country also influences the development of international law reform and shapes the future of the legal profession throughout the world.

59 Projeto do Lei do Senado No 554 de 2011.

CHAPTER NINE

Fighting for Peace in Rio's Favelas and Beyond

Luke Dowdney

Introduction

Luta pela Paz (Fight for Peace) is a community-based organisation that was set up to work with children and youth from communities suffering from crime and violence in Rio de Janeiro. It was born in the Complexo da Maré, a community of 17 favelas territorially divided by two of the city's drug factions, where young people openly carry war-grade weaponry (M16s, AK-47s, AR-15s, grenades). It has since expanded its activities by opening a centre in London, run on the same model, and is increasingly helping to develop other similar projects across the world. It can, therefore, be considered a successful export of a Brazilian social initiative.

Luta pela Paz targets youth at risk, including those involved in and affected by crime and violence, and those not in school or employment. It uses sport as an entry point and also helps participants obtain access to the formal labour market and develop leadership skills. The project provides educational and support services, and a series of personal development classes to promote alternatives to violence, gang membership and drug-trafficking, or to help people leave gangs. Luta pela Paz helps participants improve their lives and their neighbourhoods, and to obtain practical knowledge to become leaders in their communities. For the past ten years, those of us involved in its creation and management have gained a great deal of experience working with vulnerable youth, which we believe has a wider international applicability.

The project was originally established in 2000 while I was working for the non-government organisation Viva Rio. In 2007, it became independent in its own right. In the first ten years of its existence, Luta pela Paz has trained over 7,000 young people and produced two Brazilian national champions, who are now candidates for its Olympic boxing team. A spin-off sports wear clothing company – LUTA – has also developed alongside the project.

As a former amateur boxer, I found that my involvement in sports gave me a way of talking to young people that other projects had traditionally failed to reach. We set up the project in a small gym in Complexo da Maré and initially only had ten participants, although the numbers grew rapidly. Through listening to them explain the politics of the community in which we were working, what motivated people to join armed gangs and what needs these gangs fulfilled, we were able to develop a highly responsive methodology which can help protect them from these influences. It must be stressed that this methodology, which is described in greater detail below, arose out of our practical experiences and learning as we developed Luta pela Paz, rather than a theoretical construct that we have tried to impose from above.

This chapter starts with a brief description of the term 'situations of organised armed violence', which was first developed by Luta pela Paz, and is now increasingly being accepted by governments and international agencies as a specific phenomenon to be addressed. This is followed by an overview of the project, which traces its development over the last ten years. Luta pela Paz developed in a specific context, which was shaped by the emergence of heavily armed drug-trafficking gangs in Rio de Janeiro in the 1980s and 1990s and this history is briefly traced to place in context how and why we developed the methodology that we did. The methodology itself is then explained, which is followed by a discussion of its wider applicability and how Luta pela Paz is currently turning itself into an international organisation.

London and Rio de Janeiro are the next two cities to host the Olympics and Luta pela Paz is currently working in both of them. We hope that our experiences of using sport to promote social inclusion can help to stimulate similar initiatives throughout the world, but also that the lessons we have learnt can be of practical benefit to other projects.

Situations of organised armed violence

Brazil has one of the highest murder rates in the world.[1] Although not at war, more people (and specifically children) are dying in Rio de Janeiro, than in many countries in civil conflict.[2] For example, between 1987 and 2001, 467 children were killed as a result of the Israeli/Palestine conflict. During the same period, 3,937 children died from gun violence in Rio de Janeiro.[3]

From 1978 to 2000, it was estimated that 49,913 deaths were caused by firearms in Rio de Janeiro alone.[4] Armed violence is the leading cause of mortality among young people, with firearm-related mortalities accounting for 59 per cent of all deaths of 14 to 19 year-olds.[5] According to statistics from the Brazilian Ministry of Health, between 1998 and 2008 a total of 198,085 people were victims of homicide in Brazil, the majority from gun violence. Young people between the ages of 15 and 24 years are the group most affected by this tragedy, representing eight per cent of the population in Brazil during this period but a total of 16 per cent of the deaths.

Rio de Janeiro cannot be considered in a traditionally defined state of 'war' or 'armed conflict' for the simple reason that the state is not the deliberate object of attack. Drug factions are economically oriented and have no interest in overthrowing or taking the place of the state. Although the violence is often described as a 'war' by politicians and the media, it is important to stress that this is not the case. The provisions of international humanitarian law, rather than human rights law, apply to the use of force in war zones or situations of armed conflict which, in practical terms, means a lower level of legal protection for the civilian populations. Under human rights law, the use of lethal force must meet the criterion of strict necessity. International humanitarian law, by contrast, allows such force in a far broader range of circumstances. It is also important to note that, while the army has, on some occasions, been deployed to support the police, these retain primary responsibility for upholding law and order, which remains primarily a civilian rather than a military task.

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1 Julio Jacobo Waiselfisz, *Mapa da Violência 2010* (Instituto Sangari, São Paulo 2010) available at: **www.sangari.com.br/midias/pdfs/MapaViolencia2010.pdf** accessed March 2012.

2 Julio Jacobo Waiselfisz, *Mortes matadas por arma de fogo no Brasil 1979 –2003* in UNESCO Serie Debates VII, 2005 available at: **http://unesdoc.unesco.org/images/0013/001399/139949por.pdf** accessed March 2012.

3 See Luke Dowdney, *Children of the drug trade: a case study of children in organised armed violence in Rio de Janeiro* (7Letras, Rio de Janeiro 2003).

4 DATASUS – Brazilian Health Ministry, Rio de Janeiro Health Secretary database.

5 *Ibid*.

Nevertheless, it is estimated that 10,000 young people are armed and involved in the drug trade in Rio de Janeiro and their structure and organisation is extremely hierarchical at the local level. Factions are less structured at the city level and the three main factions, which are discussed in further detail below, are not internally unified through a traditionally understood military or corporate hierarchy. The factions cannot be separated in terms of ideology or objective although they do constantly seek to demonise one another, indoctrinating community members, specifically youth, to hate and fear other competing factions and people from communities dominated by rival factions. The factions are geographically defined through dominating favela communities where drug sales are based and they control favela communities through quasi-political domination, enforced via extrajudicial rules and punishments. Until the recent 'pacification' campaigns began, the factions were a constant armed presence within the favela communities they dominated.

The factions arm themselves with war-grade weapons and are involved in high levels of small arms violence to protect the illicit commerce of drugs, their primary economic objective. They seek to defend their sales points from equally well-organised rival faction invasion and police raids. Territorialisation is an economic issue as favela communities provide defensible power bases from which drug sales can be based. Territory is dominated simply for economic gain, not in direct opposition to the state. Quasi-political domination of favela communities is primarily a security issue enabling factions to entrench themselves within the community in order to defend themselves and their illicit economic activity.

Until recently the state responded to the rise of organised armed violence through purely repressive measures. The police kill over 1,000 alleged criminals a year in Rio de Janeiro alone, often in circumstances that give rise to concerns about extrajudicial executions. There has also been a drastic rise in the number of minors convicted of drug-related criminal offences. Between 1980 and 2001, for example, the number of registered convictions of adolescents for drug-related offences increased by a staggering 1,340 per cent. This increase began in the early 1980s, when drug factions first became established in Rio de Janeiro's favelas, and rose most notably from 1993, when drug faction disputes were intensive.

From the mid-1990s onwards, children and adolescents began to substitute older traffickers in positions previously only held by adult traffickers. This was due to many adult traffickers being imprisoned or killed, which paved the way for more children to enter the drug trade as a full time occupation. As is described elsewhere in this book, the high recidivism rate of former prisoners in Brazil means that relying on imprisonment to deal with youth crime is likely to be a self-defeating policy. A more holistic policy needs to be developed in which the police, the justice sector, social services and civil society work together to tackle the roots of crime and violence.

Creation of Luta pela Paz

We chose Complexo da Maré in which to establish Luta pela Paz mainly because it was one of the most difficult and dangerous places that we could think of in which to work. Complexo da Maré has one of the highest youth mortality rates in Rio de Janeiro. Its local economy is based on small businesses, informal commerce and drug-trafficking. It is a low-income community with high levels of unemployment, poverty and social exclusion. Many children and adolescents are employed by drug factions as armed foot-soldiers, lookouts and drug sellers. Many carry firearms and patrol the community at night, defending the territory from rival groups and the police. Gun battles are still regular occurrences, although the levels of violence have diminished in recent years.

We originally based ourselves in a small rented gym in which ten young members of the local community attended boxing training and citizenship classes, designed to educate them on personal and community development. Participation soon quadrupled to 40 and the project has continued to grow since then. In 2005, Luta pela Paz moved to a purpose built Academy, which has a sports gymnasium with shower and toilet facilities as well as classrooms, an information technology centre and a staff room. It now trains around 1,600 children every year.

In 2010, Roberto Custódio became our most successful boxer to date, winning the Brazilian national boxing Championship. Roberto is part of the Brazilian national boxing team and his career victories include several Golden Gloves Championships. He originally joined Luta pela Paz in 2001 at the age of 14. In November 2011, Thayson de Souza became our second national boxing champion and the two are now in pre-selection for the Brazilian Olympic team. Other Luta pela Paz members have also won bronze medals at the Brazilian national and Pan American Championships. As importantly, hundreds of graduates of its classes have completed their schooling, obtained work and even gained admission to universities.

Luta pela Paz's innovation revolves around using non-traditional methods, boxing and martial arts, to engage young people where traditional methods aren't working. It has also developed an integrated programme that is tailored to support the individual with options and supportive influences to deal with a multi-causal problem. This process is supported by both on-the-ground practice and widespread ethnographic research/theory. Unlike many programmes that focus on only one solution (eg, education), Luta pela Paz integrates a series of actions to respond to a number of problems young people may have. When we cannot offer a service, young people are referred to other programmes via a network of local actors. Luta pela Paz also receives young people from this network, helping to complement other services.

In 2007, Luta pela Paz expanded its activities to become a registered charity in England, with the opening of a Fight for Peace Academy in North Woolwich (East London). This area also suffers from high unemployment, lack of leisure facilities and opportunities for children and young people, and has a high level of youth criminality. While there are dramatic differences between Rio de Janeiro and London, there are similarities across certain risk factors. In the UK, there are lower crime rates, but youth violence (mainly knife crime) is problematic. Both the Rio and London academies use the same methodology and continuously learn from one another.
The launch of Luta Clothing, a new top-of-the-range sports label, should be seen as a separate but complementary initiative. LUTA is a fight wear, training wear and lifestyle clothing company which has a 50 per cent profit-sharing scheme with Luta pela Paz. It was set up with significant private capital funds and, while it is still in the early stages of development, has already started trading online (**www.luta.co.uk**) and in selected retailers in the UK.

LUTA is consciously maintained as a standalone entity and it markets its clothes on their own merits. The original idea for producing a brand-range came after we began giving shirts as prizes to participants in the project. They became so popular that we realised that they had the potential to become an international fashion item. As well as helping to finance our project activities, LUTA helps us to establish a 'brand identity', which reinforces key parts of the methodology that is discussed below. Boxing and martial arts can provide positive role models for young people that channel youth aggression into self-discipline, control and respect for rules. We aim to inspire the young people we work with to reinforce their sense of self-worth and to be fearless when they say that they are proud to stand up for peace.

Involvement in crime, gangs and armed violence is often a young person's response to drivers and external influences. For example, if a young person has a limited education, no real job prospects, poor family relationships, feels socially excluded, has suffered police harassment or harassment from other young people and has nothing to do, then joining a gang may fulfil a number of needs. Gangs can offer an income; a potentially upwardly-mobile path; friendship to replace family relationships; a sense of identity; feelings of power through holding a weapon; protection from other young people and the police; adrenaline-based behaviour; and access to drugs and parties.

Individual involvement is multi-causal and correspondingly programmes that seek to protect people from violence must also be holistic and integrated. As long as there is a lack of other responses (or options) for young people, or a lack of counter-influences that actively support non-involvement, for many crime, gangs and guns will remain a rational choice – possibly the only realistic choice. Behavioural changes among young people that access programmes will need to take place at an underlying level (eg, decision-making based on social, moral and emotional development), and an overt progression/exit level (eg, education or employment outcomes). Policy-makers will need to increasingly accept that repressive policing tactics and the juvenile justice system cannot be the only policy focuses for this problem if it is to be successfully treated. In order to provide alternatives to the influence of armed groups in Rio de Janeiro, we also need to understand their history, motivation and structure.

A brief history of the drugs trade in Rio de Janeiro

The systematic organisation of Rio de Janeiro's retail drug market has its roots in prison with the creation of the first drug faction, the Comando Vermelho (Red Command), which drew some inspiration from political prisoners, under the dictatorship. Its members soon realised that their internal prison organisation could be used for profitable gain. Being based in prison, the Comando Vermelho had power over its members both within and outside the prison system, as every professional criminal knows that if released they may one day be rearrested and incarcerated again. Failing to fulfil the Comando Vermelho's instructions while free, would mean returning to prison as a traitor to be punished by the group.

By the end of the 1970s, the Comando Vermelho's incarcerated members began to organise criminal activity (primarily bank robberies and kidnappings) and were subsequently able to buy their freedom with illicit earnings brought into prison. This coincided with the arrival of cocaine, transported to Rio from Bolivia, Peru and Colombia for export to the West and local sales. Freed bank robbers linked to the Comando Vermelho realised the vast profits that could be made from the sale of cocaine. As a result, they carried out a number of bank robberies and kidnappings in order to finance a concerted move into the retail drugs business.

Traditional favela-based and marijuana-oriented *bocas de fumo* were viewed as the ideal distribution base for retail cocaine sales. Affiliated members of the Comando Vermelho began organising themselves and their favela territories within a loose structure of mutual support. In order to monopolise the market, arms and money to buy a first shipment of cocaine would be lent to members to take over established *bocas de fumo* or create new ones, under the collective banner of the Comando Vermelho and for a percentage of future profits. Hierarchically structured *quadrilhas* were established within favelas in order to defend sales points and the surrounding communities from police invasion or attack from other gangs. Between 1984 and 1986, the first *soldados do tráfico* began to appear.

Similar structures began to be replicated in different favela territories. The local organisation was based on military needs for defence and invasion and a simple division of labour for the bagging and sales of drugs. This structure has remained essentially unchanged until today. During this period, drug-trafficking became known as '*o movimento*' and the role of community *dono* became the almost exclusive position of drug-traffickers, as opposed to *bicheiros* and important criminals or vigilantes as seen previously. Each *dono* was in accord with other *donos* also affiliated to Comando Vermelho and, therefore, in its origin, the Comando Vermelho can be seen as a network of affiliated independent actors, rather than a strictly hierarchical organisation with a single head figure.

The death of some important members of the Comando Vermelho in the second half of the 1980s led to growing distrust and rivalry between its leaders. From 1986 onwards, the Comando Vermelho began to fragment internally and disputes for territorial control between *donos* became commonplace and increasingly violent. The increase of deadly conflicts during the second phase of drug-trafficking marked the growing decomposition of an organisation founded on the reciprocal trust that had prevailed during the first phase. The social network implanted from the prison system still continues, but it has become dismantled by ever younger traffickers in a continual conflict to

occupy new territories or to take over from older *donos*. By the mid-1990s, three rival factions had emerged within Rio de Janeiro: Comando Vermelho; Terceiro Comando (Third Command); and Amigos dos Amigos (Friends of Friends).

As a result, a militarised subculture has been established within Rio de Janeiro's favelas, with heavily armed groups in intermittent but regular conflict. Armed confrontations between rival factions or the police have become commonplace. As one commentator has observed, armed groups now '... have an arsenal sufficient to make any terrorist group or legitimate security force jealous. All of this apparatus is in the hands of inexperienced youths, mostly adolescent, many of whom can barely handle the weight of such firearms.'[6]

The Comando Vermelho's most powerful *donos* are currently in prison, from where they continue to control their territories via mobile phones and visiting colleagues. As the majority of these *donos* are in the same maximum security prison, Bangu 1 in the west of Rio de Janeiro city, they have been able to centralise faction control via a prison-based structure that is headed by a 'president' and a 'vice president'. These do not control or receive money from the territories of other *donos*. Instead, they rule prison life, settle internal disputes that occur outside prison and make the final decision on any matters of mutual interest for faction affiliates.

The drug factions have become a recognised socio-political force at the favela level. Their power has been accepted by community populations due to fear and a lack of alternatives. Faction dominance has been based on historically existent structures of social control and protection that were developed into a system of 'forced reciprocity' maintained by a double tactic employed by drug-traffickers: supportive coercion and repressive violence. The recent 'pacification' of some of the favelas has done much to erode the physical control of the armed groups in some areas. However, this needs to be accompanied by a more holistic intervention to erode their influence.

The Five Pillars

The model and methodology developed by Luta pela Paz is multi-faceted: using boxing and martial arts as the basis for attracting the attention and interest of young people; followed by education and personal development; employment access; youth support; and leadership training. It targets young people of both sexes, who live in communities with low social investment and are vulnerable to armed violence and police confrontation. It aims to develop their sense of self-esteem and citizenship in their everyday lives. A central theme is concerned with creating a culture of peace and youth leadership that is recognised within the community.

Gangs, street crime and the drugs trade offer excitement to many children and young people. Boxing and martial arts classes aim to offer an alternative adrenaline rush, sense of belonging and self-worth to that offered by gang membership. Participating in sports such as boxing, capoeira and wrestling, garners respect from peers. At Luta pela Paz, the adrenaline generated from physical

6 DRE police report as cited in Nepad and Claves, 'Estudo Global Sobre O Mercado Ilegal de Drogas no Rio de Janeiro' (Universidade Estadual Rio de Janeiro / FIOCRUZ, Rio de Janeiro, October 2000) 44.

activity is combined with discipline, responsibility, positive behavioural development, teamwork and leadership.

We have developed this approach into a codified holistic and integrated programme that provides young people with the options and supportive influences they need to respond to the drivers and external influences identified as causal to youth involvement in crime, gangs and gun violence. The Five Pillars are:

1. *Boxing and martial arts* – provides role models, attracts young people and channels youth aggression; transforming it through building self-confidence, self-control, discipline, identity, responsibility and respect for rules. Non-violence is key to all aspects of the coaching process.
2. *Formal and extra-curricular education* – numeracy and literacy, information technology, formal qualifications for 16–29 year-olds who have dropped out of the education system, themed life-skills classes.
3. *Employability* – access to the formal work market through job skills training, partnerships with companies for internships/employment, careers advice service.
4. *Youth support services* – one-to-one mentoring support, profiling, case-working, targeted agency referral (eg, social, medical, legal), home visits, community outreach support.
5. *Youth Leadership* – accredited youth leadership course, youth council participation in all levels of programme development, staff internships.

Personal development is delivered across all pillars by all staff. Five values also underpin all of our activities:

- embracing (we accept anyone with no judgment);
- solidarity (we work together);
- champion (we aim to be the best in all we do);
- inspiring (we aim to inspire and are open to being inspired); and
- fearless (we are proud to stand up for peace).

In addition to using sport as a mechanism for building self-identity and self-worth, the project gives young people opportunities to make choices and access alternative activities to joining street gangs or armed groups. It provides a 'non-involved' peer group offering support and companionship within the programme, and a constructive place to spend their free time. The classes serve to channel negative energy and aggression, and transform it into positive energy through teamwork, self-confidence, healthy competition and respect for the law.

The project offers educational and professional training as well as career advice, to prepare young people who are often excluded for the formal labour market. They may be unemployed, in need of an income to help their family budget, or to start their own professional lives, or wanting to leave criminal activities. Following young people's demands for formal education classes, Luta pela Paz set up the Novos Caminhos (Pathways Education to Employment) project. Professional training is also offered to help high school students access the job market.

Novos Caminhos

The Novos Caminhos project was introduced in 2009. The project focuses on attracting the most hard-to-reach and vulnerable young people between the ages of 16–29, who have dropped out of the formal education system, to return to their studies. The project provides: numeracy and literacy training and support; courses in nationally recognised education and training qualifications; individual mentoring and support; personal development classes; job training and workshops; careers guidance and advice; and boxing and martial arts coaching. The aim is to provide the necessary training and specialised support to help young people successfully access the job market. On completion of Level 1 or Level 2 of the project, participants are supported by staff to secure internships and/or job interviews at companies.

Novos Caminhos was successful from the beginning, with the number of applications far exceeding initial expectations. Two additional classes were added to meet local demand – doubling the number of students supported per year from 70 to 140. However, despite this expansion, there are still more than 250 interested community members on the waiting list. Alongside regular activities, additional support is offered to students with learning issues, such as literacy classes for those who have been absent from the classroom setting for a long period of time. All students are granted an official valid diploma from the local education authorities after finishing the secondary level, as well as specific training on job market issues.

Luta pela Paz encourages members to help improve the community in which they live, by assuming leadership roles. Those who take on a leadership role within the group are invited to participate in youth leadership workshops. During the workshops, they develop public speaking skills, and are trained in group dynamics, and how to best represent the project and themselves in seminars, events and meetings. Members are invited to take an active participatory role in overall project coordination by joining the Luta pela Paz Youth Council, composed of ten to 15 young people. The Council has decision-making power over Luta pela Paz's projects, which includes hiring personnel, planning events, starting new projects or improving existing ones.

Luta pela Paz also provides individual mentoring for vulnerable children. It carried out mentoring sessions for 147 children in 2010, while 408 home visits were completed by the social work and youth team and 532 follow-up telephone calls were made. The project also provided additional after-school tutoring to 63 children and organised four parents' meetings. The project organised 13 cultural visits outside the community, which included: Rio de Janeiro's Museum of Modern Arts (MAM); Fiocruz; CRIAM; Rio de Janeiro's Botanical Gardens; Museum of Federal Justice; Banco do Brasil Cultural Center; as well as movie screenings and plays.

Research

As discussed above, the methodology that we developed at Luta pela Paz was based on our specific experiences working in one of Rio de Janeiro's favela complexes. However, it is also backed up by two pieces of qualitative empirical research into the lives of its primary target groups both in Rio de Janeiro and internationally. *Children of the Drug Trade*, which was published in 2003, was the first ethnographic study of why young people get involved in Rio de Janeiro's armed gangs.[7] This was followed by *Neither War nor Peace*, which was published in 2005, and which compared the role of children and youth in armed groups in ten non-war countries across four continents.[8] Both studies remain today an influential reference for Brazilian social anthropologists.

While writing these books, I coined the phrase, 'child-involvement in organised armed violence' (COAV), a term which is increasingly now being used by UN agencies and NGOs. This has coincided with a growing international awareness of the specific problems of organised armed violence in non-conflict settings, as can be shown by the Geneva Declaration on Armed Violence and Development of 2006, which has now been ratified by over 100 states. The Geneva Declaration is a high-level diplomatic initiative designed to support states and civil society actors to achieve measurable reductions in the global burden of armed violence in conflict and non-conflict settings. The Declaration asserts that: 'whether in situations of armed conflict or crime, armed violence has a devastating impact on development and hinders the achievement of the Millennium Development Goals. It reduces national income and productivity, diverts investment and rolls back hard-won development gains'.

The Declaration also notes that although the incidence of armed conflict has declined in recent years, the number of people killed by armed violence has not. More than 740,000 men, women and children die each year as a result of armed violence. The majority of these deaths – 490,000 – occur in countries that are not affected by armed conflicts.[9] Research by the Small Arms Survey shows that 15–24 year-olds are also most affected by this everywhere, and this age group is growing fastest in developing countries.[10]

There is now a broad consensus that the main drivers for youth participation in crime, violence and gangs include: poverty/inequality of wealth; lack of economic options; social marginalisation; violence from state forces and other groups; dysfunctional family; and lack of cultural and leisure facilities. These are compounded by the involvement of key reference groups, such as friends and family; exposure to crime and gangs on the street; and the emergence of gang subcultures, which promote violence seen as an acceptable tool for conflict resolution.

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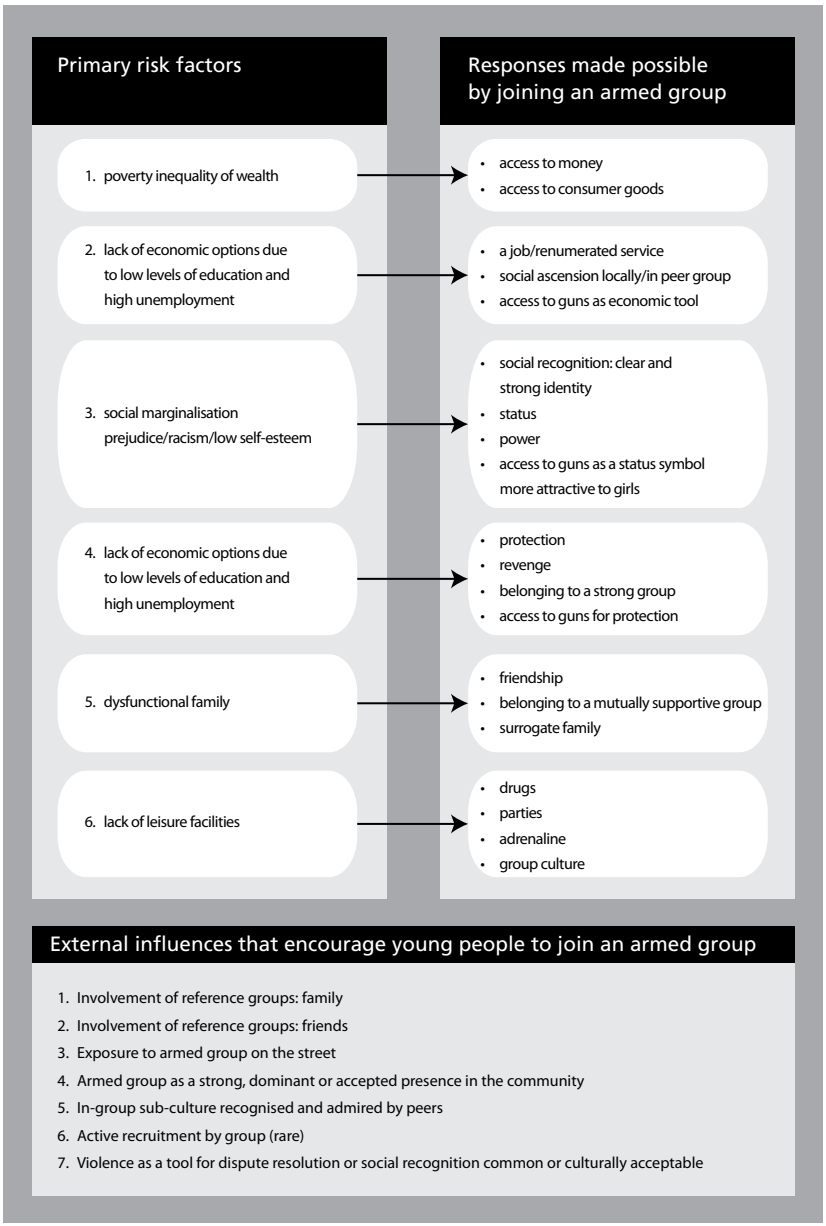
7 See note 3 above.

8 Luke Dowdney, *Neither War nor Peace: International Comparisons of Children and Youth in Organised Armed Violence* (Viva Rio / ISER / IANSA, 7Letras, Rio de Janeiro 2005).

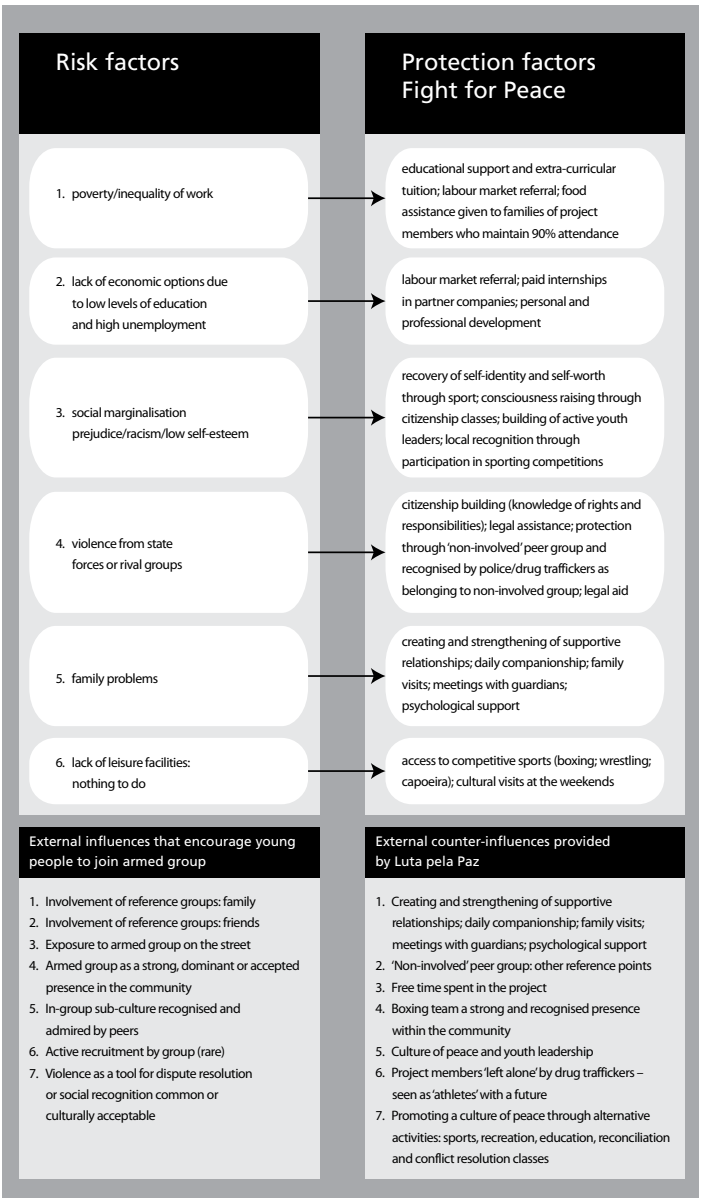
9 See: **www.genevadeclaration.org/the-geneva-declaration/what-is-the-declaration.html** accessed March 2012.

10 For more information, see the Small Arms Survey: **www.smallarmssurvey.org/home.html** accessed March 2012.

The table below, which is taken from *Neither War nor Peace*, summarises the *responses* to these *risk factors* made possible to children and youths by joining gangs and armed groups. The table also lists the external *influences* that were identified from interviews with children and young people involved in gangs as being common to all or most of the environments where they were interviewed.



The next diagram outlines how Luta pela Paz's working methodology gives young people the opportunities to actively respond to these risk factors that have been identified as causal to children and adolescents joining street gangs and other armed groups. It also shows how our project encourages counter-influences in response to the types of influences that have been found to contribute to young people choosing to join gangs and armed groups.



Evaluations and results

Two independent assessments have been carried out of Luta pela Paz's activities and impact, one in 2006/7 and one in 2009. They have both confirmed that Luta pela Paz's projects succeed in reducing participants' social vulnerability and risk factors.[11]

In 2006/7, the Latin American Centre for the Study of Violence and Health (CLAVES) carried out an evaluation on behalf of the United Nations Development Programme (UNDP); Pan American Health Organization (PAHO); University of São Paulo (USP); and the Brazilian Ministry of Health. The final report concluded that: 'as shown during this study, the Fight for Peace project demonstrates efficiency, quality and effectiveness in primary prevention of violence and criminality… Among the many virtues that Fight for Peace has, we stress that, in our opinion, if taking into account the project's specific scope, it can be replicated in any community where armed violence exists and obtain success.'

The University of East London carried out an external evaluation of Luta pela Paz/Fight for Peace (FFP) in the UK in 2009. The final report noted: 'FFP has a strong ethos informed by clear values and goals, a robust organisational structure including a culture of monitoring, self-evaluation and a vision about how FFP model can be replicated… [furthermore] replication in other locations is achievable.'

Luta pela Paz also uses an evaluation tool called VIEWS, which was pioneered by the Mayor of London's office. VIEWS is an online database that records all factors relating to young people, the activities they take part in, and the holistic range of outcomes they realise. Qualitative indicators around behaviour monitored include: self-confidence; self-worth; ability to make proactive decisions about the future; resilience towards challenges faced; improved relationships with family, friends, teachers, employers, etc; better physical fitness; and likelihood (reduced or increased) to get involved in gang or violent behaviour. Quantitative indicators include: core details; attendance; education, employment and training status; known to the youth or criminal justice systems (UK specific); at risk of offending; offending; victim of crime; and physical and mental health issues.

The majority of participants in Luta pela Paz's projects felt they had a higher level of safety and improved self confidence after taking part in the project. In response to surveys, project participants also said that they were less likely to carry guns or commit crimes. While Luta pela Paz obviously cannot substitute itself for the state's responsibility to provide adequate social services to areas that have been historically neglected, it does show that its methodology can bring concrete results.

A total of 852 young people participated in Luta pela Paz projects in 2010, which was an average of 230 young people per day. In 2009, 866 young people participated in boxing and martial arts training and personal development sessions (drugs, gender, rights and responsibilities, conflict mediation, democracy), and 98 per cent of participants of the Novos Caminhos project remained at school that year, while 14 young people who were out of the formal school system successfully

11 Research on LPP's work is available at: **www.fightforpeace.net/default.asp?contentID=11&lang=1** accessed March 2012.

re-enrolled.[12] Since 2009, 70 young people have successfully graduated from the Novos Caminhos project, which has grown from three young people participating in 2008, to 284 enrolled in the Brazil Academy and 27 in the UK during 2010.

Transferability and up-scaling

Luta pela Paz is now building on its success in Brazil to begin a process of project replication in other communities around the world that are affected by crime and violence. Over the last five years, we have received numerous requests from practitioners across the world who want support from our project and access to our methodology. We believe that the most efficient, effective and innovative way to take our approach to young people at scale is to develop partnerships whereby we share our methodology to build the delivery capability of local practitioners who have the insight, access and credibility to deliver impact for young people in their communities. This strategy is currently being very carefully developed with intense involvement from external organisational growth experts.

The objective of the international training programme is to allow us to share our methodology without distracting from our work in Rio de Janeiro and London. We are developing a Training Manual and Curriculum Development Project for community-based non-governmental organisations, schools and sports projects that aim to use Luta pela Paz's methodology. A Monitoring and Evaluation model and a roll-out plan are also being developed. We are conducting training of trainers with our teams internally, and will pilot with two groups of international practitioners. From then, our ambition is to train up to 30 practitioners each year. We hope to recruit a team to permanently manage and deliver the programme. We are also hoping to establish funds to support practitioners from across the world to come to Rio to take part.

Finally, Luta pela Paz is creating an Alumni Programme, which is a combination of organisational capacity-training, consultancy and support services. The programme is the result of a thoroughly comprehensive development process which began three years ago with an internal organisational project to determine the universal factors that make our work effective in both London and Rio. This was followed by a year-long piece of research which: i) documented all our practices and methods; ii) mapped the needs and expectations of practitioners around the world who might take part in the programme; and iii) borrowed best practice from leading capability-building providers. Last year, this pool of knowledge and insight was crafted into the package of learning and support, and trialled with nine organisations from eight countries: Uganda, Kenya, the USA, Costa Rica, Lebanon, UK, DR Congo and Ghana. An evaluation is under way to determine the precise impact of the programme on the young people those projects serve after three, six and 12 months, but the initial feedback and proof of concept has been very positive.

12 Luta pela Paz Annual Report 2009 is available at: **www.fightforpeace.net/downloads/FFP_Annual_Report_2009_ENG.pdf** accessed March 2012.

CHAPTER TEN

Criminal Justice and Penal Policy: a Positive Agenda for Reform

Pierpaolo Cruz Bottini

Introduction

The Brazilian penal system is faced with serious problems. From a legislative perspective, the norms set out in the Brazilian Criminal Code, which was created in the 1940s, do not sit in harmony with the modern principles laid down in the 1988 Constitution. From a managerial perspective, the crisis of prison overcrowding leaves people serving custodial sentences in subhuman living conditions.

To resolve these problems, a major overhaul to reform the justice system was required. The reform efforts, which saw the creation of new institutions, laws and systems of judicial administration, began shortly after the formation of the Constituent Assembly, which drafted the 1988 Constitution. It has intensified in the last ten years. The reform process did not solve all the problems and there is still much to do, but it consolidated legal structures that are helping to alleviate the lack of rationality and humanity plaguing the application of national criminal policy.

The intensification of debate on judicial reforms led the Federal Government to create a Department of Judicial Reform in the Ministry of Justice in 2003. This department was conceived by then Minister Márcio Thomaz Bastos, and its first Secretary, the lawyer Sérgio Renault. I succeeded his position in 2005 and 2006, having previously served in the Department for Judicial Modernisation in 2003 and 2004.

This chapter seeks to illustrate in general terms the start of the reform process and the main changes instituted from 2003. It then considers prospective changes for the coming years. It starts by setting out the context in which judicial reform is taking place, and then describes the significance of the constitutional reforms that have resulted since the enactment of Constitutional Amendment 45. This is followed by the description of some of the most important legislative reforms that have been enacted in recent years. Alongside these legislative achievements, there have been significant management reforms, which have improved the day-to-day functioning of the Brazilian justice system, and these are outlined in the next section. The chapter concludes with a discussion of the challenges that lie ahead and prospects for the future.

As is discussed elsewhere in this book, it will be important for the judiciary, the Executive, the Legislature and civil society to work ever more closely together to monitor the reform process.

Context of judicial reform

Since the enactment of the 1988 Constitution, debate on the need for change in the regulatory framework of the judicial system has intensified in Brazilian society. The issue has gained importance as the judiciary has emerged as an increasingly influential political actor in the Brazilian institutional framework. This new sense of judicial prominence is attributed to the expansion of citizens' rights and guarantees provided by the Constitution. As citizens sought to exercise these new constitutional rights in national courts, judicial activities and developments have correspondingly assumed greater significance. Furthermore, evolution of the courts' jurisprudence, which widened the scope of judicial review, placed the judiciary in a position to supervise, correct and even influence the proactive work of the Legislature.

Indeed, since 1988 the judiciary has become an important political player, as issues with far-reaching national impact have been adjudicated in the courts. This has included: the demarcation of indigenous lands; same-sex civil partnerships; abortion of anencephalic foetuses; the scope of amnesty laws; and the scope of the anti-corruption Ficha Limpa (Law of Clean Record), among others. These decisions were followed with keen interest by civil society. In the field of criminal policy, the judiciary has challenged the validity and constitutionality of laws relating to heinous crimes and the setting of bail, and considered the possibility of alternative sentences in drug-trafficking cases. These decisions demonstrate how the judiciary has assumed an increasingly important role in formulating criminal policies in the country, as it sets parameters and limits for legislators and administrators.

The judiciary's growing political leadership can be explained in several ways. The courts' influence grew in tandem with the expansion of constitutional rights and the widening mechanisms of judicial review. This new sense of activism developed a more engaging and robust jurisprudence to close gaps and eliminate contradictions in the law. Consequently, this judicial growth strengthened civil society's interest in the judiciary. By gaining importance as a political actor, the judiciary became the object of numerous discussions, especially relating to its operation and its shortcomings.

Ultimately, the Brazilian judicial system has become a significant component of political agendas and social discussions. Sectors of society that were previously indifferent to these issues began to take an interest in debates regarding the ideal judicial framework for the country. A growing number of citizens realised that these matters were not only relevant for legal professionals such as lawyers, judges and prosecutors, but were important for society as a whole. Therefore economists, journalists, psychologists, doctors, unions and organised social movements began to discuss the need for judicial reforms and suggested optimal judicial modes in accordance to their individual perspectives.

The creation of the Department of Judicial Reform in 2003 should be seen in this context. The department provides Executive assistance to facilitate discussions and develop modernisation proposals for the judiciary. Although Executive interference in the judiciary was initially perceived by some as unwelcome, this early sense of mistrust soon dissipated as the department's participation in the reform process was clearly confined to logistical and administrative elements of the judiciary and never the substantive contents of judges' decisions.

In its first year of operation, the department identified the judiciary's slowness and the lack of access to courts as the main weaknesses of the Brazilian judicial system. These problems are significant because lengthy delays give rise to a sense of impunity and injustice, while the lack of access makes it difficult for those with fewer resources to defend themselves. Together, these problems may lead to the unequal application of penalties on the poorest sectors of society.

To resolve the problems presented by the slowness and lack of access to justice, the department laid out three strategic lines of action: (i) to implement constitutional reforms; (ii) to implement statutory reforms; and (iii) to encourage procedural reforms of the judicial system. In order to carry out this series of reforms, the Department examined the implementation of judicial reforms in other countries (especially Spain) and concluded from these international experiences that a formal pact between all three branches of the government was the key to achieving judicial reform.

Constitutional reform

Representatives from the three branches of the government agreed in a formal pact (often referred to as the Republican Pact – or simply the 'Pact') to approve and regulate a constitutional amendment that was already under way in Congress. This constitutional amendment sought to alter the framework of the justice system. The amendment addressed several issues, but some points were especially relevant for the modernisation of justice:

- the creation of the Conselho Nacional de Justiça – CNJ (National Council of Justice);
- the imposition of binding precedents;
- the guarantee of autonomy to the Public Defender; and
- to federalise crimes against human rights.

All these points were part of Constitutional Amendment No 45 and they were adopted at the end of 2004.

The CNJ is an administrative body, which includes the judiciary, and is composed of state, federal and labour judges, as well as prosecutors, lawyers and representatives of civil society. It has no judicial functions or any power to address the contents or the execution of the courts' budgets. Thus, the courts retain their own financial autonomy. The CNJ was designed to provide planning and guidance to the judiciary, and to act as a regulatory body – investigating and punishing judges who act outside the established law or ethical rules.

The creation of the CNJ had important consequences for the improvement of the Brazilian criminal system. First of all, the CNJ firmly stated that pre-trial detentions and wiretaps were excessive procedures in a criminal investigation. In order to respect the independence and autonomy of the magistrates, the CNJ did not question the reasoning behind the courts' decisions to approve pre-trial detentions or wiretaps; instead it established a set of administrative rules for the adjudication of phone confidentiality: Resolutions 59/08 and 84/09 contained rules that regulated and standardised routine procedures for the interception of communications via telephone and other means, while Resolution 66/09 subjected proceedings regarding pre-trial detentions to some control mechanisms.

However, the CNJ's most important contribution to the judicial system was the creation of the Mutirões Carcerários (Prison Task Forces). The *mutirões* are task forces comprised of judges and CNJ staff who are sent to the criminal courts which supervise detentions and sentences (Varas de Execução Penal). The CNJ monitors prisons, reports on the functioning of the criminal system, implements the Project Começar de Novo (a social reintegration project for those who have completed their prison sentences), and discusses proposals for the improvement of criminal justice.

The CNJ noted several problems that were observed by the task forces in relation to the criminal system. These problems include prisoners who are incarcerated for a period longer than their prison sentence, their inability to move to lower levels of security or to receive parole despite satisfying the legal requirements, etc. Moreover, the *mutirões* exposed the appalling conditions of prisons in the country. Although the appalling prison conditions were widely known, it was the first time that they were formally recognised by a high-ranking organ of the judiciary. The work of the Mutirões Carcerários is further discussed in the first chapter of this book.

Another innovation of Constitutional Amendment 45 was the establishment of precedents, which gives some Supreme Court decisions binding force. This provides that certain constitutional interpretations of the Supreme Court must be followed by all magistrates, so that the interpretation of constitutional norms is standardised by binding precedent. Some had criticised binding precedents as an instrument that restricts judicial freedom because it does not allow lower courts to interpret the law differently from the Supreme Court. However, the adoption of this mechanism significantly reduced the amount of litigation in general and reduced the number of cases that reached the Supreme Court, thereby enabling other cases to proceed more quickly through the judicial system.

In addition to the creation of the CNJ and the introduction of binding precedents, Constitutional Amendment 45 also established institutional autonomy for the State Public Defender's Office (PDO). This autonomy was the first step in strengthening the PDO, whose main function is to provide legal assistance to low-income populations. As a result of this reform, the PDO is able to independently organise its budget and administrate its operations, thereby elevating its importance and independence to the level of other essential judicial organs such as the Prosecutor's Office and the judiciary itself, consolidating a policy of access to justice commanded directly by government agents. The work of the PDO is discussed further in chapter six of this book.

According to the Third Public Defender's Diagnostic Report published by the Ministry of Justice in 2009,[1] since it became institutionally autonomous, the number of public defenders and PDOs has increased in key states such as São Paulo, which previously did not have any similar bodies. However, the growth in the number of PDOs is still limited as their operations cover only 42 per cent of Brazilian states. According to published data, states that invested less in PDOs had the worst social indicators and were the most in need of the PDO's services. This was proved by the larger number of public defender appointments conducted in states with lower human rights indicators.

Nevertheless, the gradual consolidation of the PDO is an important element in expanding access to justice and humanising criminal policy. It also guarantees criminal defence for those with low incomes, serving as a valuable bulwark against illegal or unnecessary punishment. The report noted that in 2008, state and federal public defenders conducted some two million appointments across the country in criminal cases alone. In the same year, approximately 230,000 criminal proceedings were filed by state public defenders. Each state public defender had served approximately 2,170 people and participated in about 270 hearings. In 2008, the police referred roughly 70,000 arrests in flagrante to public defenders, and more than 55,000 applications for bail and habeas corpus were filed. The establishment of the Public Defender's division inside prisons have also reduced tensions, violence and riots. As prisoners are able to access information regarding their sentences in these divisions, their anxieties and emotions have become somewhat more stable.

Constitutional Amendment 45 contains many other important judicial changes, including the 'federalisation' of crimes against human rights. This constitutional change was considered a key breakthrough in encouraging the investigations and prosecutions of human rights offences. The state police possess the jurisdiction to investigate most criminal offences in Brazil, and courts have acted with impartiality and gravity in most proceedings. However, there were instances where the police, judges and the courts were impeded by political interference to spare punishment or halt investigations and proceedings against those who possessed great political power and influence in some regions of the country. Therefore, where such political interference or negligence is suspected in a human rights case, it will be possible to federalise the case. This means that the tampered case will be transferred from state to federal judges, while the investigation will be handed over to federal police. It is important to note that this mechanism does not mean that local courts are rife with corruption or impunity; it serves as a corrective mechanism that may be used only if there are clear indications of the police or courts failing to observe their responsibilities.

1 Available at: **www.mj.gov.br** accessed March 2012.

Statutory reform

In the statutory context, the three branches in the above-mentioned Pact introduced several bills whose passage would be important to streamline and expedite the handling of cases in the judicial system. Among these were dozens of legislative projects to modify the rules of employment, civil procedure and criminal law. With regard to criminal proceedings, four relevant projects were submitted and approved. The first resulted in the 11.719/08 Act, which reorganised criminal procedures with new important features, such as the consolidation of the traditional three-stage criminal hearing and the modification in the timing of interrogation procedures.

Prior to the new law, a criminal proceeding was conducted in three separate sessions. The first session involved the defendant's interrogation. This was followed by a second hearing where the prosecution's witnesses were examined; and finally, a third separate hearing where the defence witnesses were examined. The statutory reform unified the three separate sessions of a criminal proceeding, meaning a criminal case is now conducted in one single hearing where the prosecution, defence witnesses and the defendant are all heard in one session. In addition to combining the three previous hearings into one, the reform also reallocated the defendant's interrogation from the start of a hearing to the end of a hearing. This reallocation was to ensure that the defendant could benefit from a broader, more robust defence as he or she would now be able to develop a defence after all relevant evidence had been submitted. In short, this legislative amendment streamlined and expedited the criminal trial process, and contributed to a more effective implementation of a stronger defence.

The second project resulted in the 11.689/2008 Act, which clarified the trial by jury process. In Brazil, a jury will be called to try defendants that are charged with crimes that require an intention to kill. The 11.689/2008 Act introduced new technical and procedural rules that simplified the trial process. Principally, a defendant charged with a sentence of 20 years or more is no longer entitled to request a new jury for a retrial. Furthermore, the reforms required trial judges to refer questions and issues to the jury in clearer, simpler terms to facilitate the jury's understanding of those points. This was done to avoid a null trial caused by conflicting answers provided by a confused jury.

The third project gave rise to the 11.690/2008 Act, which regulates the submission of evidence in criminal proceedings and expressly forbids the use of illegally obtained evidence.

Finally, the last reform project of the Pact was the 12.403/2011 Act. This Act addresses personal protective measures, and appears to be the most significant measure to improve Brazil's criminal policy. The Act created mechanisms that judges can use to maintain order in a criminal trial, especially in cases where a defendant tampers with evidence or demonstrates signs of escaping.

Until the introduction of this law, a pre-trial detention was the only instrument that the court could employ to maintain order in a trial. Thus, if a defendant engaged in witness tampering or any other unlawful activities to impede a trial, the trial judge would issue a pre-trial arrest order because he or she did not possess any other instruments that were less severe or precluded the deprivation of the defendant's liberty. Consequently, almost half of Brazil's prison population were pre-trial detainees – detained without a conviction. The new law introduced a number of other precautionary measures that can be applied to ensure order in criminal proceedings. In addition to traditional pre-trial detention, judges may now issue warrants to seize important documents (eg, passports), ban defendants from attending particular areas, or electronically monitor the defendant's movements. Pre-trial detention is no longer the only way to maintain order in criminal procedure. In addition, the new law also forbade judges from issuing pre-trial detention orders against first-time offenders charged with a maximum sentence not exceeding four years. Thus, legislators sought to reduce the number of pre-trial detainees and to remove from prisons those accused of minor crimes. This is to ensure that those charged with minor crimes are not unnecessarily subjected to the harsh and often negative experience of a prison environment.

The background to the enactment of this law is further discussed in chapters two and three of this book. The effects of the new law have yet to be studied, due to the scarcity of statistical data. However, some law enforcement officers have already observed some negative impacts of the new law. For instance, officers have noted that the new non-detention measures available to judges are in fact more intrusive and restrictive than the traditional pre-trial detention. Under the old law, a judge had the discretion to not issue pre-trial detention orders if she or he believed that it was disproportionate to the defendant's crimes. However, with the introduction of the new non-detention measures, a larger number of defendants who may not have been detained under the old law were now subjected to electronic monitoring or movement bans. In this sense, the new law has increased a sense of state intervention to the detriment of defendants' rights by granting judges more tools to deprive or restrict defendants' liberties.

Furthermore, in practice, the new law does not seem to be reducing the number of pre-trial detainees, as judges continue to issue pre-trial detainment orders against those who were likely to receive one under the old law. Instead, the courts now issue the new non-detention orders against minor offenders who may not necessarily have been subjected to pre-trial detention orders under the old law.

In contrast, some have observed other significant impacts the new law has brought to the prison system. They emphasise how the new non-detention measures represent a positive step towards the protection of rights as those convicted of less serious crimes may no longer be subjected to pre-trial detentions. This prohibition of pre-trial detentions against those charged with less serious crimes and the creation of new non-detention measures have prevented some defendants from experiencing the severe deprivation of freedom that accompanies imprisonment.

It is not yet possible to make any definitive conclusions at this point. The positions outlined are merely observations by law enforcement officers involved in the criminal system, and the absence of reliable statistical information makes it difficult to draw any conclusive statements regarding the effects of the new law. Nevertheless, a sense of hope lies in the judiciary's understanding of the legislators' intentions to reduce pre-trial detention. In this regard, as explained above,

public defenders have organised task forces to accelerate the implementation of the new law and eliminate unnecessary or illegal pre-trial detention orders. This has helped to consolidate a more liberal interpretation of the new law which supports non-imprisonment.

Finally, the new legislation also established a shared digital database of arrest and capture warrants, which facilitated the implementation of these warrants throughout the country. Because Brazil is a federal country, it is prone to communication problems between state officials. Indeed, some defendants have evaded arrest warrants (or other similar measures) by travelling to a different state, rendering the warrants unfulfilled. Thus, this data integration is a measure – if properly implemented as prescribed by law – important for the effective use of arrest warrants and other orders.

Apart from the projects proposed in the Republican Pact, it is interesting to note the approval of Law 12.433/11. This law established that convicted inmates may qualify for a sentence reduction if they spend time on education/studies while serving their sentence. In other words, Law 12.433/11 can be viewed as a rehabilitation measure, as inmates who pursue education/study while serving their sentence may be released earlier – the more one studies, the shorter one's period of incarceration.

Management reform

The last element of judicial reform consists of the streamlining of judicial administration and implementation of optimal practices. This improvement did not require legislation or constitutional changes; it only involved reorganisation of the administration of courts and ascertainment of successful solutions already in operation. This has been referred to as the 'silent revolution' by Professor Joaquim Falcão.

For this, several strategies were adopted such as offering incentives to use new technologies, improving resource management, and granting rewards for innovative activities. The implementation of a new electronic system in criminal proceedings is an example of the judiciary's adoption of new technologies. With this system, the prosecution, defence and the trial judge can instantly access and submit relevant documents by using the internet. Consequently, the traditional procedures of criminal proceedings are simplified and accelerated as communications and summons can be made directly via e-mail. Thus, the use of new technologies remedies the slowness caused by bureaucratic processing of documents and legal acts, which creates a more efficient prosecution and a more credible judicial system.

In addition to technological incentives, the identification of successful administrative practices was another component of the management reforms; and offering rewards is one method of ascertaining those successful practices. Therefore, the Innovare Award was created to honour and award judges, courts, prosecutors and lawyers who successfully organised their operations, and promoted citizenship and human rights. The purpose of the Award is to identify good practices and disseminate them throughout the country. Its work is discussed further in the fourth chapter of this book.

An example of good practice awarded by Innovare in the context of criminal policy is the Federal District's Community Justice Programme (the 'Programme'), which is discussed in the fifth chapter of this book. Already replicated elsewhere, the Programme enables community leaders to mediate and engage in conflict resolution. The scope of the Programme is to train community workers to guide and facilitate the settlement of disputes, to promote social peace and to prevent such disputes from developing into litigations. By promoting notions of citizenship and social cohesion, the Programme also helps to reduce levels of crime and violence, which in turn relieves some of the burdens on the criminal justice and penal systems.

Another policy noted for its impact on criminal policies is the gradual extension of the pardon decree. A pardon is the cancellation of a relevant penalty under Brazilian criminal law. Usually granted in an annual presidential decree, the pardon sets aside punishments for those who have already served a considerable portion of their sentence and demonstrated good behaviour. Over time, the Conselho Nacional de Política Criminal e Penitenciária (National Council on Criminal and Penitentiary Policy), which is responsible for drafting the proposal of the pardon decree, progressively widened the scope of application of the pardon. Indeed, the pardon now may be granted to those confined in alternative 'security measures' and those convicted of drug offences. Expansion of the pardon has alleviated prisoner distress and reduced the number of convicts in prison. Furthermore, it has also helped to remove those with good behaviour from the harsh prison environment and facilitated their social reintegration.

Prospects for the future

The reforms mentioned above only represent first steps because improvement of the criminal justice system is a dynamic and constant process. Consequently, the problems that the reforms seek to remedy may also change over time. In reality, judicial slowness and inefficiencies, which are a major cause of over-incarceration, remain problematic. While one can engage in ideological discussions concerning the roots of such problems, it is clear that they cannot be resolved without a change in the cultural perspectives of the people. Such cultural changes can be inspired by modifying the training of legal professionals and these projects already exist to improve the guidelines of Brazilian criminal policy. This is discussed further in the eighth chapter of this book.

In the legislative dimension, it is clear that the codified criminal law – substantive and procedural – is outdated, since the main rules originate from the 1940s. Although judicial reforms have been implemented, the coded system remains archaic and it is necessary to modernise the law by systematising and updating the list of crimes. This could be done by incorporating crimes currently outlined in separate statutes into a single Criminal Code, reforming procedural rules and the appeals system, and altering some jurisdictional rules. These measures would bring more rationality to the general criminal procedure.

In recent years, the Senate has created a committee of legal experts to submit proposals for a new Criminal Code and Criminal Procedure Code. These projects are currently under discussion and, regardless of its progress, they reveal the legislators' intentions to address the complex and delicate issue of legislative reform more broadly.

There are also a number of bills currently before Congress which, if approved, would represent a major transformation in how the law treats certain criminal offences, particularly property offences committed without serious violence or threat. To instil a greater sense of rationality and proportionality in the criminal processing of those offences, the Justice Department is currently discussing a proposal to redesign some relevant (statutory) articles. First, the Department seeks to ensure that the law will respect the 'insignificant principle'. For some time, Brazilian law had held that property crimes involving small objects of low value (eg, bread, chocolates, cosmetics) were not crimes. For such 'insignificant' cases, the courts steered away from criminal punishments and pushed parties towards the civil law of equity compensation. However, such an interpretation lacked a sound legal basis since there were no express provisions authorising the legal recognition of 'insignificant' crimes. Thus, to attach a stronger sense of legitimacy to the courts' interpretation of 'insignificant' crimes, it is important to place this interpretation within a legal framework that expressly establishes the 'principle of insignificance'.

Also in the realm of property crimes committed without violence or threat, there is a proposal to change the procedural requirements relating to execution of the prosecution process. A bill is currently pending in Congress which requires the victim's express consent as a precondition for the initiation of a criminal prosecution. Thus, in cases of theft or embezzlement, no criminal prosecution will be conducted if the victim of those cases fails to express their interests in launching a prosecution. In addition, there are other legislative changes under way. These do not directly impact the functioning of the judiciary or prisons. Instead, they seek to strengthen the fight against certain criminal practices contained in outdated legislation; specifically, these are the offences committed by organised crime and economic crimes.

One of the problems of the criminal justice system is its effectiveness against certain sectors of the population. The prevention and prosecution of property crimes and drug-related crimes, which are typically perpetrated by members of economically disadvantaged groups, are usually the priorities of the government. However, economic crimes, which are usually committed by members of other social groups, are much less pursued in comparison, either in terms of prosecution or sentencing. This imbalance and inequality demonstrated in the criminal policy must be addressed.

The solution to the unequal application of criminal law is not simply found in a hasty hardening of laws related to economic crimes. Rather than creating more severe penalties or interfering with rights, legislative developments and improvements in intelligence gathering is needed to enhance the quality of investigation and reduce impunity. Therefore, a set of bills seeking to improve the legal frameworks in relation to economic crimes are pending in Congress. Regardless of the criticisms raised concerning various aspects of the proposals, such as the disproportionate increase of penalties and the imposition of arbitrary procedure rules, it should be acknowledged that other parts of the bills appear consistent and appropriate. These include the creation of new preparatory crimes in relation to money laundering (despite concerns of this being too broad), the creation of new organised crime offences, the reform of the uncertain financial crimes legislation, and the organisation of international cooperation in criminal cases (which lacks any specific regulatory legislation today).

Thus, in the legislative context, proposals are currently in the process of modernising and humanising the criminal legislation, while simultaneously contributing to a more effective combat against organised crime and softening the court's stance with regard to less serious offences.

Finally, in addition to legislative reform, much remains to be done; some developing projects may positively impact the implementation of management reforms and improve the courts and judicial bodies.

First, good practices recognised and awarded must be replicated. Ideal practices such as the use of new suitable technologies in judicial procedures and the conduct of community justice should be pursued to standardise such successful practices. This would help resolve similar problems that affect several states.
Practices awarded by Innovare, for example the Community Justice Programme, have been followed and its replication has been encouraged in various locations across the country. Indeed, a study sponsored by Professor Maria Tereza Sadek (researcher and research director at the Brazilian Center for Judicial Studies and Research), revealed that some activities of excellence recognised by the Award have been adopted by other regions throughout the country.

With regard to the adoption of technologies to improve the judicial system, and specifically in the criminal area, it is important to note the Ministry of Justice's project to implement electronic monitoring in criminal prosecutions. The Mutirões Carcerários – as explained above – illustrated an unfortunate national phenomenon: prisoners either being detained longer than their sentences, or being unable to progress to lower levels of security, were forgotten by the courts. This troubling reality can be changed with the electronic organisation of criminal execution processes, to warn the judge and his or her staff when nearing the period for granting a benefit (level of security progression, probation) or the end of the sentence.

To implement such a digital monitoring system, the Executive sent to Congress a bill (PL 2786/11) which requires that data and information pertaining to the execution of penalties and security measures must be maintained and updated in a computerised system. This computerised system will monitor the execution of penalties, with electronic notices that 'timely and automatically' notify magistrates and other officials of the deadlines for progression of level of security or other benefits in criminal enforcement. Approval of this proposal and its proper implementation will help prevent judges from 'forgetting' prisoners that have completed their sentences, or inmates that satisfy the requirements to obtain benefits.

The reforms, legislative measures, pending projects or judicial practices in the context of criminal law discussed in this paper are not exhaustive. They merely represent the principal constitutional, legislative and management changes seeking to improve Brazil's criminal system and its future prospects. Furthermore, these changes have important consequences for the development of national criminal policy.

Steps have been taken, but more are needed. However, the ongoing concern and preoccupation with the diagnosis, solutions and empirical verification of the results reveals the key national political actors' commitments to combat the serious problems found in the Brazilian criminal system. The reform process should not be perceived to be complete; instead, one must recognise the efforts already made and identify a plan that guarantees the continuity of reform activities; a plan which always leans towards a more humane and efficient criminal policy.

GLOSSARY AND TRANSLATIONS

Glossary of Acronyms

AIDEF	Inter-American Association of Public Defenders
AMB	Associação dos Magistrados Brasileiros (Association of Brazilian Judges)
ARP	Associação pela Reforma Prisional (Association for Penal Reform)
BRC	Brazilian Red Cross
CESEC	Centro de Estudos de Segurança e Cidadania (Centre for the Study of Security and Citizenship)
CLAVES	Latin American Centre for the Study of Violence and Health
CNJ	Conselho Nacional de Justiça (National Council of Justice)
CNMP	Conselho Nacional do Ministério Público (National Council of Public Ministry)
COAV	Child-involvement in organised armed violence
CONDEGE	Conselho Nacional de Defensores Públicos Gerais (National Council of Federal Public Defenders)
CPIs	Parliamentary Commissions of Inquiry
CPP	Código de Processo Penal (federal Criminal Procedure Code)
CPSRJ	Civil Police of the State of Rio de Janeiro
CPT	European Committee for the Prevention of Torture
DEPEN	Departamento Penitenciário (Penitentiary Department)
DMF	Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas (Department to Monitor and Inspect the Penal System and the System of Executing Socio-educational Measures)
DPU	Defensoria Pública da União (National State Public Defender's Office)
ECHR	European Convention on Human Rights
EDEPE	Escola da Defensoria Pública do Estado (National Public Defenders School)
EMERJ	Escola da Magistratura do Estado do Rio de Janeiro (Rio de Janeiro State Judges' School)
ENFAM	Escola Nacional de Formação e Aperfeiçoamento de Magistrados (National Judges' School)
FCO	UK Foreign and Commonwealth Office

FGV	Fundação Getulio Vargas (Getulio Vargas Foundation)
GOVV	Grupo Organizado de Valorização da Vida (Group Organised to Value Life)
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IDDD	Instituto de Defesa Direito de Defesa (Institute for Defence of the Right to Defence)
IFRC	International Federation of Red Cross and Red Crescent Societies
ITTC	Instituto Terra, Trabalho e Cidadania (Institute of Land, Work and Citizenship)
LEP	Lei de Execução Penal (Law on Penal Execution)
NAI	Núcleo de Atendimento Integrado (Centre of Integrated Treatment)
NUDEM	Núcleo de Defesa dos Direitos da Mulher – NUDEM (Centre for the Defence of the Rights of Women)
NUDEP	Nucleo de Execução Penal (Centre of Penal Execution)
OAB	Ordem dos Advogados do Brasil (Brazilian Bar Association)
OAS	Organization of American States
OHCHR	UN Office of the High Commissioner for Human Rights
PAHO	Pan American Health Organization
PAI-PJ	Programa de Atenção Integral ao Paciente Judiciário Portador de Sofrimento Mental Infrator (Programme of Integrated Attention to Judicially Detained Patients)
PRONASCI	Programa Nacional de Segurança Pública com Cidadania (National Programme of Public Security and Citizenship)
PT	Partido dos Trabalhadores (Brazilian Workers' Party)
SAMU	Serviço de Atendimento Móvel de Urgência (Emergency Ambulance Services)
SEAP	Secretaria de Administração Penitenciária (State Secretariat of Penitentiary System)
SEASDH	Secretariat for Human Rights of Rio de Janeiro
SEEDUC	Secretaria de Estadual de Educação (Municipal Secretary for Health and Civil Defence)
SMSDC	Secretaria Municipal de Saúde e Defesa Civil (State Secretary for Education)

STF	Supremo Tribunal Federal (Federal Supreme Court)
STJ	Superior Tribunal de Justiça (Superior Court of Justice)
TJDFT	Tribunal de Justiça do Distrito Federal e dos Territórios (Court of the Federal District and Territories)
UNDP	United Nations Development Programme
UPPs	Pacification Police Units
USP	University of São Paulo

Glossary of Abbreviations

Community Justice Programme (Programme)

National Red Cross and Red Crescent Societies (National Societies)

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Optional Protocol to the Convention against Torture)

Portuguese to English Translations

Associação dos Magistrados Brasileiros (AMB) – Association of Brazilian Judges

Associação pela Reforma Penal (ARP) – Association for Penal Reform

Centro de Estudos de Segurança e Cidadania (CESEC) – Centre for the Study of Security and Citizenship

Centro de Formação e Pesquisa em Justiça Comunitária – Centre for Training and Research in Community Justice

Código de Processo Penal (CPP) – federal Criminal Procedure Code

Comando Vermelho – Red Command

Começar de Novo – New Start project

Comissão de Constituição e Justiça – Commission of the Constitution and Justice

Conselho da Comunidade – community council

Conselho Nacional de Defensores Públicos Gerais (CONDEGE) – National Council of Federal Public Defenders

Conselho Nacional de Justiça (CNJ) – National Council of Justice

Conselho Nacional de Política Criminal e Penitenciária – National Council on Criminal and Penitentiary Policy

Conselho Nacional do Ministério Público (CNMP) – National Council of Public Ministry

Conselho Penitenciário – prison council

Defensoria Pública – Public Defender's Office

Defensoria Pública da União (DPU) – National State Public Defender's Office

Defensoria Pública do Estado de São Paulo – São Paulo Public Defender's Office

Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas (DMF) – Department to Monitor and Inspect the Penal System and the System of Executing Socio-educational Measures

Departamento Penitenciário (DEPEN) – Penitentiary Department

Depoimento Sem Dano – Statements without Damage

Escola da Defensoria Pública do Estado (EDEPE) – National Public Defenders School

Escola da Magistratura do Estado do Rio de Janeiro (EMERJ) – Rio de Janeiro State Judges' School

Escola Nacional de Formação e Aperfeiçoamento de Magistrados (ENFAM) – National Judges' School

Escola Superior do Ministério Público do Estado de São Paulo – São Paulo State Prosecutor's School

Ficha Limpa – Law of Clean Record

Força de Pacificação – Pacification Force

Fundação Getulio Vargas (FGV) – Getulio Vargas Foundation

Grupo Organizado de Valorização da Vida (GOVV) – Group Organised to Value Life

Instituto de Defesa do Direito de Defesa (IDDD) – Institute for Defence of the Right to Defence

Instituto Terra, Trabalho e Cidadania (ITTC) – Institute of Land, Work and Citizenship

Juizado Especial Cível Itinerante – Itinerant Special Civil Court

Lei de Execução Penal (LEP) – Law on Penal Execution

Luta pela Paz – Fight for Peace

Ministério Público – Public Prosecutor's Office

Mutirão Carcerário – Prison Task Force

Novos Caminhos – Pathways Education to Employment project

Núcleo de Atendimento Integrado (NAI) – Centre of Integrated Treatment

Núcleo de Defesa dos Direitos da Mulher (NUDEM) – Centre for the Defence of the Rights of Women

Nucleo de Execução Penal (NUDEP) – Centre of Penal Execution

Ordem dos Advogados do Brasil (OAB) – Brazilian Bar Association

Partido dos Trabalhadores (PT) – Brazilian Workers' Party

Pastoral Carcerária – Pastoral care of Prisoners

Programa de Atenção Integral ao Paciente Judiciário Portador de Sofrimento Mental Infrator (PAI-PJ) – Programme of Integrated Attention to Judicially Detained Patients

Programa Nacional de Segurança Pública com Cidadania (PRONASCI) – National Programme of Public Security and Citizenship)

Regras Mínimas para o Tratamento do Preso no Brasil – Minimum Rules of the Treatment of Prisoners in Brazil, 1994

Secretaria de Administração Penitenciária (SEAP) – State Secretariat of Penitentiary System

Secretaria de Reforma do Judiciário – Secretariat for Judicial Reform

Secretaria de Estadual de Educação (SEEDUC) – Municipal Secretary for Health and Civil Defence

Secretaria Municipal de Saúde e Defesa Civil (SMSDC) – State Secretary for Education

Serviço de Atendimento Móvel de Urgência (SAMU) – Emergency Ambulance Services

Superior Tribunal de Justiça (STJ) – Superior Court of Justice

Supremo Tribunal Federal (STF) – Federal Supreme Court

Territórios da Paz – Territories of Peace

Tribunal de Justiça do Distrito Federal e dos Territórios (TJDFT) – Court of the Federal District and Territories

Varas de Execução Penal – Courts of Criminal Execution

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A silent revolution is transforming the Brazilian justice system, challenging some of its most archaic practices through new innovations. These seek to provide a fairer, faster criminal justice service, but also to tackle the roots of violent crime. Changes are taking place at the constitutional, institutional, legislative and practical level. Many of the most creative innovations started locally before being scaled up to national projects. This book brings together some of the voices of those involved in the reform process to reflect on their own experiences and their wider applicability.

The Brazilian justice system has rightly attracted international notoriety in the past because of the scale of its problems. However, the success stories contained in this book also show how reform is possible given political will. The process is ongoing and still faces enormous challenges. Brazil's experiences of justice sector reform may be of direct relevance to other countries of similar levels of social, economic and political development and some of the projects described in this book may provide models that others can learn from.

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