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The Policy Challenges of Informal Prisoner Governance

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Introduction

Informal prisoner governance in Latin American penal institutions raises a number of dilemmas for policy. The responses must encompass decarceration and diversion policies, and an approach to prison security that emphasises co-production and co-governance rather than coercive control.

Survival and rent, monopoly and competition

The roots of both survival-oriented informal prisoner governance and violent, rent-oriented prisoner groups lie in the policies of mass incarceration adopted in the region from the 1980s, and consequent state omission and institutional violence. However, these policies have produced quite distinct experiences for prisoners and problems for the state. The articles in this special edition demonstrate a spectrum, differentiated by a combination of variables. These include: (1) the level of autonomy of the prisoners, collectively, from the prison authorities; (2) who exercises coercive control and violence, even lethal force, within the prison walls; (3) the degree of structure, hierarchical organisation and reach of prisoner organisations (whether they are monopolistic or competitive within a single facility, networked across several facilities in the prison system, or operational outside the prisons as well as within); and, finally, (4) the material resources (goods brought into the prison, or necessities inherent to imprisonment) that can be traded or used to extract rents and encourage loyalty and immaterial resources (legitimacy, trust or fear) available to such prisoner syndicates, enabling them to maintain dominance in relation both to the prisoners and to the prison authorities.

All but the most draconian prison regimes require some degree of collaboration and communication between staff and inmates to maintain routines, predictability and the safety of both.¹ However, a tipping point occurred in the early 1990s in Latin America with rising prisoner populations outstripped the authorities' capacity to provide even the most minimal living standards, resulting in the state retreating to the perimeter of many prisons, and leaving inmates to fend for themselves. The self-governing prisoner communities that emerged for the purposes of day-to-day survival saw individuals and groups trading in the supply and distribution of

¹ This becomes even more necessary in conditions of scarcity of staff and of basic amenities as Postema et al describe in Lurigancho prison in Peru (this volume) and Darke shows in his study of a police lock-up in Rio de Janeiro. Darke, S. (2013) 'Inmate governance in Brazilian prisons' *Howard Journal of Criminal Justice* 52 (3): 272-284.

desperately needed goods, with the rules of this prison society upheld through constant reciprocity, trade and contract-like arrangements, and by prisoner disciplinary committees.² Whilst a response to state neglect, the informal monetisation of everything produced by internal markets also tended to stimulate the creation of social hierarchies on the basis of income, with the community imposing segregation on stigmatised groups such as sex offenders.³

More commonly, however, the supply of survival goods within an overcrowded prison was regulated not by monetary exchange, but by violence exerted by a dominant group or groups functioning as a rent-seeking protection racket, extracting taxes from the prisoners, and monopolising force.⁴ This monopoly was often unstable, and periodically rival groups or 'strong men' attempted to capture the commanding positions. This competition led to a volatile and terrifying environment for ordinary inmates. Mass incarceration policies also caused an influx of younger prisoners, often held for short periods on remand, with no knowledge of the 'convict code', which upset the previous equilibrium between guards and inmates, and caused a surge in interpersonal violence. The number of riots and murders rose steadily from 1990 to 2000 in Brazil's prisons.⁵ The state's response was brutal, epitomised by the police killing of 111 prisoners during a disturbance in the House of Detention in Carandiru. This, and other mass prison deaths, in the region, signalled to prisoners that they had no option but to organise to protect themselves from the violence both of the state and of their fellow inmates. The Carandiru massacre prompted, and legitimised, the emergence in 1993 of the Primeiro Comando da Capital (PCC), a prisoner syndicate that came to control over 90 per cent of the prisons and prisoners in São Paulo state through its deployment first of violence then of a form of diffuse and collective responsibility.

The PCC lies at the centralised end of the prisoner self-governance spectrum. Born within the prison system, it metamorphosed into a hegemonic and bureaucratic organisation with a codified ethos, stratified membership and a pseudo-legal disciplinary system,⁶ that was able to extend its activities and power beyond the prison walls, acquiring a dominant presence as an organised crime cartel in many low-income urban communities. By providing survival goods to the mass of inmates, it assured its *own* survival as an organised crime syndicate, racketeering both inside and outside the prison, for which their governance of the carceral space is key. Unlike territories (carceral or non-carceral) where there are two or more gangs engaged in violent turf-warfare, the PCC imposed a 'pax

² San Pedro prison in Bolivia lies at the decentralised end of the informal self-governance spectrum, with relations between prisoners generally non-violent, with complex, decentred economic exchanges, functioning property rights, and internal markets for all kinds of goods (legal, illegal, survival and luxury). Additionally, there is no evident monopolistic prisoner group, or violent intra-group power struggles. Skarbek, D. (2010) 'Self-governance in San Pedro prison' *The Independent Review* 14 (2): 569-85.

³ Those accused of sex offences in San Pedro are forced to work in the kitchens. Cerbini, F. (2012) 'Comer y olvidar: los peligros del rancho en la cárcel de San Pedro (La Paz, Bolivia)' *Dimensión Antropológica* 56: 133-165.

⁴ Antillano, this volume.

⁵ Dias, C. N. and Salla, F. (2013) 'Organized crime in Brazilian prisons: The example of the PCC' *International Journal of Criminology and Sociology* (2): 397-408. p 400.

⁶ Dias and Salla, this volume.

monopolista',⁷ regulating the use of violence by its members and those under its purview precisely because of the regular traffic between neighbourhoods and prison where it operated, and thus allegedly reducing the homicide rates in both. Other structured criminal groups, such as the *comandos* in Rio de Janeiro and the *MS13* and the *Barrio 18* gangs in El Salvador and Honduras.⁸ moved in the opposite direction, from the streets *into* the prisons through widespread arrest and incarceration. They may exert monopolies inside individual prisons that the authorities have segregated by gang, but are not hegemonic throughout the system. These distinct dynamics require appropriate policy responses.

Policy responses

Carceral self-rule, in its different stages and dynamics, has been produced by the state, either through *commission*, in its penal policies, or *omission*, in its poor governance. Mass incarceration has provided a ready constituency of prisoners desperate for their basic survival and personal security needs to be met, and from whom rents can be extracted by dominant inmate groups. Specific penal policies, such as those targeting 'gang members' or drug dealers/users, ended up strengthening originally rather weak collective identities or affiliation through incarceration and group segregation, giving organised crime groups a territorial base. Prisoner syndicates may operate as a parallel power in the physical absence of the state authorities inside the jails but they are also engaged in a 'deadly symbiosis' with legal/coercive actors reliant on them to control violence inside and outside the prisons, and thus shore up state legitimacy.⁹ The São Paulo authorities have claimed credit for the drop in prison violence and homicides in PCC-influenced areas.¹⁰ Similarly, the 2012 gang truce between the government and the *maras* in El Salvador was brokered from behind prison walls and resulted in a dramatic, albeit temporary, fall in murders.¹¹ Yet, the government's credit-claiming was ambivalent for it was simultaneously an admission of the state's inability to provide law and order. Overall, the state's ceding of the prisons and other areas is toxic to its legitimacy and ability to hold a monopoly on force as a key component of the rule of law. It is perhaps this paradox that often paralyses what might be sensible policies for reducing the need for survival-oriented prisoner self-governance, and thus the opportunities for rent-seeking prisoner syndicates.

Policy responses to date have largely consisted of denial and co-existence because the periodic outbreaks of violence within the jails with competing prisoner groups, or outside the jails, where monopolistic groups project their coercive and economic muscle, invite media attention and engender public insecurity. Two key policy areas that would address the more negative aspects of 'prisoner capture' of

⁷ Biderman, C., Lima, R., Mello, J. M., Schneider, A. (2014) *Pax monopolista and crime: the case of the emergence of the Primeiro Comando da Capital in São Paulo*, Brasília: CAF Working Paper N° 2014/03 07/15/2014.

⁸ Carter, this volume.

⁹ Denyer Willis, G. (2009) 'Deadly symbiosis? the PCC, the state and the institutionalization of violence in São Paulo'. In: D. Rodgers and G. A. Jones (eds) *Youth Violence in Latin America* (pp. 167-181), New York: Palgrave.

¹⁰ Dias, C. N. (2013). *PCC: Hegemonia nas prisões e monopólio da violência*, São Paulo: Editora Saraiva.

¹¹ Van der Borgh, C. and Savenije, W. (2015) 'Desecuritising and re-securitising gang policies: the Funes government and gangs in El Salvador' *Journal of Latin American Studies* 47 (1): 149-176.

the carceral space are (1) the ratio of state resources to inmates, which involves both the supply side – how many prisoners are coming into the system - and the allocation of state resources, how much and to what purpose? (2) control and security issues, which includes issues such as the size of prisons, their architecture and regime. These in combination produce a high or low level of governance, and thus of legitimacy, for the state in relation to the prison system.

The PCC slogan ‘peace, justice, liberty and equality’ summarises the intangible *rule-of-law goods* denied to the carceral mass by the state, and which lead to prisoner self-rule. Therefore, the obvious policy approach to reduce rent-seeking prisoner organisations is for the state to provide these and survival goods so that prisoners do not have to turn to inmate groups. However, logical that may seem, Latin American penal policy is underpinned, at local and national levels by a variety of overarching, and often political, not criminological, goals and underlying ethos. Modern prison systems claim to meet four objectives: incapacitation of the offender, deterrence of potential future offenders, legally-based punishment of a proven offence through the deprivation of liberty, and prevention of reoffending through education, job training, and psychological and family support. But in reality political, ideological and financial considerations prioritise some over others. These tensions are evident in the mixed successes of the key policies discussed below.

Decarceration, diversion and dejudicialisation

Informal prisoner governance results from extreme overcrowding and overstretched administrative capacity due to incarceration as a default penal response. Criminal laws are often inflexible and externally influenced: the United States, the major bilateral donor in the region, made mandatory remand and custodial sentences one of the conditions of its funding to countries such as Colombia, Bolivia and Mexico in its ‘Wars’ on drugs and organised crime.¹² One in five prisoners in Latin America is currently held on a drugs charge. This has partly sustained the excessive - and often illegal and unjustifiable - use of remand which is causally correlated with prison corruption, the use of torture, the spread of disease, poverty for detainees’ families, and an undermining of the legitimacy of the criminal justice system, all of which lead ordinary inmates to place their trust and reliance in one another or informal prisoner organisations.¹³ Therefore, a key strategic response should be a determined reduction in the prison population, thereby draining the pool of new recruits or taxable inmates available to coercive rent-seeking prisoner organisations and freeing up resources to improve prison governance and enable inmate to thrive, not just survive.

By the end of 2014 Brazil had over 622,000 prisoners, some 40 per cent of whom were on remand and waiting on average three months to see a trial judge. Many will be acquitted, or receive a non-custodial sentence in the end. Whilst there is no straightforward correlation between levels of pretrial detention and informal prisoner governance, as the quality of governance and the sheer size of

¹² Transnational Institute and Washington Office on Latin America (2011) *Systems Overload: Drug laws and prisons in Latin America*, Amsterdam, TNI, and Washington DC, WOLA.

¹³ Open Society Foundations (2014) *Presumption of guilt: the global overuse of pre-trial detention*, New York: Open Society Foundations.

overloaded detention facilities are also determining factors,¹⁴ the revolving door of arrest, detention and release sends around one million individuals through the Brazilian prison system every year and into the arms of predatory prisoner groups.¹⁵ Slashing pretrial detention would free up resources (prison places, budgets for guards and services) for better governance of smaller prisons dedicated to serious offenders (convicted and remand), and avoid these harms.¹⁶ International organisations such as the Inter-American Commission on Human Rights and the Open Society Justice Initiative have thus urged countries to implement custody hearings requiring suspects to be brought quickly before a judge (typically between 24 hours and a week) to determine the necessity of pretrial detention.

If prison authorities generally welcome a reduced flow of new inmates into the system (assuming they are not extracting rents from them), they are frequently hindered by other branches of government: the legislature and judiciary.¹⁷

Decarceration policies also founder on governance deficits, popular discourses on crime and in the discretionary sentencing practices and attitudes of judges, which end up denying the due 'liberty', 'equality' before the law, access to 'justice' and 'peace' (security) that the PCC promises to its members in substitution of the state. States in the region have introduced alternatives to remand such as electronic tagging, house arrest, regular reporting to a police station, and a home-based curfew, as well as diversionary programmes, such as drug courts that would send small-time users to therapy rather than to prison. Non-custodial sentences such as community services and fines have been introduced for less serious crimes. But their effectiveness depends on governance capacity. Lack of adequate infrastructure and funding for penal alternatives, and ambiguities in the wording of laws, which leave them open to interpretation (for example, as to what a 'serious' crime is, whether an individual poses a 'risk', or what quantity of narcotics would be for 'personal use'), mean that judges default to the higher, rather than lower, levels of control. They are also influenced both by moral panics and penal punitivism in regards to socially marginalised populations – young, poor black men, or indigenous people – and a professional culture that neglects prisoners' rights. Between 2008-2016 volunteer lawyers from Brazil's National Justice Council, which oversees the country's judges, reviewed 400,000 prisoner case files across Brazil, granting 80,000 benefits to which the prisoners were already entitled and freeing 45,000 detainees with spend sentences, but still in custody.¹⁸ These rights should have been guaranteed by local circuit judges tasked with overseeing prisoners' sentences. With increasing criticism of the judicialisation of social relations and politics in the region, perhaps some aspects of the penal system, specifically post-sentencing, should be *de-judicialised*, a controversial proposal in a civil law system.

¹⁴ Skarbek, D. (forthcoming) 'Covenants without the sword? Comparing prison self-governance globally' *American Political Science Review*.

¹⁵ DEPEN (2016) *Levantamento de informações penitenciárias InfoPen 2014*, Brasília, Departamento Penitenciária Nacional, Brazilian Ministry of Justice.

¹⁶ Inter-American Commission on Human Rights (2013) *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13.

¹⁷ Detainees held long term in police lockups are more susceptible to extortion and unlikely to resist collectively, due to the very limited space and resources.

¹⁸ <http://www.cnj.jus.br/sistema-carcerario-e-execucao-penal/pj-mutirao-carcerario>

Security, securitisation and super-max

A second policy challenge is how the state regains control of carceral spaces governed informally by substitutive, monopolistic groups. The Ecuadorian experience suggests a combination of transferring inmates to new prisons, removing all the sources of the group's rents, supplying basic survival goods and maintaining a differentiated control unit elsewhere to isolate ringleaders.¹⁹ But again, it faltered on governance problems, viz. the state's commitment to its own plan and an entrenched culture corruption among guards and police.

A more serious challenge is containment, especially of the ringleaders of predatory prisoner groups that project power throughout and outside the prison system. In Latin America, despite the porosity of the system and clear *lack* of state control in many units, prisons are still often seen as part of the state's security apparatus, and thus fall under the aegis of the ministries of internal affairs, public security, police or government. But securitisation of prisons is not new: super-maximum security regimes or facilities (geographically isolated fortress prisons, individual cells and very little association) existed since the nineteenth century. Indeed, another motive in the formation of the PCC was the experience of torture and illtreatment by 'disruptive' prisoners who were transferred to the rigid and abusive Taubaté disciplinary unit. Yet the state had no other tools with which to contain PCC leaders other than the regime that had fuelled the original grievance and collective action. When the PCC flexed its muscle by coordinating rioting in 29 prison units in 2001, the prison authorities in São Paulo, Rio de Janeiro and then at federal level created a Differentiated Disciplinary regime.²⁰ The PCC made it clear in its second 'mega-riot' in 2006 that it would resist transfer either to the federal units, or any other super-max facility. Conversely, transfers of leaders within the state prison system, or across state boundaries, seem to have facilitated the rhizomic spread of the PCC to other states in Brazil.²¹ The more horizontal and co-operative the structure and culture of the inmate organisation, the more multipliers it has. Fluid positions within the group, a broad base of shared identity and norms among a large social class, combined with frequent prisoner release and re-imprisonment, will propagate rent-seeking inmate groups and prison-based gangs.²²

However, prisons have to provide security not just for state and society in relation to violent offenders, but for all inmates under their purview. Again, policies have contradictory outcomes. Segregating competitive gangs in their own units, as in El Salvador, Honduras and Rio de Janeiro, will reduce immediate prison violence for the detainees swept up in that logic, but it does not remove the underlying threat of

¹⁹ Nunes and Fleetwood, this volume; Tritton with Fleetwood, this volume.

²⁰ Dias and Salla, this volume.

²¹ Lessing, B. (2010) 'The dangers of dungeons: prison gangs and incarcerated militant groups.' In: *Small Arms Survey 2010: Gangs, Groups and Guns* (pp. 157-183), Cambridge: Cambridge University Press.

²² Biondi, this volume, and Lessing, B. (2016) *Inside Out: the Challenge of Prison-based Criminal Organizations*. Washington DC: Brookings Local Orders Paper Series, No.3.

violence implied in the gangs control of the unit. It also strengthens the groups' cohesion, providing them with a territorial base for power projection. Countries across the region are now reaching for imported control solutions. The US 'super-max' model has been vigorously promoted both by private sector security providers that have moved into prison management, and by the US government, particularly where it has leverage over countries through large-scale security sector financing (Plan Colombia, and Plan Mérida in Mexico).²³ New, 'everyday' maximum security prisons are also now incorporating as a matter of course recognisable super-max architectural features such as remote surveillance and electronic control. They tend not to have riots and disturbances, although this is not because they are run by the private sector or in public-private-partnerships, but rather because the contracts preclude any level of overcrowding, and often require a level of governance and service provision far beyond that required of state-run prisons. But they are criticised for being dehumanising, and focussing on control rather than on rehabilitation. Whilst they may reduce disruptive prison association, they also effectively preclude more positive prisoner association. In the absence of dialogue with the authorities, collective co-governance is impossible and prisoners are reduced to deploying everyday forms of resistance through a myriad micro-transgressions.²⁴

Co-production and co-governance

The biggest challenge for any inmate, anywhere, is how to survive prison. For those in well-ordered and controlled prisons, this consists in 'doing time,' dealing with mind-numbering routines, maintaining one's sense of self, and navigating the institutional rules, whether consistently applied, or capriciously set aside by staff. However, in many of Latin America's prisons prisoners and staff are mutually dependent for physical, not just psychological, survival.²⁵ Encouraging a structured form of co-governance would be a pragmatic response that recognises the complex and dense human relations that characterise most prisons, and which form the bedrock of successful management, order maintenance and rehabilitative approaches.

Formalised forms of co-operation between prisoners and prison authorities are not new, and in Latin America existed in the mid-twentieth century heyday of large, model, high security prisons. In Brazil the system of 'trustee' prisoners and block and cell committees was overturned in the 1990s by a more repressive view of prison management.²⁶ A return to structured co-governance seems a better guarantee for the core aims of the prison system, as well as for fundamental human rights protection, and in some of the carceral spaces abandoned by the state, non-governmental and religious groups have experimented with more

²³ de Dardel, J. and Söderström, O. (2015) *The Rise and Fall of Supermax: how the US Prison Model and Ultra Punitive Penal Policy Travelled to Colombia*. Geneva: University of Neuchâtel, Working Paper 3-2015/E.

²⁴ de Dardel, J. (2013) 'Resisting 'bare life': prisoners' agency in the New Prison Culture era in Colombia' In: D. Moran, N. Gill and D. Conlan (Eds.) *Carceral Spaces: Mobility and Agency in Imprisonment and Migrant Detention*, London: Routledge.

²⁵ King, R. and Valensia, B. (2014) 'Power, control, and symbiosis in Brazilian prisons', *South Atlantic Quarterly* 113 (3): 503-528.

²⁶ Alvarez, M. C, Salla, F., and Dias, C.N. (2013) 'Das Comissões de Solidariedade ao Primeiro Comando da Capital em São Paulo,' *Tempo Social* 25 (1): 61-82.

democratic relations with prisoners. In the so-called APAC units (generally run by Catholic voluntary groups on their own or in partnership with the state) and the Resocialisation Centres (run by a variety of NGOs and the state in São Paulo), inmates were collectively and individually made co-producers of their own personal transformation.²⁷ These small, local prisons are successful by many measures: cheaper to run than state and privatised prisons, human rights compliant, devoid of violence and disturbance, and embedded positively in the local community. Yet they have remained marginal because often the higher echelons of prison management are dominated by a militarised view of the prison-as-barracks, in which obedience to rules and repressive responses to infractions are seen as key to order. As noted above, this tends to backfire and result in prisoner resistance and self-rule.

Both prison management and offender re-integration can be achieved, but state must both relinquish its fantasies of complete control of the prison environment, and fulfil its constitutional and international legal responsibilities to those it incarcerates. If the state is to successfully prevent rent-seeking by coercive inmate groups or corrupt staff, and gain the trust and collaboration of survival-oriented prisoner governing groups, it also needs to re-establish legitimacy. This would include reduction of the prison population to manageable levels to avoid destabilising co-governance through overcrowding pressures, proper separation of categories of prisoners (whether by seriousness of crime, propensity for rehabilitation, stage or sentence or other criteria), meeting prisoners' survival and rule-of-law needs, and ensuring *effective* external oversight of prison management. These conditions should make it feasible for prison staff to engage with detainees in some form of sustainable co-operative co-governance, albeit a necessarily asymmetrical one, that would humanise and protect the human rights of both, reduce fear and insecurity, and make the carceral space more than just survivable.

²⁷ Darke, S. (2014) 'Recoverers helping recoverers: discipline and peer-facilitated reform in Brazilian faith-based prisons'. In: Miller, V. and Campbell, J. (eds.) *Transnational Penal Cultures: New Perspectives on Discipline, Punishment and Desistance* (pp. 217-229), London: Routledge; and Macaulay, F. (2014) "'Whose prisoners are these anyway?'" Church, state and society partnerships and co-production of offender "resocialisation" in Brazil'. Also in: Miller and Campbell (pp. 202-16).