Non-governmental organisations and the rule of law:
The experience of Latin America

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INTRODUCTION

The rule of law, that is, the fair, competent, effective, and predictable application of laws that enhance, rather than undermine, social accountability and fundamental human rights, is a core function of the state, and forms part of its social contract with the citizenry. However, ensuring that a government upholds the rule of law requires a number of checks and balances. Some of this accountability and enforcement function lies with the other branches of government: oversight of the executive by the legislative branch through its committees and reports, and by the judiciary, which has its own proactive powers and can be petitioned by citizens and their representatives. But this republican structure can still be unresponsive or resistant to scrutiny, particularly when elites across the branches of government are indifferent to, or collude in, maintaining chronic problems in the justice system. Active non-governmental organisations (NGOs) are therefore recognised as a crucial component in the effective application of the rule of law due to their independence from government and their often-different perspective on the impact of unevenly applied and unjust laws and law enforcement through direct contact with the victims of arbitrary treatment. This chapter explores ways in which NGOs (both international and local) can contribute to strengthening rule of law through a case study of how the Open Society Institute and its Justice Initiative (OSJI) and a network of Brazilian NGOs developed a campaign to reduce the excessive use of pre-trial detention.

It demonstrates how NGOs can fulfil important watchdog functions and are able to change laws, policies and practices that significantly improve the rule

of law by working strategically with one another, with international partners and with sympathetic state actors.

NGOs AND RULE OF LAW

Non-government organisations have diverse roots: many spring from informal civil society movements in which actors at some point decide to set up a professionalised, institutionalised bureaucracy to order to be more effective in pursuing their goals; legally-focussed NGOs often emerge from human rights and pro-democracy movements. However, the presence of external actors offering incentives, such as funding, can also provide the impetus for the creation of such NGOs. Rule of law and justice sector reform has been a component of democracy promotion since the 1990s, and some NGOs were set up specifically in order to deliver this global reform agenda. These mixed origins result in a diversity of NGOs, some oriented more to mobilisation and protest and others to legislative and institutional change. In practice NGOs often take on a number of different functions, discretely, in sequence or in tandem. These include: direct provision of justice services, either in substitution of, or co-production with, the state, for example, pro-bono work for individuals lacking legal counsel; interventions in pivotal cases through amicus curiae briefs; public interest litigation challenging the government on bad laws, poor legal decisions, or constitutional violations; research and public awareness work (around rights, deficits in the rule of law and their social consequences); and policy advocacy work (lobbying for reforms to laws and practices).[1] These NGOs tend to be relatively small in comparison to other law-related civil society organisations such as Bar Associations, but on whose backing or individual members they may draw. They may also be heavily reliant on funding from state sources (when contracted to carry out research or provide legal services) or from international funders; inter-governmental organisations tend to fund research and service provision, whereas international non-governmental organisations have greater latitude to fund advocacy in pursuit of structural change. However, their degree of

[1] On the role of Latin American civil society in social accountability see Perruzotti and Smulovitz (2006).

leverage or effectiveness lies not in their size, but in the ways that they can work with both international actors (inter-governmental and non-governmental) and local state actors to find opportunities and spaces within which to press their reform agenda.

PROMOTING RULE OF LAW IN LATIN AMERICA

From 'law and development' to human rights and governance: 1960s-1980s

International NGO (INGO) interest in the rule of law in Latin America dates back to the 1960s. A number of large US philanthropic organisations were engaged in development assistance to Asia, Africa and Latin America, promoting economic growth, human capital formation through public sector investment, and state-building through project planning and management.[2] State-building framed how the Ford Foundation and other US-based institutions supported legal reform activities in Latin America as part of the 'law and development movement'. They assumed that lawyers trained along North American lines would provide a bedrock of legal competence that would facilitate domestic and foreign private investment, and thus reduce poverty. However, the results were disappointing, as the imposed liberal, common law, model failed to mesh with local, civil law, cultures. The rule of law was also not yet seen as entailing the protection of human rights and citizens' voice in decision-making. However, the 1964 military coup in Brazil, and subsequent installation of other prolonged authoritarian regimes in Chile (1973), Argentina and Uruguay (1976), changed that position, especially for the Ford Foundation, whose staff increasingly argued a moral duty to promote human rights as a keystone of democracy. It switched its funding from government agencies to local think-tanks, NGOs, and civil society/activist organisations, and to the nascent Human Rights Watch. Having tested its support for human rights-centred rule of law in Latin America, the Foundation then extended its

[2] These include the W.K. Kellogg, Tinker and Rockefeller Foundations, the Rockefeller Brothers Fund and the Carnegie Corporation. However, the Ford Foundation dwarfed them all in the scope, range, and size of its funding, giving grants worth US$61.7m to developing regions between 1950-1961 (Kiger 2000: 132).

new approach to its programmes in the Middle East and Africa, assisting the end of the Apartheid regime in South Africa. By 1981, the Ford Foundation's new programme structure made 'human rights and governance' one of its four major units, with the view that governments should be responsive to their citizens, who in turn need the tools to demand accountability (Alliance Magazine 2009; Frühling 2000; Carmichael 2001). Its work was ground-breaking both in supporting a culture of NGOs working on rule of law related matters in developing and democratising regions, and in demonstrating the power of INGOs in framing debates and supporting local civil society networks to achieve concrete changes.

(Re)democratisation: 1980s-1990s

Several Latin American countries made the transition from authoritarian and military rule to democracy after the mid-1980s. Human rights NGOs, such as the Centre for Legal and Social Studies in Argentina and the Legal Defence Institute in Peru, which had been documenting the arbitrary abuses and supporting the victims of the military regimes, gradually moved away from pursuing justice for past violations towards a more agenda-setting and public litigation role around the continuing weaknesses of the justice system (Frühling 2001; Shifter 2001). The 1996 peace agreement in El Salvador prompted the establishment of the Due Process of Law Foundation, based in Washington DC, to strengthen the rule of law and respect for human rights, with an emphasis on empowering civil society's voice in any reforms.

However, the inter-governmental organisations (IGOs), such as the World Bank and Inter-American Development Bank, promoting judicial reform in transitional countries initially took a narrow, top-down, and state-centric approach that promoted a 'cookie-cutter' set of reforms, applied in every country regardless of local specificities and 'fit'. These packages typically involved rewriting laws and codes, training programmes for legal professionals, technology assistance (computerisation of court processes and records) and refurbishing courthouses, and institutional development (Alkon, 2002). They focused mainly on court efficiency, quality, and political

independence (Domingo and Sieder 2001; Hammergren 2008). Access to justice initiatives such as alternative dispute resolution mechanisms were designed at first to address commercial disputes in order to attract foreign investors. However, some forms of community conflict resolution and mediation were developed as a means of increasing the legitimacy of the democratic state and reducing social violence. These were sometimes delivered by human rights and legal NGOs acting as co-producers of the rule of law for the most marginalised communities, for example, through the *Balcão de Direitos* legal aid centres set up in the *favelas* in Rio de Janeiro between 1996-2005 by the NGO Viva Rio.

Criminal justice reform was lower down the agenda of the multilateral donors as the control of crime and violence was regarded as a matter of state security and thus politically sensitive. Procedural code reform – such as the switch from an inquisitorial to an adversarial system - was seen as more technical and easier to achieve than penal code reform, which often fell victim to penal populism. The United States, the major bilateral donor in the region, had a paradoxical impact. On the one hand, it promoted judicial and police reform, and the strengthening of accountability mechanisms such as ombudsman's and human rights offices. Yet it also demanded tougher police action and mandatory remand and custodial sentences as part of its War on Drugs (Transnational Institute and Washington Office on Latin America, 2011). It was thus partly responsible both directly – through conditionality in its funding to countries such as Colombia, Bolivia, and Mexico (and indirectly through its creation of a moral panic on drugs) for the region-wide explosion in the prison population, this focus on punishment also reflected the orthodoxy in parts of the UN system, such as the United Nations Office on Drugs and Crime. So, the task of reversing the flow of prisoners into the system fell to NGOs and INGOs.

MASS INCARCERATION AS A RULE OF LAW PROBLEM

The post-authoritarian and post-conflict criminal justice systems of the region began to be tested from the 1990s by a surge in crime and violence, much of

it linked to the increased trafficking of illegal narcotics and related contrabands, and to the emergence of criminal networks and street gangs in some countries. Although this was concentrated in certain countries and urban centres, a common response was expanded punitivism and penal inflation: in Brazil in the 30-year period 1985-2016 115 crime-related laws were passed, putting around 550 new offences on the statute books.[3] Police arrested more people, due to both increased efficiency and institutional incentives, whilst the judiciary and wider society backed imprisonment as the preferred form of punishment, particularly for the young, non-white male population regarded as a social threat. Every country thus saw a rise in incarceration in terms of absolute numbers, and in the rate of imprisonment. Some experienced a four-to-five- fold rise in the two decades since the first half of the1990s: El Salvador's incarceration rate shot up from 99 to 509 per 100,000 population; Brazil's went from 74 to 301.

Whereas imprisonment as a form of legal and legitimate punishment of offenders that threaten the rights of others could be understood as fulfilling the rule of law, such mass incarceration (especially with high levels of pretrial detention) ends up undermining the rule of law in a number of dimensions: denial of due process, equality before the law and the presumption of innocence; arbitrary and illegal detention, violation of the right to liberty and other human rights, and an erosion of the state's monopoly on force. Across Latin America prisoner numbers quickly outstripped capacity, leading to serious overcrowding, inhuman and degrading conditions of detention, torture, excessive force, and collective punishment inflicted by staff on prisoners, and chaotic violence between inmates. This led first to frequent riots and prison breaks, and then to prisoners creating inmate collectives that came to constitute parallel forms of governance inside the prisons (Lessing 2010). Brazil's major inmate syndicate, the First Capital Command (*Primeiro Comando da Capital* - PCC), was born in the São Paulo prison system and now dominates 95 per cent of the facilities in the state, that is, over 225,000

[3] http://emporiododireito.com.br/o-excesso-punitivo-e-mais-um-erro-legislativo/

prisoners, or over a third of Brazil's prison population. It was able to extend its trafficking and protection racket operations into low-income neighbourhoods thanks to the prison estate providing associational space, infrastructure, and new recruits from a revolving door of arrest, detention and release that sent one million individuals a year through the prison system (DEPEN 2016: 23). In those urban areas, it functioned both in tandem and in competition with the police (which it often co-opted or corrupted). Thus, the rule of law and order both inside and outside the prison system was privatised by violent non-state actors.

Where pretrial detention has become the rule, not the exception, it has been a major contributor to the problems of mass incarceration, both in the numbers of individuals that it places in an overloaded system, and in the corrosion of the rule of law, which in turn produce grievances that make inmates turn to prisoner collectives and gangs. Often the period of pre-trial detention exceeds any reasonable, or legally stipulated, period for the authorities to conclude their investigation and preparation of charges. Judges frequently ignore official criteria for remand, such as a threat to public order, or risk of absconding. Detainees are not given information about the actual charges that will be, or have been, brought against them, or when they will eventually be brought before a judge for the first time, and are denied access to legal counsel. In many cases individuals are held on remand on charges for which a custodial sentence could not be imposed, or for a period beyond the maximum custodial sentence. Yet, illegal and unjustified pretrial is clearly the result of state commission or omission, because whilst 85.9 per cent of Bolivia's prisoners and 79 per cent of Paraguay's detainees are awaiting trial, only 12.3 per cent of Nicaragua's prisoners and 17.2 per cent of Costa Rica's are on remand. [4]

Latin America has the one of the oldest and strongest regional human rights system, and the Inter-American Commission on Human Rights (IACHR) has

[4] World Prison Brief http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All accessed on 4 September 2016

been actively highlighting such excessive pre-trial detention as a major concern for over a decade through its periodic inspection visits. The region's history of government human rights abuses and strong civil society responses has enabled information-sharing between policy networks of NGOs, government officials and international organisations. These factors have allowed activists to meet, compare notes, diffuse good practice, and put pressure on recalcitrant governments, as the case of custody hearings in Brazil demonstrates.

NGO action on detention

Before the 1990s human rights Latin American NGOs focused on the arrest and treatment of political detainees and protesters, and did not much consider wider structural issues affecting the mass of inmates. But the exploding prison population turned the attention of some to the torture of prisoners in police custody, excessive use of force by authorities in dealing with prison incidents, the denial of healthcare and legal assistance, and the impact of arbitrary and prolonged detention on families and communities. Sometimes they provided direct services, such as legal assistance, that should be the responsibility of the state. They conducted research and handed over documentation on systematic rights violations to inspectors from the national authorities and from international organisations, such as Amnesty International, Human Rights Watch, and the Inter-American and United Nations human rights bodies. They took key emblematic cases to the domestic courts and then to Inter-American Court of Human Rights, making full use of what Keck and Sikkink (1998) term the 'boomerang' strategy of using international opprobrium as a lever for changes in domestic policies and practices. Increasingly, groups such as the Center for Justice and International Law (CEJIL) turned to public interest litigation to force governments to comply with their own norms and standards for the treatment of prisoners.

Brazil's prison population rose 575 per cent in the quarter century from 1990-2015. Since the return to democracy in the mid-1980s, the *Pastoral Carcerária* (the Catholic Church's Pastoral service to prisoners) had been

addressing the immediate welfare of prisoners but more recent mass incarceration forced it to begin addressing structural problems with lobbying and mobilisation. Newer NGOs founded by individuals - often lawyers - who had cut their teeth in the human rights movement of the late 1980s and 1990s began to tackle deficits in the operation justice system. For years, many of Brazil's 27 states either had no legal aid service, or had one that was woefully understaffed with its lawyers earning considerably less than their prosecutorial counterparts (Weis, 2012).[5] As a result prisoner typically spent three to six months on remand before they received any legal assistance. The Institute for the Defence of the Right to Defence (*Instituto de Defesa do Direito de Defesa* – IDDD), founded in 2000 by 35 criminal lawyers in the city of São Paulo, began by offering pro bono legal assistance to prisoners through its network of volunteer lawyers, carrying out systematic reviews of case files in particular prisons (such a collective, focussed effort is called a *mutirão carcerário*).

Other NGOs formed at the same time in Rio de Janeiro and São Paulo with research on prisons and assistance to prisoners as their sole or major remit, came at the problem from complementary angles, lobbying norm-setters and litigating in both national and international fora. The Land, Labor and Citizenship Institute (*Instituto Terra, Trabalho e Cidadania* - ITTC) was founded in 1997 in order to combat inequalities and human rights abuses. Based in São Paulo it works in particular on women's issues, including foreign nationals, in detention. It conducts research and campaigns on non-custodial sentences and drugs and gender issues. Lawyer James Cavallaro left his post as Human Rights Watch's representative in Brazil to set up Global Justice (*Justiça Global*), a human rights research and advocacy organisation, in 1999 in order to take cases to the Inter-American human rights mechanism as so few cases were being submitted concerning Brazil. Conectas was set up in 2001 by a group of human rights lawyers and activists to promote human rights and the consolidation of the rule of law in the Global South through training human rights defenders and supporting collaborative networks. In Brazil, it specialises in advocacy and public interest litigation. The Association

[5] http://www.ipea.gov.br/sites/mapadefensoria/defensoresnosestados

for Prison Reform (*Associação pela Reforma Prisional* - ARP) was set up in 2003 as an arm of the Centre for Studies on Security and Citizenship at Candido Mendes University in Rio de Janeiro to provide legal assistance to prisoners and litigate domestically on prison issues. Both were established by Julita Lemgruber, former head of Rio de Janeiro state's prison system and a law-and-order reformer. The Institute of Human Rights Defenders (*Instituto de Defensores de Direitos Humanos* – IDDH), a Rio-based group set up in 2007, specializes in legal aid to, and strategic litigation on behalf of, pre-trial prisoners. These NGOs would form the heart of the Criminal Justice Network set up in conjunction with Open Society to tackle the 'gateway' issue of pretrial detention as part of a wider campaign on global justice and rule of law reform.

OPEN SOCIETY'S APPROACH TO JUSTICE REFORM

Whilst the criminal justice systems in Latin America were coming under strain, a new 'meta-NGO' was consolidating itself internationally as a policy entrepreneur and agenda-setter around the rule of law in transitional societies. The Open Society Institute (OSI), established in 1993 by the billionaire philanthropist and financier George Soros, is a grant-making foundation that serves as the hub of a global network of autonomous Soros foundations and organisations in more than 60 countries set up since 1984 (Stone, 2010). OSI's explicit mission is to shape public policy to promote democratic governance, human rights, justice and the rule of law, health, education and youth and media and information. This it aimed to do by promoting appropriate economic, social and legal reforms and by supporting local level actors, through its cross-border and cross-regional alliances, to advocate for, and ensure the enactment of, these reforms. As this case study will demonstrate, it was able to reset the terms of debate internationally around pretrial detention and work with country-level and community-based NGOs to achieve tangible changes in both policy and practice. [6]

[6] Based on email, skype and face-to face conversations with senior programme staff from the Open Society Justice Initiative, and with key

The Open Society Justice Initiative, which is a division or endowed NGO within the Open Society structure, began its campaign on pretrial detention as a component of its wider work on pretrial justice, in which two of its key staffers had been closely involved: Zaza Namoradze of the Budapest office had been promoting legal aid in Central Europe and community-based paralegals in West and South Africa, and Martin Schönteich had been researching pretrial detention, noting that over the course of a year, nine million people pass through pretrial detention, and three million – that is, one third of all people behind bars – are on remand on any given day. In 2010 a global campaign on the latter was suggested as a strategic means of exposing the wider dysfunction of justice systems. A 12-person core OSJI team was assembled from staff in Abuja, Budapest, Brussels, New York, and Mexico. In order to create regional networks of NGOs that could work, strategise, and build for the long term, they used a snowball technique, communicating initially with some 100 known contacts through newsletters. Madeleine Crohn, a Brussels-based advocacy officer seconded to the New York office and experienced in running big campaigns, assumed that it would take up to ten years both to build effective advocacy networks and reframe and legitimate the issue with policy-makers. In the event, the Global Campaign was projected to last for just three years, with OSJI receiving substantial matching funding from the British Department for International Development. The latter was then restructured and moved on to other priorities, and the Global Campaign ended after five, also due to internal restructuring. However, the NGO policy networks it had built in Central and Eastern Europe, Africa and Latin American endured, to varying degrees. At a country level, in particular, the policy communities continued to function, focussed on specific goals, as will be seen in the case of Brazil.

The first move in the Global Campaign was an epistemic one. OSJI produced a number of position papers that collated reliable and comprehensive data on excessive pretrial detention and identified it as the cause of multiple harms –

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individuals from the Criminal Justice Network in Brazil, between May and September 2016.

the practice of torture, spread of disease, institutional corruption, family poverty, erosion of the rule of law and hence of public confidence and state legitimacy – that affect not only the detainees, but also their families, communities, and states. This reframed a supposedly criminal justice matter as a much broader public governance issue and hence attracted a wider group of policy makers (Open Society Foundations, 2014). Their research also underscored how abuse of pretrial detention involves violations of both procedural, or thin, (rules) and substantive, or thick, (outcomes) aspects of rule of law (see the introduction to this volume). Legal system operators routinely ignored the legal guidelines, that is, the process values governing remand. The OSJI sought to empower a coalition of Brazilian NGOs to work with key state actors in order to improve the transparency, predictability, enforceability, and stability of the pretrial decision-making process, to make the judiciary more accountable and in so doing improve the legitimacy of the justice system.

The Brazilian Criminal Justice Network

As the OSJI wanted maximum impact for their campaign they asked a third party who knew the key players in the Brazilian NGOs to meet with them individually and seed the idea of a network and a common agenda. Those that recognised the importance of both the funding on offer and joint work were the first to form the network: Conectas, the Church's prison ministry, and Instituto Sou da Paz, which had previously worked more on public security, disarmament, and police violence. Others joined later, and the network fluctuated between three and ten members.

In February 2010, when the Brazilian Criminal Justice Network was formed, the first strategic target was the national legislature, which produces all law on penal matters. The three NGOs set up an advocacy project (*Projeto Brasília*), establishing a permanent presence in the country's capital to track proposed justice-related legislation. They soon logged 1,300 bills, classified them in terms of their positive or negative impact on substantive rule of law issues, and tracked them through the bicameral system. They met with the college of

party leaders where the weekly legislative agenda is determined, sat in committees and floor sessions, and thus identified key players and opinion-formers. Their work was helped, paradoxically, by the fact that most legislators were not used to being lobbied by civil society, which both lacked the resources and found it difficult to target a highly fragmented party system (23 parties were represented in Congress in 2010) where politicians frequently switch parties. In consequence legislators felt ill-prepared on criminal justice matters and eagerly took up the statistical data, policy briefs, legislative bills proposals and evaluations supplied by the Network's representative and the three NGOs, which built trust, collaboration, and a division of labour despite their different histories and mandates (Romanach et al 2012).

Many of the bills the network focussed on were regarded as regressive, and therefore they sought to block or amend them. In order not to seem negative in its agenda, the group selected two bills to promote positively, one of which was the Law of Precautionary Measures (*Lei de Medidas Cautelares*). Intended to reduce pretrial detention it gave judges a wider range of alternatives to remand or unconditional release of suspects, including house arrest, regular reporting in to a court, electronic monitoring, night-curfew at home, payment of bails, and bans on specific movement, contacts, and jobs. The law had been circulating since 2001, having come out of the government's expert-led review of the Criminal Procedure Code initiated at the end of 1999. However, despite this initial executive backing, it had languished for a decade. It took a year of discussion for the network to find key allies in the Office of Legislative Affairs in the Ministry of Justice who then championed the bill. It was approved in April 2011, at a point when Brazil had over 215,000 people in pre-trial detention, which accounted for 44% of the total prison population.

Judicial blockages and solutions

The implementation of the bill depended on a culture shift among the country's judges who had already been identified responsible for much of the

prison system's crisis, having ignored existing legal criteria for pretrial detention, and failed to perform their other function of overseeing prison sentences. Brazil's National Justice Council (*Conselho Nacional de Justiça* – CNJ), set up in 2004 as the watchdog arm of the judiciary, started a systematic review of prisoner case files in 2008. Whereas the IDDD, as an NGO, had relied on volunteer lawyers, as a branch of the judiciary the CNJ was able to pass internal ordinances to prosecutors, judges and state legal aid lawyers released from normal duties to conduct these 'mutirões carcerários'; a 2009 law institutionalised this function within its structure by creating a Department of Prison System Monitoring (Foley, 2012). By 2016 it had examined over 400,000 case files, and had arranged for overdue earned prison benefits (such as progression to a lighter prison regime, or parole) to be awarded to 80,000 inmates, over 45,000 of whom were released from prison having in fact served their full term.[7] However, the judges responsible for these omissions suffered no consequences. Brazilian judges, right down to circuit court level, enjoyed too much, rather than too little, individual autonomy. Binding precedent was weak, and state-level appeals courts often compounded the problem.

Thus it was perhaps not surprising that the impact of the new Precautionary Measures bill was modest. Judges still held considerable discretionary power to decide whether an individual posed a re-offending or flight risk. They also believed, with some justification, that the executive branch had not put in place the infrastructure for these new measures, for example electronic monitoring. This had also been their reasoning behind resistance to applying non-custodial sentences made available to them by laws passed in 1998 and 2007. Members of the Criminal Justice Network set about evaluating the actual impact. A study in Rio de Janeiro showed that before the law, judges remanded into custody in 83.8 per cent of cases: this dropped only slightly to 72.3 per cent in the six months after the passage of the law (Lemgruber et al 2013: 12). A study conducted in São Paulo in 2014 confirmed the continued

[7] http://www.cnj.jus.br/sistema-carcerario-e-execucao-penal/pj-mutirao-carcerario.

default position of judges: one quarter of the 410 prisoners in the remand centre were released after review of their cases (IDDD, 2016a).

It therefore became clear to the NGOs, and to the CNJ, that further steps would be needed to compel judges to use pretrial detention as an exceptional measure. The Network realised, through its contact with other human rights NGOs and IGOs in Latin America, that Brazil was now the only country in the region without a federal law on custody hearings, a mechanism whereby an individual arrested in flagrante must be brought speedily before a judge in order to determine under what conditions they should await trial. This meant that Brazil was not compliant with Article 7.5. of the Inter-American Convention on Human Rights. In 2011 the network therefore identified a relevant bill in the Senate; although very limited in scope, the bill provided a useful rallying point, as custody hearings would both identify police brutality and reduce pressure on remand centres. The IDDD and CNJ together drafted amendments to it and from 2011-14 the Network lobbied legislators to get it approved. However, it took four years to get through the committee stage, and was stalled by the counter-lobbying of police, judges' associations, the prosecution service, and 'tough-on-crime' legislators.

Meanwhile, the prison authorities in the State of São Paulo were desperate to stem the inflow of new prisoners into the system, and in 2014 approached IDDD to carry out a standard 'mutirão carcerário', The IDDD and CNJ decided that a better response would be to block the pipeline. With the bill stuck in Congress, the new President of the Supreme Federal Court and of the CNJ, Ricardo Lewandowski, used the latter's own institutional powers to trial custody hearings (*audiências de custódia*) in São Paulo. Initiated in February 2015 in a mega-complex of courts handling all of the city's criminal cases, the project required a judge to see detainees in the presence of a public prosecutor and a defence lawyer within 24 hours of their arrest in flagrante in order to determine the legality and necessity of pretrial detention, whether there were alternatives to remand as provided in the *Lei de Medidas Cautelares*, and whether the prisoner has been tortured or ill-treated in police custody. Up until then, police were required only to present the paperwork to

the judge in this time period, and prisoners often waited months to get their first hearing. The IDDD and Chief Justice Lewandowski worked together to win over the notoriously conservative judges of the state Court of Appeal: it helped that he was from São Paulo and knew many of them personally and professionally. Helpfully, IDDD is also staffed by volunteer criminal lawyers who trained in the same law faculties as these justice system operators, circulated in the same social and professional spheres, and could call on this social capital.

Staff from IDDD monitored the custody hearings from the outside, and in April 2015 entered into a partnership agreement with the CNJ and the Ministry of Justice to formally evaluate the pilot project. The project was then rolled out in the capital cities of the other 26 states and the federal district. The CNJ passed a formal resolution in December 2015, which took effect on 1 February 2016, requiring all courts in every jurisdiction in the country to conduct custody hearings. Although this has faced legal challenge, the CNJ's justification is that it holds a remit to make Brazil's judicial processes compliant with its obligations under regional and international human rights treaties. The latter are regarded supralegal and infraconstitutional in Brazil's constitution, and do not require additional legislation to be effective.

The impact was very positive: by June 2016, 93,4000 custody hearings had been held, in just under half the suspects released on bail, nearly always under some kind of precautionary measure. Moreover, over 5,000 allegations of police brutality had been logged. The system had allowed state agencies and legal provision to work together, not at odds. The custody hearing centres can refer the accused directly to social services, working with the Centres for Non-Custodial Sentences and setting up arrangements for electronic monitoring and other measures, all of which removes the judges' room for punitive latitude. That said, there is a lot more for the network to do to make this as effective as possible in reducing pretrial detention. Each state's justice system is autonomous, entering into separate agreements with the CNJ, and producing quite disparate outcomes: the level of post-hearing release ranges from 15 per cent to 79 per cent. The custody hearings currently apply only to

individuals arrested in flagrante rather than to all detainees, such as those detained by arrest warrant. Follow-up on police brutality allegations has been minimal. Keeping half of arrestees on remand is still much too high and appears that judges still make their decision based not on the likelihood of the accused interfering with the judicial process, but rather on their personal characteristics and history (IDDD 2016b).

INGO, NGO, and governmental partnerships for improving rule of law

This case study has shown how a 'meta-NGO', local NGOs and key state actors were able to work together effectively to challenge the abuse of pretrial detention in Brazil. Heupel (2012) argues that both inter-governmental actors and (international) non-government actors share a common analysis of rule of law deficits in transitional societies, attributing them to a lack of will among the political elite, a lack of capacity among local justice sector actors, a lack of knowledge about how to strengthen the rule of law and limited belief in the value of the latter. The OSJI's strategy succeeded because of its non-hierarchical relations with partners and lack of conditionality, as it directed significant funding at local NGOs already engaged in justice issues. It thus overcame two key challenges that face IGOs in promoting rule of law. The first is often a lack of solid knowledge to devise effective strategies, but here the local NGO network could produce extensive data on both the deficits, and the impact of new practices. Secondly, justice reform often forgets the participation and empowerment of local actors, but the Criminal Justice Network in Brazil continued actively pushing forward pretrial detention reform after the OSJI funding for the Global Campaign ceased in 2014, with ongoing funding from both OSI and the new state partner.

The OSI and OSJI were also able to act as effective policy entrepreneurs by deploying the four styles of translating research into policy identified by Stone and Maxwell (2005, 7-8). Firstly, as a 'storyteller' the partnership created a new policy narrative, recast remand custody as an issue of good governance, public health, human rights, and economic development. Secondly, as a 'networker' it developed and participated in an epistemic and policy

community, the Criminal Justice Network, which built interpersonal trust, social capital, and shared commitment to exchange ideas, produce and disseminate research and pilot, evaluate, and transfer new policy approaches. The network acted as researcher-as-fixer, getting the ear of the right higher-level lawmakers or policy-makers, in the Ministry of Justice, and in the Supreme Court and CNJ. The network's relations with the CNJ also enabled it to deploy researchers-as-engineers' to work with 'street-level bureaucrats', that is those who would actually implement the policy, in this case, the judges.

There was also an important regional dimension to this endeavour: the OSJI set about building a regional network as well as the start, drawing on data and pilot projects in Mexico. Additionally, the Inter-American system played an important role: the Inter-American Commission, which had worked incidentally on imprisonment, turned its full beam onto pretrial detention with the election of role James Cavallaro as Commissioner to the Inter-American Human Rights Commission in June 2013, with a specific remit for detention. His career as law professor at Harvard and Stanford followed his work with Human Rights Watch and Global Justice, and he was well connected to the Brazilian human rights and legal reform community. IACHR's first major report specifically on pretrial detention was issued that same year. It also played a legitimating role, as the CNJ and NGO network were able to invoke the need to comply with the Inter-American Convention on Human Rights, whilst Chief Justice Ricardo Lewandowski insisted on presenting the findings from the first six months of the Custody Hearings roll-out to a meeting of the IACHR in October 2015.

FINAL COMMENTS

As has been demonstrated, NGOs can play important roles in strengthening the rule of law where the state has either signalled its indifference to existing problems, or acts to exacerbate them. In this particular case, the branch of government expected to exercise the most oversight over government policy and over the protection of rights and due process was not only failing to do so, but compounding the problem through the discretionary, and illegal, actions of

its members. For some time, NGOs had been trying to act as checks and balances in regard to the abuses in the prison system, but until 2010 could only take their concerns to the international system as an echo-chamber to exert reputational pressure on the government. Keck and Sikkink's boomerang theory breaks down, however, when the state turns out to be unresponsive to such external opprobrium. Thus, the NGOs in this case needed a catalyst and funder, in OSJI, and strategic allies in the state, which emerged under a government that strengthened the mechanisms of judicial oversight in the form of the CNJ and made the Ministry of Justice take justice reform seriously. On their own, NGOs could not exert effective controls as representatives of private citizens: when the state closes the door to them they are ineffective. The state may also try to close the door to them when they *are* effective: criminal justice actors involved in security and crime policy rarely invite public scrutiny. They also cannot – and should not, strategically – substitute for the state. Sometimes, NGOs find their greater advantage in identifying the opportunities for leverage and co-operation that exist in the diverse institutional spaces, locally or nationally. At others, however, stepping out of the logic of the state by breaking the law through symbolic action has a greater pedagogic value in terms of public perception of state violations. Whichever strategy they use, as the Latin American experience clearly shows, NGOs can be key, flexible, networked and morally compelling actors for the improvement of the rule of law.

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