Competition and Collusion among Criminal Justice and Non-State Actors in Brazil's Prison System

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ABSTRACT

This chapter examines competition and collusion among criminal justice institutions and non-state actors in imprisonment in prisons in Brazil to analyse how both formal and informal dispositions and practices have created and sustain the mass incarceration that is a pre-condition for extensive prisoner self-governance. The chapter thus looks from the outside-in, examining how relationships between extra-mural institutions have created and sustained such an enormous prison population in Brazil. It also analyses these institutions and organisations as intra-mural actors that, through their action or inaction, exercise a key role in shaping the carceral experience for inmates. It highlights the competition between the different actors involved in the penal arena for control of the carceral space and of prisoners, driven by a variety of motives – rent-seeking, moral/philosophical, and territorial.

Keywords: Brazil; prison monitoring; informal institutions; criminal justice system; non-state actors; prison conditions

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Introduction

Most of the chapters in this book focus on the internal logics of prison life in Latin America, where state abandonment encourages prisoner self-governance, in its many modalities, and relegates the most immediate representatives of the penal state (prison guards) to collaborators. However, prison populations are produced in the first instance by criminal justice actors and institutions. The latter shape the penal experience, for they act not just outside the prison system, as the funnel that directs particular social groups into existing carceral communities, but also within. Their discretionary practices and institutional power determine much of the context of prison insecurity and survival dynamics that is closely analysed by other authors in this volume. Unlike Anglo-Saxon prison systems, which are managed largely by the executive branch, Latin American judicial institutions are integral to prisoner and prison system

management. This creates territorial competition on several levels (philosophical, legal and material), but also collusion, when there should be a separation of functions and oversight. In addition, a number of non-state actors and prisoner organisations are also now competing for control over parts of the carceral archipelago in Brazil and offering alternative formal and informal governance and penal experiences.

This chapter examines how both the formal and informal dispositions and practices employed by criminal justice-related institutions in Brazil have created the conditions for the prisoner self-governance and survival strategies analysed by other authors in this volume. It looks at how extra-mural criminal justice institutions have created and sustain such an enormous prison population, how these exercise an intra-mural role in shaping the carceral experience for inmates and how they interact with the non-state actors active in the carceral space. These dynamics are complex, sometimes contradictory, and can shift between competition and co-operation. The process of mapping these relationships is also incipient, with ethnographic work on the prisoner experience (Dias, 2013; Biondi, 2016; Darke, 2018) but little ethnographic data on the justice system, its operators and its institutional micro-cultures. I first embarked on researching the Brazilian prison system in 1997, on behalf of Amnesty International, and since then have visited dozens of penal institutions, of different types, and spoken to many criminal justice operators in diverse levels of administrative responsibility, and to civil society groups involved with prisons, all around the country. This chapter draws on those observations, conversations and poking-and-soaking in the Brazilian penal field.

Informal institutions are here understood as shared sets of practices, values and unspoken rules of behaviour that may be at odds with the formal rules and purposes governing the organisation in question (Helmke & Levitsky 2006). Often, they emerge in organisations as a form of resistance to being governed and directed by other actors, either those in a hierarchically superior position, or in a separate branch of government or sphere. In Brazil this is accentuated by horizontal relations between the three major institutions of the criminal justice system (police, prosecutorial service, and courts) that are characterised by fragmentation, compartmentalisation, territorialism and hyper-autonomy. As a result of

institutional design, individual judges and prosecutors are accorded excessive personal discretion -- it was not until late 2004 that the principle of binding precedent was introduced, weakly, into Brazilian law. Therefore, the formal criminal justice institutions have relatively weak vertical controls, which in turn encourages informal corporate values and practices that influence individual actors in the aggregate. Territorial competition for governance of the incarcerated is also visible as a number of state and non-state actors jostle for influence over the prisoners and the resources that they represent, and over the way in which prisoners' rights are framed.

Roberto Kant de Lima, the pioneer in legal system ethnography in Brazil, has argued that these institutions do not form a criminal justice *system* as such, as in Anglo-Saxon countries, given the bifurcation between public security professionals (police, prison authorities) and criminal justice professionals (judges, prosecutors and public defenders), and the hyper-autonomy of each of the agencies, driven by distinctive institutional goals and philosophies (Lima 2010: 28). Others have argued that the two domains – of law-and-order, or 'public security' as Brazilians call it, and justice – often find themselves counterposed in political discourse and public policy as a choice between *defesa social*, that is, defending the society of 'decent people' from the 'bad people', and *garantismo*, that is, upholding constitutional and legal rights of criminal suspects and convicts. All the actors and institutions of the criminal justice system have to position themselves in relation to this apparent binary. And, at times of moral panics about crime and violence, fuelled by punitivist talk by politicians, judicial actors tend to identify as part of the state's crime-fighting apparatus more than as rights protectors. A survey of judges in the criminal courts in Rio de Janeiro in 2011 found that, when sentencing, they were putting a general concern about social order over the specifics of the individual case and the rights of the accused in front of them (Casara 2015). This preoccupation was even evident in a key Supreme Court ruling on a legal challenge alleging the unconstitutionality of mass incarceration and consequent poor prison conditions in Brazil.[1] This slippage of identities and institutional overlap means that whilst criminal justice institutions often engage in inter-institutional

competition for resources, they also collude when their moral philosophies around crime coincide. This results in agencies that should exercise distinctive functions and mutual oversight collaborating in sending too many criminal suspects to prison and keeping them there.

Formal and informal practices of incarceration

By the end of 2019 Brazil's prison population had topped the 750,000 mark, putting it third in the world in absolute numbers after the USA and China. Its prison population rose more than six-fold from 1992, and its imprisonment rate nearly quintupled, from 74 to 357 per 100,000 population. This seemingly inexorable rise in mass incarceration, which shows no signs of abating, has been produced not just by the changing patterns of crime (particularly the violence and insecurity created by trafficking in narcotics and associated goods), but also by the operational and philosophical preferences of criminal justice agencies for arrest, detention and the carceral disposition (Melo 2020). Brazil's prisons are the product of a central tension in governance: the system is understood to be highly dysfunctional and unsustainable, yet it continues to grow. The political branches of government have often been pulling in different directions. The national legislature tended to lead in introducing hyper-penalizing legislation, adding new crimes to the statute books and ramping up penalties, often in response to periodic moral panics around crime.[2] The executive branch, up until 2016 at least, sponsored diversionary legislation, intended to take the pressure off a system that it part-finances, understanding that the building of new prisons can never catch up with the inflow of new detainees. But its decarcerating laws have only slowed the rate of increase, not reversed it, because the judicial branch (judges and prosecutors), at a subnational and individual level, has tended to resist such moves, and maintained an informal institutional bias in favour of incarceration as a form of *defesa social* (Carvalho 2010: 60). These judicial actors have a double, conflicting, interest in prisoners, simultaneously responsible for placing them in custody, and for upholding all the legalities of their detention, and this conflict of interest plays out in the rituals and decision-making in courts every day. The fate of three such initiatives – the 2006 drug

law, the 2011 precautionary measures law, and the 2015 custody hearing policy – is illustrative of how judicial and prosecutorial cultures have undermined the intention of both the federal government and the governing body of the judiciary to tackle Brazil's prison crisis.

In 2006 the law was changed to divert those convicted of possession of drugs for personal consumption into education, community service and treatment, and away from prison. Yet, after the change in the law the proportion of individuals incarcerated for minor drug offences actually *doubled,* accounting at one point for one quarter of all custodial sentences. The law had left enough loopholes for discretion on the part of law enforcement officials and justice operators, who simply reimposed their own preference for imprisoning the young black men at the *boca de fumo* (street-corner retail sales point) rather than the consumers and intermediaries in the drug chain. As these young men were moved through the hands of the various agencies of the justice system, their fate was sealed by an escalating punitive process. Police routinely recorded the amounts of drugs found on suspects as 'excessive for personal use', and this assessment was almost never revised by further post-hoc investigation.[3] Analysis of the cases of prisoners in two large prisons in São Paulo revealed that prosecutors then had a marked tendency to super-penalise, upgrading a third of all the offences listed in the police crime reports to a more serious one once they formally brought charges. Offenders arrested for an 'attempted' crime would find themselves charged as if they had actually committed the crime in question (ITTC & Pastoral Carcerária Nacional 2012: 61). Then, once the cases reached court, the judges frequently decided that anyone selling drugs must automatically be a member of a criminal organisation, which carries an even higher prison sentence.[4] Yet, a study of 800 sentences handed down in eight Brazilian states from 2013-2015 for 'drug trafficking' showed that two thirds of the accused were low income, 80 per cent were first time offenders, firearms were present in under 10 per cent of arrests, there was no accomplice in 70 per cent of cases, and the average value of cash confiscated was just £45 per person (Semer 2019), confirming findings in other studies based on police, prosecution and court records (Boiteux 2010; Valois 2016; Machado et al. 2019).

This judicial drive to incarcerate has made it difficult to reduce the number of pre-trial prisoners, who continue to make up nearly one third of the prison population. They are often held in the worst conditions in terms of overcrowding and legal neglect and, as such, are particularly in need of the protections offered by the prisoners organisations, or *comandos*, that substitute for the state in so many facilities. 'Preventive detention' is a legal tool available to judges to stop suspects from absconding,[5] or committing more crimes, but tends to be used as a form of pre-emptive extra-legal punishment. The country's legal culture – its *sensibilidades jurídicas* – is underpinned by an a priori presumption of guilt, an inquisitorial logic that seeks to arrive at a presumed 'truth' about the offender and offence, and the judge's prerogative of 'interpreting' subjectively the facts put before them (Lima 2010). In over 90 per cent of cases examined in São Paulo, the judges handling cases of *in flagrante* arrest did not even bother putting down a reason for upholding the pre-trial detention, tending to view the detainees as a broad category, rather than as individuals with specific circumstances to be considered. Pre-trial detention was also applied where the individual had been accused of a crime that would not even result in a custodial sentence (ITTC & Pastoral Carcerária Nacional 2012). Such detentions violate the provisions of the 1998 Alternative Penalties law, the first serious diversion and decarceration initiative by the executive branch, which allows first-time offenders who have committed offences carrying a tariff of under four years in jail to receive an alternative sentence such as community service. Such illegal detentions would be equivalent to state kidnapping, an argument I make more widely for pre-trial detention without legal counsel, justifiable charge or for excessive periods, which is still very common in Latin America (Macaulay 2019).

The Precautionary Measures (*medidas cautelares*) law passed in 2011 was the first executive-led attempt to offer judges a range of options to ensure that criminal suspects were still available to stand trial without holding them in detention. However, case data and interviews with justice system operators in Rio de Janeiro revealed that the latter initially boycotted the new philosophy: 98% of those accused of drug offences continued to be held in pre-trial detention for the duration of their case (Lemgruber et al. 2013). The same was true of 90 per cent of

cases involving illegal ownership of a firearm, for which bail conditions are explicitly set out in the law, and for well over 50 per cent of non-violent offences against property such as theft and receiving stolen goods (ibid: 10).

Given that local judges were ignoring the spirit and intent of national legislation, the governing body of the judiciary, the National Justice Council (*Conselho Nacional de Justiça* - CNJ), was convinced by NGOs active in promoting criminal justice reforms and prisoners' legal rights to introduce new procedures that would oblige judges to justify the necessity of preventive detention in each case (Macaulay, 2018). In 2015, backed by the Ministry of Justice, the CNJ introduced compulsory custody hearings (*audiências de custódia*), requiring law enforcement authorities to bring suspects arrested in flagrante before a judge within 24 hours. The hearings are intended to uncover abuse or torture by police, and a decision is made immediately about bail conditions, whereas previously suspects would have waited an average of six months in pre-trial detention for a first hearing. Reducing the pre-trial prison population was also seen as means of regaining governance over parts of the carceral space: it was a notorious outbreak of gang violence, gruesome murders and escapes in Maranhão that led that state to pilot these hearings in October 2014. However, as with the previous initiatives, the system absorbed and adapted in order to maintain the *status quo ex ante*. CNJ data shows that 60 per cent of prisoners are still remanded in custody, and only one per cent are released without any conditions at all. The hearings and outcome are public and so have been the subject of both observational studies and quantitative analysis, which revealed that they are conducted in a formulaic manner that still does not pay attention to the individual cases, and routinely ignores illegalities in the arrest (abuse, lack of evidence) that they were intended to flag up (Instituto Pro Bono, 2018). Judges are, in effect, practising *Täterstrafrecht*, a German legal term for offender-based criminal law that criminalises the actor, rather than the act.

And, of course, there is considerable variation across the country. Unusually for a large federal country, Brazil has a single, national criminal code. However, its criminal justice agencies are governed by the relevant political and judicial authorities in the 26 states and the Federal District. This decentralisation produces a high degree of autonomy and discretion, and quite localised judicial cultures, institutional mechanisms and informal practices. For example, the legal culture in São Paulo state has long been known as one of the most punitivist in the country (Koerner, 2005). This *paulista* judicial culture is maintained by a process of professional socialization among prosecutors and judges, through attending the same prestigious law school, personal networks and patronage. This culture can be seen reflected in the higher sentences handed down for drug offences, even though the seriousness of these offences is lower than elsewhere (Semer, 2019). Their preference for incarceration is also institutionally maintained by two filter mechanisms unique to the state. Since 2013 the São Paulo appellate court has exercised direct control over the entrance and exit portals to the prison system through the police investigation department (*Departamento de Inquéritos Policiais* - Dipo), and the sentence serving department (*Departamento Estadual de Execução Criminal* -- Deecrim). In the first, judges oversee cases of police in flagrante arrests, including the resultant custody hearings, and police crime investigations (except of murder or misdemeanours), which are then distributed to the courts to try. In the second, judges make decisions on petitions for regime progression, benefits, parole and release. The appointment of these judges is at the discretion of the appellate court, and therefore judges are selected, or removed, at will on the basis of their alignment with the state judiciary's maximalist position on incarceration

(Zapater 2015). For example, the appointment of a 'tough' judge at the end of 2017 saw the proportion of pre-trial prisoners remanded in custody rise markedly under her tenure. Judge Patrícia Álvarez Cruz had a clear position that the common judicial practice of dismissing 'trivial' offences (known as the *princípio de insignificância*) had no basis in law: she herself was notorious for having jailed a woman for the theft of a bottle of shampoo and conditioner.[6] My personal observations of custody hearings in São Paulo in this period confirmed this pattern of excessive control even of those accused of the most minor crime. One case I witnessed involved the theft of a salami from a supermarket, but as it was a repeat offence the judge, prosecutor and public defender engaged in debate about the need for preventive detention. In the end the homeless person accused of the theft was required to report to a police station once a month until trial.

This philosophical orthodoxy in the judiciary is applied when policing its own ranks. In at least one instance, a judge was removed from the DIPO at the request of prosecutors for being too concerned with upholding prisoners' rights.[7] A justice in the appellate court initiated disciplinary proceedings against fellow justice Kenarik Boujikian after she signed off on the release of 11 prisoners whose pre-trial detention period had exceeded any sentence they could have received for the charges they faced. Her colleagues resented her failure to consult with them and thus allow them to veto the decision. The case was struck down by the CNJ, which will correct poor judicial decisions retroactively, but is very wary of disciplining poor judges due to the principles of federalism and judicial autonomy.[8]

Contests over prisoners and prison regimes

In 1997, I visited the Roger prison, the main men's facility in João Pessoa, the capital of the north-eastern state of Paraíba, following reports of prisoner-on-prisoner violence. On 29 July 1997 eight prisoners were brutally killed after they had taken hostages in a failed escape attempt. The military police stormed the prison before negotiations had been completed; the hostages escaped and police shot and wounded the hostage takers. Prison officers and a number of 'trustee' inmates from the kitchens then took over and used crowbars and knives to murder the eight injured prisoners. [9] This incident was typical of the intra-inmate violence in Brazilian prisons where the authorities had lost effective control of the carceral space. What was more unusual was the allegation that *defensores públicos* -- legal aid lawyers employed by the state to represent these prisoners and defend their legal rights -- had stood on a balcony overlooking the yard and egged on the violence. Two researchers from Human Rights Watch went to investigate. As they were talking to inmates in the prison yard, a *defensor* suddenly appeared, brandishing a habeas corpus decision issued by the local *juiz da vara de execução penal* (the judge and court locally designated to oversee the serving of prison sentences in that jurisdiction). This habeas corpus writ purported to 'protect'

the inmates from 'interrogation by foreign individuals'. Despite its spuriousness, the researchers were ejected from the prison.

About a month later, I went, on behalf of Amnesty International, to test whether this attempt to prevent scrutiny of the prison still stood. It did, and I sat through a tense meeting in the prison administration block in which the *defensores públicos* used the habeas corpus decision to prevent me entering the prison, to the very evident discomfort of the prison governor, who was being over-ruled in his own establishment. I then paid a visit to the local *juiz de execução penal* who had issued the decision, one Dr Hitler Cantalice.[10] White linen-suited, he was every inch the old-style *coronel*, and very aware of the discretionary patronage power that he held over the prisoners, who had to petition him, via the *defensores*, for all their entitlements, such as parole, sentence remission for work, eventual transfer to a lighter regime, and even final release. My first attempt to meet with him had failed. Although his secretary had informed us that he was 'just coming up in the lift', an hour later he had still not appeared. But sitting waiting on a sofa in his office, I overheard one side of a phone call taken by one of his staffers, which went as follows, 'Yes, yes, keep the prisoner in solitary for a few days – until the marks disappear.'

Although this incident was extreme, in one sense, and occurred over two decades ago, it is illustrative of continuing dynamics in many parts of Brazil's carceral archipelago. Rather than exercising their formally mandated roles as advocates and guarantors of the prisoners' fundamental human rights, both the *defensores* and the *juiz* were informally using their positions to act as powerful gatekeepers, standing in the way of inmates' legitimate rights claims. Prisoners indicated to me that the former had been extorting them in exchange for legal representation.[11] These judicial actors had *de facto* replaced the prison bureaucracy as the arbiters of prisoners' physical safety, and were acting in a way that contradicted their formal responsibilities as laid out in the Constitution and the law governing the serving of sentences (*Lei de Execução Penal* -- LEP). Moreover, civil society actors were actively excluded from exercising their legal independent oversight role in the prison, and this has been the pattern across Brazil. The most significant institutional shift has occurred in the *defensoria pública* which,

in the intervening years, has become a key judicial agency advocating and protecting prisoners' individual and collective rights.

The other actors in this scenario were, of course, the prisoners themselves who were dictating the life and death of other inmates. A key feature of the last two decades in the Brazilian prison system has been the shift from the apparently random chaos of prisoner-on-prisoner and state agent-on-prisoner violence to a more structured and hierarchical system of order imposed by inmate organisations in many prisons (Biondi 2015; Darke 2018; Manso & Dias 2018). Many structural factors continuing to drive ordinary inmates into the fold of these groups can be laid at the door of judicial institutions that are directly responsible for hyper-incarceration and a failure to provide legal representation, judicial oversight and physical protection. This creates a situation of two-fold 'prisoner capture'. First, punitivist legal cultures and institutions have produced mass, and very often illegal, detention of hundreds of thousands of individuals who are then left unprotected, in a situation of 'bare life'. Then, once trapped in the carceral space, they become a source of rent and manpower for the gangs and criminal groups operating inside and outside the prisons (Macaulay, 2019), as many of the chapters in this book explore. They also represent a captive audience for religious organisations, particularly the neo-Pentecostal ones that appreciate the financial benefits of converted souls.

Determining prison regimes

Once prisoners have been funneled into the penitentiary system by judges and prosecutors, those same actors have considerable power to determine the quality of the prison regime and the quality of life for inmates. Although the executive branch is responsible for maintaining security and providing infrastructure and basic services, the judiciary, as a primary 'owner' of imprisonment as a punishment and therefore of prisoners, retains a central role in the oversight regime. In Brazil several different governmental (executive and judicial) institutions are empowered to inspect penal establishments. At the state level the key bodies are the internal affairs department of the prison administration, the

prosecutor's office, *juizes de execução penal*, and, since 2010, the *defensoria pública*. The last three have a potential conflict of interest, as they are involved in prisoners' parole and transfer hearings, which may impinge on the impartiality with which they treat prisoners' complaints, whilst the internal affairs department cannot be considered independent and is structurally prone to collusion with the state prison authorities.

The *juizes de execução penal* are legally required to inspect local prisons once a month and tend to the collective concerns of prisoners, but they also have discretionary power over individual prisoners, conceding or deny specific benefits, as the Roger incident above illustrates. In the two dozen or so interviews I have conducted with such judges around the country, they fall into two camps. Some -- a minority -- embrace their responsibility and become supporters of greater civil society involvement (Valois & Macaulay 2017). Such *garantista* judges often find themselves at odds with the judicial and law enforcement establishment locally, and suffer petty persecutions and legal harassment, for 'siding with the prisoners'.[12] For example, when a judge inspects a prison and orders it shut down immediately, the prison bureaucracy resists compliance because the constant overcrowding of facilities leave it few options. But most judges remain completely uninterested, take on the function of the *execução penal* as part of their career trajectory and set foot in the prisons in their jurisdiction only when forced to (for example, after an outbreak of violence). They are reactive, not proactive, bureaucratic, and apparently oblivious to the actual penal regime that they are meant to be supervising, whose normative parameters are laid out in Brazil's 1984 *Lei de Execução Penal*. During my research into small prisons in São Paulo state co-governed in a state-civil society partnership I sat through the inspection visit of the two *juizes corregedores* from the state appellate court. They neither toured the prison nor spoke to prisoners but focused solely on minor flaws in the prison's paperwork. Some local judges never visited at all and declined to use the purpose-built rooms designed for court hearings or business related to sentencing, insisting that prisoners be escorted to the courthouse by the police, thus creating a barrier to prisoners' claiming their rights. Whilst decentralisation of *execução penal* creates a very dispersed and heterogeneous field that is hard to evaluate, the centralisation of this function, as in the Deecrim in São Paulo, brings its own

dangers of orthodoxy. The relatively little ethnographical research conducted into the attitudes and practices of these judges indicates that they view the prison law as impossibly utopian, as 'an idea out of place' (Schwarz 1992). Given judges' scepticism about rules governing the formal institution, they default to an informal and collective common sense (Marques 2009). A 2002 study of 339 petitions brought to the *vara de execução penal* in São Paulo city demonstrated that even after prisoners had been sentenced, judges used their discretion to hyper-penalise, extending the original prison tariff (Teixeira & Bordini 2004).

Since the CNJ was set up as a watchdog body for the nation's judiciary as part of the judicial reform process in 2004, it has tried to compensate for the inaction of the local level judges by carrying out periodic inspections of selected prisons as well as conducting joint custodial efforts (*mutirões carcerários*), sending in teams of lawyers in to clear the backlog of pending legal problems facing detainees. Between 2008 and 2014 they examined 400,000 case files, conceded 80,000 benefits to prisoners, and released 45,000 who had exceeded the end of their sentences. These *mutirões*, which were meant to be one-off events, became routinised informal institutions that also failed to dent the level of pre-trial detention. Since 2019 the CNJ has set up a centralized database, making the tracking of prisoners' legal situation more transparent, although this does not solve the problem of highly variable and negligent action by local judges.[13]

In São Paulo, the prison bureaucracy responded to the blockages created by the judiciary by 'de-judicialising' some of the processes prescribed by the prison law. Nagashi Furukawa, state secretary for prison administration from 1999 – 2006 and himself a retired *juiz de execução penal,* introduced a computerized system that allowed prisoners to be released on time by the prison authorities, without having to wait for a judge to sign off on the paperwork. The sheer size of the carceral machine in the state of São Paulo has resulted in more extensive *de facto* dejudicalisation, as the prison bureaucracy has acquired a level of autonomy from both the political executive and the judiciary in relation to operational decisions such as transfer and movement of prisoners, and the regulation of the supply of goods to prisoners through the state, family members and, of course, the prisoner organisations (Melo 2020). Other *juizes de*

execução penal also support the transfer of certain administrative functions away from judicial actors (Valois & Macaulay 2017). The removal of such gatekeeping power elicited inevitable resistance from the state judiciary. On the other hand, it has shown little interest in exercising its legal powers of oversight, not least as this would bring it onto a collision course with the state political authority, with which it has a demonstrable relationship of accommodation and collusion (Cardoso 2018).

As noted above, the *defensoria pública* has become a counterpoint to the institutional cultures of the prosecution service and judiciary, using new legal powers to advocate for prisoners individually and collectively where other official and social oversight bodies had made little discernible difference. Despite the *defensoria pública* being listed in the 1988 Constitution as a key judicial function, not all states had one until 2012, and it was only in 2004 that a constitutional amendment guaranteed its 'administrative and functional autonomy' putting it, in principle, on a par with the courts and prosecution service. Even now, there far fewer *defensores* than prosecutors, with whom they do not enjoy parity of salaries, benefits or status. In the state of São Paulo, legal aid had been provided by the *Procuradoria de Assistência Judiciária*, a branch of the state prosecution service, creating a clear institutional conflict of interest. It was civil society demand that in 2006 created an independent *defensoria pública* which increasingly adopted an activist stance, aiming to see all incoming remand prisoners within two weeks in order to get them released on bail.[14] In 2007 the law changed nationally to allow the *defensorias públicas* to engage in class actions (civil legal action), an area previously the preserve of the prosecution service, which naturally opposed the change as encroaching on its legal prerogatives. This boost to their powers has seen the *defensorias públicas* in São Paulo and Rio de Janeiro file many successful lawsuits, for example in relation to health care provision to prisoners. This is a means both of jousting with a largely unresponsive executive branch (the prison administration) and getting around judicial vetoing of other instruments such writs of mandamus (which order public bodies to do their job properly), and the inaction and collusion of the *juiz corregedor de presídios* with the prison bureaucracy and judiciary.

Non-state actors and incarceration

A number of non-state actors have also become involved in the prison system. Some play no role in sentencing and imprisonment but exercise oversight functions, whilst others get involved in the delivery of prison regimes. In recent years the Brazilian Bar Association (*Ordem dos Advogados Brasileiros* – OAB) has become a lot more proactive in monitoring prisons, with dedicated committees in every state branch. These undertake legal actions, get involved with state penitentiary councils and even run rehabilitation projects. This contrasts with the weakening of the activity of other civil society actors such as the Catholic Church's ministry to prisoners (*Pastoral Carcerária*) and the civil society community councils (*conselhos da comunidade*) which, according to the prison law, can be set up in any jurisdiction with a prison at the discretion of the local *juizes de execução penal*. The councils' lack of legal autonomy and resources, subordination to the local judge and territorial fragmentation mean that they have not 'laid claim' to prisoners in the manner of other civil society actors. There are very few studies on how they function and their effectiveness and a national initiative to support and empower them fizzled out as they were increasing encouraged to focus on service provision to prisoners exiting the system, rather than on oversight (Ministério da Justiça 2010).

The OAB, on the other hand, has a formal national, state-level and municipal structure and membership giving it a presence in every locality with a prison and a reach and clout like no other civil society organization. Undeniably, its members have a professional vested interest in the prison system, often being paid by the state to provide private legal aid, and thus form part of the 'crime industry' (Christie 2000). However, state-level *defensorias públicas* have fought legal battles to release themselves from contractual obligations to recruit auxiliary lawyers only from the OAB's ranks. This separation and the OAB's increasing activism in the prison field has encouraged the two bodies to collaborate on class actions and structural issues. For example, during the Covid-19 pandemic the OAB used the latter's inspection reports of health conditions in prison facilities to serve compliance notices on the state prison authorities in São Paulo.[15]

When it comes to the *direct* management of prisons, penal regimes and prisoners, a variety of non-state actors are now competing with the state and prisoner organisations. The sheer size of the prison population and estate in Brazil offers commercial opportunities, chiefly for the supply of services to the sector. Bid-rigging in procurement auctions to provide meals to prisons has been perennial, right across the country, and results generally in extremely poor-quality food and significant overcharging. For instance, in February 2020, police investigated the food contract awarded by Rio Grande do Norte, a state with one of the most chaotic prison systems, where gang-related massacres broke out in January 2017, discovering that the winning bid should have been disqualified and would have cost an excess £2 million a year.[16] Yet, despite the honeypot potential of the prison sector and some flagship projects, privatisation of prisons in Brazil has not progressed far. The first prison governed under public-private prison co-administration opened in 1999 in the state of Paraná. By 2020, there were still only 32 such units. Most operate in a hybrid arrangement (termed *co-gestão*) that sits somewhere between the US and the European models of privatization, with the state financing construction of the prison, providing the warden, deputy warden, and head of discipline inside the facility and state military police for external security, and retaining ownership of the infrastructure. The private firm provides the in-prison services and the guards. Public sector cash flow problems then led to Brazil's

first public-private-partnership (PPP) prison opening in January 2013 in Belo Horizonte, the capital of Minas Gerais state, operated by a consortium of five companies. Two factors could drive greater private sector interest in Brazil's mass incarceration. The first is the ongoing fiscal crisis, which would favour a PPP model. The second is the lobby power of the private security providers in a congress that saw the highest ever number of legislators linked to law enforcement (many former police officers) enter in 2018, on the coattails of President Jair Bolsonaro. There is sympathy for privatisation in a right-leaning congress, but little coherent direction in government driving this agenda. Perhaps the most significant blockage to private sector prison expansion, however, is the presence of the prisoner *comandos*, which the state tolerates as informally institutionalised co-administrators of the prison environment (Dias, 2013).

One of the novelties in the Brazilian penal landscape is the partnership between the state and not-for-profit civil society groups in the running of some smaller local prisons. In 1972, in São Paulo state, a group of Catholic laymen formed an NGO, the Association for the Protection and Assistance of Prisoners (APAC), to provide services to detainees in the local lock-up. From 1984, they formally ran the jail without guards, with security provided by the inmates. The model was replicated and institutionalized in São Paulo state by Dr Furukawa, who established 22 similar small prisons, known as Resocialization Centres (*Centros de Ressocialização* - CRs). In these the state provided the infrastructure, guards and external security whilst the partner NGO handled the day-to-day running of the prison and rehabilitation of prisoners. Unlike the APACs, the CR model did not stress religious conversion as the keystone of rehabilitation, and it sought to work with, not as an alternative to, the state (Macaulay, 2015).[17] Meanwhile the original APAC group moved to Minas Gerais state, found support among justices in the state appellate court, and is being replicated in various states in Brazil (Darke, 2015). There is interest in the Bolsonaro administration in the model, very likely because its emphasis on religiosity. The model will only ever cater to a very tiny minority of prisoners in Brazil and will not affect the dispositions governing the prison experience of the mass of inmates. Much more significant within the mainstream prison system is the growing presence of neo-Pentecostal groups. These evangelical ministries are double-edged – on the one hand conversion offers community and spaces that constitute a socially acceptable exit escape from the endemic violence of prison and gang life. On the other hand, as others in the volume point out, they also function as partners to both the *comandos* and the state prison bureaucracy for the purposes of social control. The neo-Pentecostal groups are increasingly enjoying privileged access to prisons and prisoners. The most organized and hegemonic churches, such as the Universal Church of the Kingdom of God, have the resources to pursue this a clear national strategy of recruitment, in much the same way as the *comandos* do, tying together their expansion inside and outside the prisons. Both levy dues on these members so, for both, the lost souls in the prison system and their families are a source of rent and influence.

In summary, the carceral field, both inside and outside the prisons, is complex, with a multitude of state-sector and non-state actors interacting, sometimes competing, sometimes colluding, in the maintenance of many illegal and dehumanizing forms of incarceration. There is a dynamic process whereby the creation of new laws, procedures and mechanisms, as a formal response to over-incarceration and its consequences, is met by informal practices of neutralization and even subversion. As Darke (2018, 69) notes, there are still very few ethnographic studies of the 'institutional culture of penal policy makers.' As this chapter has demonstrated, these cultures are plural, overlapping, and contradictory, and intersect in ever mutating ways with intra-mural prisoner survival strategies in Brazil's vast and troubling carceral spaces.

REFERENCES

Amnesty International. (1999) *No one sleeps here safely*. London: Amnesty International.

Biondi, Karina. (2016). *Sharing This Walk: An Ethnography of Prison Life and the PCC in Brazil*. Chapel Hill: University of North Carolina Press.

Boiteux, Luciana. (2010). 'Drugs and prisons: the repression of drugs and the increase of the Brazilian penitentiary population' in WOLA (ed.) *Systems overload: Drug laws and prisons in Latin America*. Washington DC: Washington Office on Latin America.

Cardoso, Luciana Zaffalon Leme. (2018). *A politíca da justiça: Blindar as elites, criminalizar os pobres*. São Paulo: Hucitec.

Carvalho, S. (2010). *O papel dos atores do sistema penal na era de punitivismo (O exemplo privilegiado da aplicação da pena)*. Rio de Janeiro: Editora Lumen Juris.

Casara, Rubens R. R. (2015). *Mitologia processual penal*. Rio de Janeiro: Saraiva.

Christie, Nils. (2000). *Crime control as industry: Towards gulags, western style*. London: Routledge.

Darke, Sacha. (2015). 'Recoverers helping recoverers: discipline and peer-facilitated reform in Brazilian faith-based prisons,' in Vivien Miller & James Campbell (Eds), *Translating penal cultures: New perspectives on discipline, punishment and desistance* Routledge, London

Darke, Sacha. (2018). *Conviviality and survival: Co-Producing Brazilian prison order*. London: Palgrave Macmillan.

Dias, Camila Caldeira Nunes. (2013). *PCC: Hegemonia nas prisões e monopólio da violência*. São Paulo: Editora Saraiva.

Helmke, Gretchen & Steven Levitsky. (Eds) (2006). *Informal institutions and democracy: Lessons from Latin America*. Baltimore MD: Johns Hopkins University Press.

Instituto Pro Bono. (2018). *Audiências de custódia: Pensando estratégias de combate ao encarceramento provisório: Dossiê*. São Paulo: Instituto Pro Bono.

ITTC and Pastoral Carcerária Nacional (2012) *Tecer justiça: Presas e presos provisórios da cidade de São Paulo*. São Paulo: Instituto Terra, Trabalho e Cidadania.

Koerner, Andrei. (2005). 'Judiciário, juizes e prisões em São Paulo nos anos noventa' in André-Jean Arnaud (Ed.) *Globalização e direito I: Impactos nacionais, regionais e transnacionais*. Rio de Janeiro: Editora Lumen Juris.

Lemgruber, Julita, Marcia Fernandes, Ignácio Cano & Leonarda Musumeci. (2013). *Usos e abusos da prisão provisória no Rio de Janeiro: Avaliacão do impacto da lei 12.403 2011*. Rio de Janeiro: ARP and CESeC.

Lima, Roberto Kant de. (2010). 'Sensibilidades jurídicas, saber e poder: Bases culturais de alguns aspectos do direito brasileiro em uma perspectiva comparada.' *Anuário Antropológico*, II: 25-51.

Macaulay. Fiona. (2015). '"Whose prisoners are these anyway?" Church, state and society partnerships and co-production of offender "resocialization" in Brazil' in Vivien Miller and James Campbell (Eds) *Translating Penal Cultures: New Perspectives on Discipline, Punishment and* Desistance. London: Routledge.

Macaulay, Fiona. (2018). 'Non-governmental organisations and the rule of law: The experience of Latin America' in Christopher May and Adam Winchester (eds) *The Edward Elgar Research Handbook on the Rule of Law*. New York: Edward Elgar.

Macaulay, Fiona. (2019). 'Prisoner Capture: welfare, lawfare and warfare in Latin America's overcrowded prisons' in Rachel Sieder and Karina Ansolabehere (eds) *Routledge Handbook of Law and Society in Latin America*. New York: Routledge.

Machado, M.R., de Souza Amaral, M.C., de Barros, M. & de Melo, A.C.K. (2019). Incarcerating at any cost: drug trafficking and imprisonment in Brazilian court reasoning. *Journal of Illicit Economies and Development*, *1*(2), 226–237.

Manso, Bruno Paes & Camila Caldeira Nunes Dias. (2018). *A guerra: A ascensão do PCC e o mundo do crime no Brasil*. São Paulo: todavia.

Marques, Gessé. (2009). 'A lei de execuções penais e os limites da interpretação jurídica.' *Revista de Sociologia Política* 17, No 33: 145-55.

Melo, F.A.L. (2020). *A burocracia penitenciarista: Estudo sobre a configuração da gestão prisional no Brasil*. Curitiba: Brazil Publishing

Ministério da Justiça. (Ed.) (2010). *Fundamentos e análises sobre os conselhos da comunidade*. Brasília: DEPEN/OSPEN.

Schwarz, Roberto. (1992). *Misplaced Ideas: Essays on Brazilian Culture.* London: Verso.

Semer, Marcelo. (2019). *Sentenciando tráfico: O papel dos juízes no grande encarceramento* São Paulo; Tirant Lo Blanch.

Teixeira, Alessandra & Eliana Blumer Trindade Bordini (2004) Decisões judiciais nas Varas de Execuções : punindo sempre mais. *São Paulo em Perspectiva* 18(1): 66-71.

Valois, Luis Carlos. (2016). *Direito penal da guerra às drogas.* Belo Horizonte: Livraria D'Plácido.

Valois, Luis Carlos & Fiona Macaulay (2017) 'O judiciário e a crise do sistema penitenciário (entrevista)' *Revista Brasileira de Segurança Pública* 11 (2): 78-87.

Zapater, Maíra (2015) 'Gargalos tampados.' *Boletim IBCCrim*. v. 23, No. 270: 9-11.

NOTES

[1] The court's ruling in favour of ADPF 347 is available at http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=10300665

[2] This legislation is tracked and analysed annually by NGO Instituto Sou da Paz.

[3] Most *in flagrante* arrests are made by the uniformed military police, who patrol the streets. Further evidence would be conducted by the civil (investigative) police.

[4] Under the heinous crime law, those convicted of criminal conspiracy are not eligible for parole, early release or regime progression, thus filling up the maximum security prisons with small-time drug users/dealers.

[5] It was often applied in cases of 'no fixed abode' or the lack of a recognised address, as would be the case of those living in informal settlements.

[6] https://www.conjur.com.br/2018-fev-18/entrevista-juiza-patricia-alvarez-cruz-chefe-dipo-sp

[7] The case was of judge Roberto Luiz Corciolli Filho, who was rotated away from the criminal courts, against his will

[8] https://www.conjur.com.br/2017-ago-29/10-votos-cnj-anula-condenacao-juiza-kenarik-boujikian

[9] This incident was followed by more violence in the prison, leaving 11 dead and scores injured over a three-month period. During a riot on 8 September 1997, 89 prisoners were stabbed and beaten by other inmates. (Amnesty International 1999: 8)

[10] This was his real given name. Apparently his mother had named his two other brothers Gandhi and Luiz Gonzaga (after a very well-known north-eastern country singer).

[11] I managed to speak in English to one Caribbean inmate, and afterwards was handed a sheaf of handwritten letters from the prisoners, passed on by a local politician.

[12] Examples are Luis Carlos Valois in Amazonas and João Carlos Buch in Santa Catarina.

[13] https://www.cnj.jus.br/sistema-carcerario/mutirao-carcerario/

[14] Interview with *defensoria pública* staff in São Paulo, September 2014.

[15] https://www.oabsp.org.br/noticias/2020/05/oab-sp-e-sua-comissao-tematica-agem-para-resguardar-o-direito-a-saude-tambem-no-sistema-penitenciario.13524

[16] https://g1.globo.com/rn/rio-grande-do-norte/noticia/2020/02/07/policia-investiga-se-houve-improbidade-em-licitacao-que-geraria-prejuizo-de-r-12-mi-ao-ano-aos-cofres-publicos-do-rn.ghtml

[17] Over the years the APAC acronym has stood for a number of very slightly different names, now most commonly *Associação de Proteção e Assistência ao Condenado.* Some confusion is caused by some of the NGOs working in the CRs in São Paulo state having adopted the APAC acronym.