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One in five: The crisis in Brazil's prisons and criminal justice system

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Executive summary

The number of prisoners and pre-trial detainees in Brazil is rising rapidly and there is widespread agreement that the current criminal justice and penal system is dysfunctional. In November 2009, the National Council of Justice announced that out of the cases it has reviewed so far, one in five pre-trial detainees have been imprisoned irregularly, which suggest that the nationwide problem is extremely serious. The Brazilian criminal justice and penal system has been the subject of numerous expert reports denouncing its failings, and there have also been ad hoc attempts to deal with different aspects of its problems. The system also appears to violate Brazil's own laws and constitutional provisions for the protection of human rights. While formally committing itself to extensive protection of the rights of its citizens, the Brazilian Government claims that hostility to the concept amongst its own officials and a large section of the public is one of the key impediments to criminal justice reform.

The first section of this report provides a summary overview of numerous recent reports and studies by UN monitoring bodies as well as international and national human rights organisations into the violations of rights that are being perpetrated by and in the Brazilian penal system. The overall trend within the Brazilian criminal justice system is to sentence more defendants to prison than are being released, which has overwhelmed the capacity of the already overcrowded penal system – this looks set to continue. A huge backlog of cases has built up leading to increasing delays in the court system, and over 80 per cent of prisoners cannot afford a lawyer. Many people are imprisoned irregularly, spend years in pre-trial detention or remain in prison after the expiry of their sentence due to bureaucratic incompetence or systemic failings. Severe overcrowding, poor sanitary conditions, gang violence and riots blight the prison system, where ill-treatment, including beatings and torture, are commonplace. Although the government has announced several reforms to tackle the problems identified, in practical terms little has changed over the last decade. This suggests that the failings are deep-rooted and systemic, so need to be addressed in a holistic way.

The second section of this report describes the formal protection of human rights in the Brazilian criminal justice system, but also explains why these guarantees remain largely on paper. An understanding of why the Brazilian state appears to violate so many of the human rights that its own laws and Constitution guarantee requires some description of the historical political context in which the relationship between them developed. This took on a critical importance during the transition from dictatorship to democracy and its legacy continues to strongly influence Brazilian society and politics, with many Brazilians associating the transition to democracy with the large increase in violent crime that has occurred in the country.

The third section focuses on the institutions constitutionally mandated to protect human rights within the Brazilian criminal justice system. While Brazil's current Constitution and many of its laws provide extensive protection, the institutions charged with upholding these rights often fail to do so. This may be because many of these corporatist institutions remain largely unreformed from the dictatorship era and have sought to shield themselves from democratic scrutiny and control.

The final section describes some of the local initiatives that have been undertaken to bring justice closer to the people in Brazil. An effective reform strategy must deal with the issue of criminal justice

reform comprehensively. The problems regarding access to justice in pre-trial detention cannot be treated in isolation from the context of the crisis in the Brazilian criminal justice system, and the broader problem of tackling crime in society. Focusing on trying to fix one specific area, through new laws or the creation of new institutions, could make the current situation worse by adding fresh layers of bureaucracy and confusion to an already dysfunctional system. This report argues that more effort needs to be put into making the existing parts of the system work better together and encouraging the development of incremental, community-led and home-grown reform.

Defensoria Pública is the body constitutionally-mandated to provide free legal assistance to those who need it, and the International Bar Association's Human Rights Institute strongly endorses the repeated calls that have been made for this to be strengthened. There are also a variety of other groups attempting to develop responses to the current crisis within their criminal justice system. Supporting their creative ingenuity to 'find a way around the obstacles that exist' (*jeitinho brasileiro*) should be an essential part of the reform process.

Chapter One

Access to Justice in Pre-Trial Detention – A Growing Crisis

1.1 Introduction

Brazil's prison population in September 2009 was 472,482, making it the fourth highest in the world.[1] Of this, 264,940 were sentenced prisoners and 207,542 – or 44 per cent – were being held in pre-trial custody. The number of prisoners in Brazil is increasing rapidly and the proportion of pre-trial detainees is also growing.[2] In 1995 there were around 106,512 sentenced prisoners and 42,248 pre-trial detainees.[3] This means that the total number of prisoners has more than trebled and the number of pre-trial detainees has more than quadrupled in the last 14 years.

This has overwhelmed the capacity of the already over-crowded Brazilian penal system. According to the Brazilian Government's National Penitentiary Department (DEPEN), in June 2008 the number of people being incarcerated exceeded the design capacity of Brazil's prisons by 40 per cent, and the number of prisoners was increasing by approximately 3,000 per month.[4] Although there is a significant prison building programme underway, this has not alleviated the problem. Indeed it may actually be encouraging the increasing use of pre-trial detention and the handing out of more and longer custodial sentences by judges. The overall trend within the Brazilian criminal justice system is to sentence more defendants to prison than are being released, so the number of prisoners looks set to continue increasing for the foreseeable future.

The courts are also being overwhelmed with the number of cases that they have to deal with. A huge backlog has built up leading to increasing delays in the conduct of trials. It is a routine practice for judges to hear several criminal cases in a single day, which may significantly affect the quality of their judgments and prejudice the rights of defendants.

The National Council of Justice (*Conselho Nacional de Justiça – CNJ)* has created an ad hoc initiative called the *mutirão* (literally, 'the help that members of a family give to one another'), in an effort to deal with this backlog. Coordinated by a small team based in Brasília, the *mutirão* is composed of groups of judges, drawn from different areas, who are assembled in a single state to re-examine its case-load. The aim is to work their way through all of Brazil's 27 states, prioritising the most serious problems. The *mutiroes* are logistically difficult to organise because they require the assembly

1 Figures supplied by *Conselho Nacional de Justiça,* 'The Brazilian Prison System', CNJ, 25 November 2009.

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

3 Pre-trial detainees fall into one of four categories: (i) detainees who have been formally charged and are awaiting the commencement of their trial; (ii) detainees whose trial has begun but has yet to come to a conclusion whereby the court makes a finding of guilt or innocence; (iii) detainees who have been convicted but not sentenced; and (iv) detainees who have been sentenced by a court of first instance but who have appealed against their sentence or are within the statutory time limit for doing so.

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

of groups of judges, prosecutors, defenders and other lawyers in a particular state for a period of time. They also distort the existing work of the judiciary and, by their nature, can only be a stop-gap solution to the underlying problem. At the same time, the initiative has revealed the extent of the crisis within the Brazilian criminal justice system.

1.2 Pre-trial detention, access to legal representation and the criminal justice system

In November 2009 the CNJ announced that, after examining 83,803 cases, the *mutiroes* had freed 16,466 people who had been imprisoned irregularly.[5] This was almost 20 per cent of the total case-load that they examined, or one in five pre-trial detainees, which suggests that the nationwide problem is extremely serious. A further 27,644 were found to be being held at inappropriate security levels. The *mutiroes* found hundreds of people who had spent far longer in pre-trial detention than they could have expected to serve as sentenced prisoners. One person had spent 11 years on remand and the *mutiroes* found many people who had spent five or six years in pre-trial detention. Others had served out their full sentences, but had not been released due to bureaucratic incompetence. In one state, Bahia, the *mutirão* discovered that while the prison authorities had recorded a prison population of 10-11,000 in January 2009, there were actually around 15,000 people in detention facilities.[6] The reason for these irregularities is discussed further below, but it suggests that a significant proportion of the people in prison in Brazil at the moment should not be there. This is a fundamental violation of their human right to liberty.

An analysis of the pattern of pre-trial detention in five Brazilian cities, carried out by Fabiana Oliveira Barreto, a Brasília-based public prosecutor, found that the courts are systematically violating the presumption of innocence, one of the principles regarding pre-trial detention on which the Brazilian criminal justice system is based. She found that, between 2000 and 2004, judges were routinely imprisoning large numbers of people who had been accused of larceny (petty theft), even though this is an extremely minor offence. In some courts over a third of those detained on this charge had spent more than 100 days in custody and many spent longer on remand than the custodial sentences that they eventually received.[7] The study showed that the use of pre-trial detention varied significantly in different parts of the country and seemed to be related to a number of subjective factors, such as the attitude of particular judges. While in Porto Alegre in the south the incarceration rate for people arrested *em flagrante* ('caught-in-the-act') for this crime was around 30 per cent it rose to 90 per cent in the northern city of Belém.

According to Rogerio Schietti Machado Cruz, a former General Prosecutor of the Brasília Federal District, judges are making increasing use of pre-trial detention because the criminal justice system is unable to process cases efficiently.[8] He argues that the lengthy and drawn-out nature of Brazil's judicial trials and appeals has led to increasing public pressure for the imprisonment of people suspected of criminal activity even before they have been tried and sentenced. This has caused judges to abandon the presumption of innocence, despite its protection within Brazil's Constitution as a corner-stone of the criminal justice system. Both studies argue that judges are using the broad discretionary powers that Brazilian law gives them to order the pre-trial detention of certain

5 *Dados atualizado mutirao carcerario,* CNJ, 5 November 2009.
6 Interviews conducted with CNJ officials in November and December 2009.
7 Fabiana Costa Oliveira Barreto, *Flagrante e Prisao Provisoria em casos de furto, da presuncao de inocencia a antecipacao de pena,* Instituto Brasileiro de Ciencias Criminais, 2007.
8 Rogerio Schietti Machad Cruz, *Prisao Cautelar: dramas, principios e alternatives,* Lumen Juris Editora, 2006

categories of people, in response to societal prejudices and anxieties about certain types of crime.

Research carried out by the *Instituto de Defesa do Direito de Defesa* (Institute for the Defence of the Right to a Defence) into 6,500 cases of robbery in the state of São Paulo in 1999-2000 showed that in around 98 per cent of all cases, defence lawyers did not file for the release of their clients who were arrested *em flagrante*.[9] Defence lawyers made requests for provisional liberty on behalf of their clients in only 23.8 per cent of the cases after the initial police inquiry had concluded but before the full trial had begun. It also claimed that defence lawyers were not even present during 21.8 per cent of cases in which their clients made their first appearance before a judge – despite the fact that this should render all subsequent proceedings null and void. In 96 per cent of the cases analysed the defendants were subsequently convicted and 77 per cent of them were sentenced to 'closed prison' regimes.

However, the Brazilian criminal justice system appears to be as bad at punishing the guilty as it is at protecting the innocent. Although it is impossible to obtain accurate up-to-date figures, it appears that tens of thousands of people who are sentenced to imprisonment do not actually serve their terms, due to the protracted nature of the legal processes, administrative inefficiency within the system and poor security.[10] The formal rights which Brazilian criminal justice laws grant to criminal suspects provide extensive opportunities for those who can afford private lawyers to challenge the system. Although these rights are theoretically guaranteed to all prisoners, and are often cited by those advocating a 'harsher' approach to crime prevention, they are in practice denied to the vast majority. Over 80 per cent of prisoners in Brazil cannot afford to hire a lawyer.[11] As will be discussed later in this report the constitutional guarantee that everyone accused of a crime has a right to legal assistance is routinely violated.

In October 2009 *Associação dos Magistrados Brasileiros*, (AMB) published a piece of research by Maria Tereza Sadek, a professor of political science at the University of São Paulo, which showed that bad management was as big a problem within the Brazilian judiciary as lack of resources.[12] Drawing on CNJ's archives for cases from 2004-2008, the report demonstrated that courts with larger budgets or smaller case-loads were not necessarily processing cases more efficiently. She found that there was a lack of proper financial planning and funds were often not spent in areas of greatest need on front-line services. Judges had little control over expenditure in their own courts and most did not even know the financial breakdown of their own budgets. Sadek argued that the Brazilian judicial system was in need of modernisation and greater professionalism, which should include training in financial management.

The penal system is also intrinsically elitist with certain social categories of prisoners – such as those who have obtained a University degree or worked for certain categories of public service jobs – having the right to separate cells and transport arrangements from the rest of the prison population. The phrase of a former Brazilian president 'for my enemies the law, for my friends anything' is widely regarded to be an informal motto of criminal justice in Brazil.[13] Brazilians hold their judiciary in very low regard, according to public opinion polls, blaming it for this combination of injustice and

9 *Decisoes judiciais no crimes do roubo em Sao Paulo,* Instituto de Defesa do Direito de Defesa e Instituto Brasileiro de Ciencias Criminais, no date.
10 This estimate comes from interviews conducted during the research for this report with the Ministry of Justice and the National Justice Council in Brazil.
11 Amnesty International, *Brazil: 'No one here sleeps safely' : Human rights violations against detainees,* AI Index: AMR 19/009/1999, 22 June 1999.
12 *JusBrasil Noticias,* '*Estudo de Maria Tereza Sadek, encomendado pela AMB, revela realidade do Judiciário brasileiro*', 29 October 2009.
13 Fiona Macaulay, 'Democratisation and the judiciary', in Maria DiAlva Kinzo and James Dunkerley, *Brazil since 1985: economy, polity and society,* Institute of Latin American Studies, 2003, p.93.

impunity.[14] The view that 'the police arrest criminals and the judges let them go' is a fairly widely held prejudice in some sections of society and the increasing use of pre-trial detention by some judges could partly be a response to this pressure. Distrust of the effectiveness of the judicial system could also be one of the underlying reasons why the Brazilian police kill rather than arrest so many criminal suspects.[15]

Keeping people in pre-trial detention also means that they do not benefit from the progressive reduction of security that occurs for most sentenced prisoners, which should move them towards more open regimes. Many pre-trial prisoners are being held in police stations and lock-ups, due to prison over-crowding. These are not designed as jails, and are rarely equipped with proper facilities for holding people in long-term custody, which increases the risk that inmates will be subjected to mistreatment.[16]

Brazil's criminal gangs recruit most of their members in prison and organise many of their activities from there. The large recent increase in the number of people who are being held in pre-trial custody, often only charged with relatively minor offences, is likely to strengthen the influence of these gangs and make the prisons more difficult to control. It costs money to keep people locked up and money spent on prisons cannot be spent on developing alternative programmes which have been shown to be cheaper and more effective in reducing crime levels. Imprisoning people for relatively minor offences has also been shown to be counterproductive and more likely to turn them into repeat offenders than a non-custodial sentence. There are, therefore, strong utilitarian reasons for trying to reduce the number of people that are sent to prison in Brazil and to use imprisonment only as a last resort.

The detention of increasing numbers of people who are only accused of minor offences – and have often not even been found guilty of them – is also aggravating the problem of prison over-crowding. Given the appalling conditions in Brazilian prisons, this should be a particular cause for alarm. As will be discussed further below, there are serious systematic problems in the management of Brazil's penal system.

1.3 Human rights abuses in the Brazilian penitentiary system: violence, overcrowding and gang culture

Numerous reports by UN monitoring bodies and international human rights organisations have drawn attention to the problems in the Brazilian criminal justice system in general and the increasing use of pre-trial detention in particular.[17] In 2007 the UN High Commissioner for Human Rights, for example, noted that the widespread use of pre-trial detention called for special attention.[18] The UN Committee against Torture has expressed concern about the long periods of pre-trial.[19] The UN Human Rights Committee has also condemned 'inhuman conditions' of detention in jails and

14 A Brazilian Judges' Association surveys show that citizens lack faith in the judiciary and consider it corrupt, slow, and mysterious. *AMB, Pesquisa qualitativa "Imagem do Poder Judiciário"*, Brasília, 2004, p. 61.

15 See for example, *Lethal Force: Police Violence and Public Security in Rio de Janeiro and São Paulo*, Human Rights Watch, 2009

16 One visit to a police lock-up in Rio during the research for this report showed conditions that fit the general pattern described at greater length here.

17 *Compilation prepared by the Office of the High Commissioner for Human Rights, in accordance with paragraph 15(b) of the annex to human rights council resolution 5/1*, Working Group on the Universal Periodic Review First session Geneva, 7-18 April 2008, A/HRC/WG.6/1/BRA/2, 31 March 2008, para 15.

18 UN OHCHR Press release, 6 December 2007.

19 Concluding observations of the Committee against Torture, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 44* (A/56/44), para. 119 (c).

delays in judicial procedure.[20] The Inter-American Commission of Human Rights has issued two precautionary measures against Brazil regarding prison conditions, one in 2009 and one in 2007.[21] A number of reports have also described the abuses in detail.

In a report of a visit to Brazil in 2007, for example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, stated that the occupancy rate in prisons was often three or more times as many prisoners as the facility was designed to hold and that the number of prisoners killed in custody was a 'major problem'.[22] He noted in his preliminary report that:

> 'The frequency of riots and killings in prisons is the result of a number of factors. Severe overcrowding in prisons contributes to inmate unrest and the inability of guards to effectively prevent weapons and cell phones from being brought into prisons. Low levels of education and work opportunities also contribute to unrest, as does the failure to ensure that inmates are transferred from closed to open prisons when they are entitled to do so. Delays in processing transfers, combined with warden violence and poor conditions, encourage the growth of gangs in prisons, which can justify their existence to the prison population at large by claiming to act on behalf of prisoners to obtain benefits and prevent violence.'[23]

The Special Rapporteur also noted that:

> 'There are many bodies with the power to investigate prison conditions, but none does its job adequately. This lack of external oversight permits poor conditions and abuses to continue. Requirements in some places to identify with one gang faction facilitate the growth of gang identification and gang-related activity. While some role for factions in the prison system may be unavoidable in the short term, this situation contributes to the growth of gangs and elevates crime rates more generally.'[24]

He concluded that:

> 'The many institutions required by law to monitor prison conditions, most notably including judges of penal execution, are unable or fail to play this role in any adequate manner. The number of such judges must be increased, and the manner in which they work must be greatly improved.'[25]

Alston repeated many of these points in his full report and concluded that, 'Broader crime control efforts must take into account the key role played by prisons in gang growth, and the failure of the prison system to curb the activities of organized crime.'[26] He also noted that:

> 'In most prisons, the state fails to exert sufficient control over inmates, and lets gangs (or other prisoners in "neutral prisons") sort out amongst themselves matters of internal prison security. Selected inmates are often given more power over other prisoners' daily lives than guards.

20 *Concluding observations of the Human Rights Committee: Brazil*, CCPR/C/BRA/CO/2, para. 16.
21 IACHR Precautionary Measures 2009, PC 236/08 – *Persons Deprived of Liberty in the Polinter-Neves Penitentiary, Brazil;* IACHR Precautionary Measures 2007 para 13 *Adolescents in the Public Prison of Guarujá.*
22 *Preliminary report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston Addendum, Mission to Brazil, 4-14 November 2007*, UN Doc. A/HRC/8/3/Add.4, 14 May 2008, para 16.
23 Ibid.
24 Ibid, para 17.
25 Ibid., para 21
26 *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Mission to Brazil,* A/HRC/11/2/Add.2 future, 28 August 2008, para 41.

They assume control of (sometimes brutal) internal discipline and the distribution of food, medicine, and hygiene kits. This practice often results in allowing gang-leaders to run prisons.'[27]

Even when a new inmate has no gang affiliation whatsoever, Alston noted that he or she may be required by prison administrators to pick a gang with which to be affiliated. 'A prisoner who refuses is simply assigned to a gang by the prison administration. The state practice of requiring gang identification essentially amounts to the state recruiting prisoners into gangs. Ultimately, this contributes to the growth of gangs outside prison and elevates crime rates more generally.'[28]

Alston noted that these practices were directly related to prison over-crowding and sympathised with those who defended the policy on this basis. He said that while 'rival gangs must clearly remain separated to avoid prison riots and deaths' states should create more 'neutral' prisons in which prisoners without any gang affiliation may be placed. However, the underlying issue to address is prison overcrowding.

Brazil's poor prison conditions and severe overcrowding are well-documented. The national prison population has risen sharply over the last decade, and the incarceration rate has more than doubled. The dramatic rise – caused by the slowness of the judicial system, poor monitoring of inmate status and release entitlement, increased crime rates, high recidivism rates, and the popularity of tougher law and order approaches favouring longer prison terms over alternative sentences – has resulted in severely overcrowded prisons. The prison system was designed to hold only 60 per cent of the inmates actually detained nationwide, and many individual prisons are two or three times over capacity.[29]

The violence in Brazilian prisons cannot be discussed without reference to the violence on Brazil's streets. For example, some of the criminal gangs which dominate many of Brazil's prisons first developed in response to the violence meted out to prisoners by prison warders. The *Primeiro Comando da Capital* (PCC), São Paulo's most powerful and violent crime gang, was initially formed by a group of prisoners to 'avenge the death of 111 prisoners' who were killed during the suppression of a protest in a prison called *Casa de Detenção* in Carandiru, which is described further below.

In May 2006 the PCC launched a series of coordinated attacks against police officers and prison staff in a protest over prison conditions, which resulted in around 450 killings.[30] The total death toll is unknown because the authorities have failed to adequately investigate these allegations to date. The PCC murdered over 40 law enforcement officials and prison guards in the space of a few days and the police responded by killing hundreds of suspected gang members and criminals; many of whom appear to have suffered extra-judicial executions. The PCC also carried out almost 300 attacks against public establishments. Riots were organised in 71 prisons in São Paulo which resulted in the deaths of several prisoners and prison staff. A truce ended the violence, but there were further attacks that August including the kidnapping of a journalist which forced Brazil's main television news network to broadcast a three minute video by the PCC.[31]

27 Ibid.
28 Ibid, paras 45 and 46.
29 Ibid, para 42.
30 See Sérgio Adorno & Fernando Salla, 'Organized criminality in prisons and the attacks of the PCC', in *Estudos Avançados* , 21 (61), 2007. These state that a total of 439 killings by gunfire were registered between 12 and 20 May 2006 in Coroners' offices in the state of Sao Paulo during this period. Oscar Vilhena Vieira, 'Public Interest Law. A Brazilian Perspective', in *UCLA Journal of International Law & Foreign Affairs*. 224, 2008, p.252 cites the number of retaliatory killings as 492.
31 Ibid.

The effective takeover of many Brazilian prisons by criminal gangs highlights a dramatic failure of management of the criminal justice and penal systems that has been repeatedly pointed out in the reports of monitoring bodies. For example, Amnesty International stated in a report to a UN Periodic Review Working group on the Brazil's human rights record in 2008 that: [32]

> Severe overcrowding, poor sanitary conditions, gang violence and riots continue to blight the prison system, where ill-treatment, including beatings and torture are commonplace. Figures released by the prison system showed that 30% of all inmate deaths were as a result of homicide – six times the rate in the wider population. In August, 25 inmates were burnt to death in the Ponte Nova in Minas Gerais after factional fighting. In Espírito Santo state, amid accusations of torture and ill-treatment, the government barred entry to prison cells to the Community Council (*Conselho Da Comunidade*), an officially mandated body, which under state law has the duty to monitor the prison system. In the Aníbal Bruno prison in Pernumbuco, at least three died and 43 were injured after a riot broke out in November 2007. Chronically understaffed and three times over capacity, the prison has long been subject to allegations of torture and ill-treatment. Over 60 deaths were reported in the Pernambucan prison system in 2007, more than 20 of them in the Aníbal Bruno prison.
>
> Amnesty International also received extensive reports of human rights violations against women in detention. While women make up only a small percentage of the prison population their numbers are growing. However, little or nothing has been done to address their special needs. Human rights groups in São Paulo did extensive work documenting torture, ill-treatment and cruel, inhuman and degrading conditions suffered by women in the state's detention system. In November 2007 a 15 year old girl suffered extensive sexual abuse while held in a police cell with 20 adult men for a period of a month, in the northern state of Pará.'[33]

The annual report on human rights for the US State Department, in its 2008 entry for Brazil, also observed that:

> 'Prison conditions throughout the country often ranged from poor to extremely harsh and life threatening. Abuse by prison guards, poor medical care, and severe overcrowding occurred at many facilities. Prison officials often resorted to brutal treatment of prisoners, including torture. Harsh or dangerous working conditions, official negligence, poor sanitary conditions, abuse and mistreatment by guards and a lack of medical care led to a number of deaths in prisons. Poor working conditions and low pay for prison guards encouraged widespread corruption. Prisoners who committed petty crimes were held with murderers.
>
> During the year 135 prisoners were involved in riots from January to June in federal prisons. There were several official complaints of overcrowding in Goias, Rio de Janeiro, Sao Paulo, and Minas Gerais states. In Rio de Janeiro, pre-trial detainees were often held together with convicted prisoners due to overcrowding… In January eight prisoners died in a prison fire in Minas Gerais State when a guard left his post and no one else had keys to the facility. In February prisoners in Minas Gerais complained of rats and scabies in the jail. Thirty inmates occupied a 320-square-foot space without exposure to sunlight and suffered from untreated injuries. Also in February prisoners in Aguas Lindas, Goias State, complained of overcrowding

32 *Brazil Submission to the UN Universal Periodic Review, First session of the UPR Working Group,* 7-11 April 2008 AI Index: AMR 19/023/2007.
33 Ibid.

(120 inmates in a jail with capacity for 37), spoiled food, and trial delays for lack of public defenders.'[34]

A Parliamentary Commission of Inquiry (CPI) commissioned by the Brazilian Congress reported similar findings in June 2008.[35] It described conditions in the *Contagem* prison in Minas Gerais where 70 prisoners, confined to cells built for 12 persons, were obliged to alternate sleeping schedules and overcrowding made bathroom facilities unusable. The report also revealed that prison overpopulation in Bahia led to the use of 20 temporary containers to hold more than 150 prisoners at the *Mata Escura* facility in Salvador. The containers were infested with rats and cockroaches and not properly ventilated. It found that many states were failing to provide separate prison facilities for women and that male officers who served in women's prisons often abused the prisoners and extorted sexual favours. The Commission also found evidence of prisoners being forced to be sex slaves and engage in pornographic acts which were recorded with video cameras. Throughout the country adolescents were jailed with adults in prison units without bathrooms and in inhumane conditions. Insufficient capacity in juvenile detention centres was also reported to be widespread.

A report by the Catholic Church's Pastoral Carceraria revealed that in some prisons inmates went for days without being given food, that prisoners with mental health problems were being kept locked up with no appropriate treatment or examination, and that mothers were being separated from their newborn babies.[36] Another stated that sexual harassment of women prisoners was routine and that the separation of women from their families increased their sense of isolation due to the long distances they had to travel for visits.[37]

Human Rights Watch has produced two reports on Rio de Janeiro's five juvenile detention centres – one in 2003 and a follow-up one in 2005 – in which it concluded 'we found a system that was decaying, filthy, and dangerously overcrowded. The facilities we saw did not meet basic standards of health or hygiene. Complaints of beatings and other ill-treatment were routinely ignored… The system lacked effective oversight; in particular, administrative sanctions against guards were rare, and none of the officials we spoke with knew of any case in which a guard had received a criminal conviction for abusive conduct.'[38] *Justica Global*, a Brazilian human rights organisation, has produced several reports about conditions in Urso Branco prison, in Porto Velho, Rondônia, which led the Inter-American Court of Human Rights to issue an urgent resolution condemning the mistreatment of prisoners there in December 2009.[39]

1.4 Reporting systematic failures: a sense of déjà vu?

These reports are consistent with many others documenting human rights abuses within the Brazilian prison system over the last two decades. Indeed it is striking how little appears to have changed – apart from the huge increase in the number of people being imprisoned – despite the widespread agreement that the current system is dysfunctional. A CPI into the prison system in 1994 reached

34 *2008 Human Rights Report: Brazil*, Bureau of democracy, human rights and labor 2008 Country Reports on Human Rights Practices, 25 February 2009.
35 *Relatorio final da CPI do sistema carcerario*, Camera dos Deputados, Julho 2008.
36 Pastoral Carcerária *A situacao dos direitos humanos no sistema prisonal dos estados do Brasil – contribucao e observacoes da Pastoral Carcerária*, 2005.
37 Caroline Howard, *Mulheres Encarceradas e Direitos Humanos*, Instituto Terra, Trabalho e Cidadania e Pastoral Carcerária, 2006.
38 Human Rights Watch, *In the dark, Hidden Abuses Against Detained Youths in Rio de Janeiro*, June 2005
39 Justica Global, *OEA: presos do Urso Branco ainda correm risco de vida*, 15 December 2009.

similar findings to the ones listed above and these have been followed by similar inquiries at state level, conducted by the Human Rights Commissions of state legislatures. There is a strong sense of déjà vu arising from the reports of international monitoring bodies over the past two decades. The federal government has repeatedly stated that it accepts many of their findings and intends to take action to deal with the problems indentified yet subsequent reports show little improvements in practice.

In a report published in 2001, for example, the UN Special Rapporteur on Torture, Sir Nigel Rodley, stressed that the appalling overcrowding in some detention facilities and prisons needed to be brought to an immediate end.[40] He noted that:

> 'torture is widespread and, most of the time, concerns persons from the lowest strata of the society and/or of African descendant or belonging to minority groups... The most commonly reported techniques used were beatings with hands, iron or wooden bars or a *palmatória* (a flat but thick piece of wood looking like a large spoon, said to have been used to beat the palm of hands and soles of feet of slaves); techniques referred to as *telefone*, which consists in repeatedly slapping the victim's ears alternatively or simultaneously, and *pau de arara* (parrot's perch), which consists in beating a victim who has been hung upside down; applying electro-shocks on various parts of the body, including the genitals; placing plastic bags, sometimes filled in with pepper, over the head of the victims. The purpose of such acts was allegedly to make persons under arrest sign a confession or to extract a bribe, or to punish or intimidate individuals suspected of having committed a crime.'[41]

In 2005, the UN Committee against Torture repeated the Special Rapporteur's concern stating that 'tens of thousands of persons were still held in *delegacias* (police stations) and elsewhere in the penitentiary system where torture and similar ill-treatment continues to be meted out on a widespread and systematic basis.'[42] It said that endemic overcrowding, filthy conditions of confinement, extreme heat, light deprivation and permanent lock-ups (factors with severe health consequences for inmates), along with pervasive violence persist.[43]

In the same year UN Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy noted that in one visit to a police station in Belém he met people who had been detained for up to nine months without having the opportunity to be heard by a judge.[44]

A Human Rights Watch report published in 1998 and an Amnesty International report in 1999 detailed almost exactly the same patterns of violations as are described above.[45] Yet although many of the practices identified are clearly illegal, it appears that little has been done to tackle them since the following report was written:

> 'In the course of our research, Human Rights Watch interviewed scores of prisoners who

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

41 Ibid, para 9.

42 Committee against Torture, Report on Brazil produced by the Committee under article 20 of the Convention and reply from the Government of Brazil (CAT/C/39/2), advance unedited version of 23 November 2007 made public by decision of the Committee against Torture adopted on 22 November 2008.

43 Ibid., para. 178.

44 *Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Report of the Special Rapporteur on the independence of judges and lawyers,* Mr Leandro Despouy, Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005.

45 Human Rights Watch, *Behind Bars in Brazil*, November 30, 1998; Amnesty International, *Brazil: 'No one here sleeps safely': Human rights violations against detainees,* AI Index: AMR 19/009/1999, 22 June 1999.

credibly described being tortured in police precincts. Inmates were typically stripped naked, hung from a 'parrot's perch' and subjected to beatings, electrical shocks, and near-drownings. Many detainees remained for long periods in the precincts where they suffered the abuse, enduring continuing contact with their torturers… Although Brazil's national prison law mandates that prisoners have access to various types of assistance, including medical care, legal aid and social services, none of these benefits are provided to the extent contemplated under the terms of the law… The situation is particularly bad in police lock-ups, where severely ill and even dying prisoners may remain crowded together with other inmates.

Another serious problem is inmate-on-inmate violence. In the most dangerous prisons, powerful inmates kill others with impunity, while even in relatively secure prisons extortion and other lesser forms of mistreatment are common. A number of factors combine to cause such abuses; among them, the prisons – harsh conditions, lack of effective supervision, abundance of weapons, lack of activities and, perhaps most importantly, the lack of inmate classification. Indeed, violent recidivists and persons held for first-time petty offenses often share the same cell in Brazil…Unfortunately, because the national prison census ceased to compile statistics on inmate killings after 1994, the overall levels of inmate-on-inmate brutality are unknown… Only killings of inmates – whose dead bodies are difficult to ignore – appear to merit investigation and prosecution, and even then the conviction and subsequent incarceration of the guilty parties is exceedingly rare. In other words, public prosecutors and other justice officials share much of the blame for the high levels of official violence that prisoners face.'[46]

The report stated that 'a substantial proportion of the incidents of rioting, hunger-striking and other forms of protest occurring in the country's penal facilities is directly attributable to overcrowding. In many instances, particularly in the state of São Paulo, inmates have rioted simply to demand that they be transferred to a less crowded facility, typically wanting to leave a cramped police lock-up for a more spacious prison.'[47]

It noted that the deficit in available capacity grew by 27 per cent between 1995 and 1997, and correctly predicted that this trend was likely to continue. It also drew attention to the length of time prisoners spent on remand and said that while this varied considerably from state to state it was not unusual to find prisoners who had spent years in pre-trial detention. While many people were being held in prison who should not be there, the report also stated that the criminal justice system was failing to ensure that those who were sentenced to imprisonment actually went to prison.

The federal Ministry of Justice estimated in 1994 that there were 275,000 such un-served sentences (*mandados não cumpridos*), significantly more than the number of prisoners in confinement. In Brasília alone, the public prosecutor's office announced this year that of the 15,077 prison sentences handed down in his jurisdiction over the past three years, only one third of them have actually been served; defendants in the remaining cases are fugitives. Obviously, were these missing convicts suddenly to be found and confined, the prisons would burst. The real number of fugitives from prison is difficult to estimate, however, as state and federal figures include multiple sentences for a single defendant, defendants who have died, and cases in which the statute of limitations has expired. One prisons expert advises that, at minimum, the existing numbers should be divided by five in order to take these

46 Ibid. p 2–4.
47 Ibid. p 33.

factors in account. Even so, the number of additional inmates these sentences represent could place a significant burden on an already overwhelmed penal system.[48]

It is difficult to obtain up-to-date and accurate figures on this issue, although the most commonly cited number of *mandados não cumpridos* is 300,000. Working on the same calculation that every five cases only represents one person, this means that there are currently around 60,000 people who have been sentenced to terms of imprisonment which they have not served. The difficulties of obtaining these figures, or indeed any accurate and up-to-date information about the prison population, indicate a wider problem in Brazil's penal and criminal justice systems. No amount of new laws or new institutions can deal with inefficiencies and incompetence, indeed they could aggravate the existing situation by adding new layers of bureaucracy and administrative confusion to what currently exists.

1.5 Political and social attitudes towards penal reform

The Human Rights Watch report also observed that while a lack of resources may have been the cause of some of the defects, the absence of political will was of more significance than a shortage of funds. Indeed 'some the most extreme cruelties visited upon Brazilian inmates, such as summary executions by military police, can in no way be attributed to meagre public resources.' It concluded that the most important reason why such widespread and serious human rights abuses were being committed on a daily basis was 'the sense that the victims of abuse – prison inmates and, therefore, criminals – are not worthy of public concern.' The report argued that this was partly because most Brazilian prisoners came 'from the poor, uneducated, and politically powerless margins of society' and partly because of public concern about rising levels of violent crime.[49]

Amnesty International also noted that the main problem was not a lack of money and that there had been a significant under-spend in some areas of the prison budget. 'Although the federal and state governments are currently building new prisons, and prisoners are gradually being transferred out of the police stations, equal importance should be accorded to investment in human capital and to increasing the quantity, quality and accountability of the personnel working within the prison system. The federal government allocated nearly US$456 million to the prison system in 1995-1997, but spent only 57% of that budget allocation. Of the US$540,000 earmarked for staff training, reportedly none was spent.'[50]

In a more recent report on conditions in a youth detention facility in São Paulo, CASA, the Brazilian human rights organisation *Conectas* noted that the institution was comparatively well-funded and that lack of material resources was not the root cause of the problem. 'Rather, it is an institutional culture that values punishment over rehabilitation and fails to hold its personnel accountable for abusive acts. The situation is reinforced by the widely held view in Brazilian society that the young people housed in CASA are dangerous and require the most brutal methods to keep them in check. In fact, young people convicted of minor infractions are mixed in with those convicted of more serious offences; the one common denominator is that all come from poor backgrounds. Affluent youth are seldom relegated to CASA.'[51]

48 Human Rights Watch, 1998.
49 Ibid.
50 AI Index: AMR 19/009/1999, 22 June 1999.
51 Vilhena 2008, p.250.

Other studies have also linked public tolerance for violations of prisoners' rights to public hostility to suspected or convicted criminals. Fear of violent crime remains pervasive throughout Brazilian society leading to support for a 'tough' penal policy. As will be discussed below, even the Brazilian Government blames hostility towards human rights by a section of public opinion for many of the abuses that take place within the system. However, this may over-simplify attitudes towards human rights, crime and justice in Brazilian society, which appear to have gone through a number of distinct phases over the past few decades.

Chapter Two

Human Rights Protection in Brazil – *'Para Ingles Ver'?*

2.1 National and international human rights obligations: theory and practice

The current Brazilian Constitution was enacted on 5 October 1988 and includes a long list of rights and freedoms that every Brazilian citizen is entitled to have respected. Fundamental rights and liberties are defined as the basis of the Democratic Rule of Law and the Constitution provides that the promotion of human rights shall be an underlying principle governing Brazil's international relations. Brazil has ratified all the main international instruments for human rights protection and created a number of institutional bodies to promote and protect human rights.

Brazil has ratified the International Covenant on Civil and Political Rights (ICCPR)[52] and is in the process of acceding to its first Optional Protocol, which enables the UN Human Rights Committee to consider individual complaints brought under it. Brazil is also a party to the Covenant on Economic, Social and Cultural Rights (CESCR),[53] the Convention on the Elimination of Racial Discrimination (CERD),[54] the Convention on the Elimination of Discrimination Against Women (CEDAW),[55] the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT),[56] and the Convention on the Rights of the Child (CRC).[57] It ratified the Option protocol to CAT, which provides for a system of monitoring places of detention in 2007.[58] Brazil has ratified all the main inter-American treaties on human rights, including: the American Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador', the Protocol to the American Convention on Human Rights to Abolish the Death Penalty and the Inter-American Convention to Prevent and Punish Torture. Brazil has recognised the competence of the Inter-American Court of Human Rights and declared its judgments to be binding.

As a result of a constitutional amendment in 2005, international human rights norms have constitutional status provided that they have been approved in a legislative proceeding by proper majority. This amendment created the possibility of 'federalising' certain cases – that is taking them from the state to federal courts – where these involve serious human rights violations. It also expressly

52 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976.

53 International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976.(ICESCR).

54 International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force 4 January 1969 (CERD).

55 Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981 (CEDAW).

56 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force 26 June 1987 (CAT).

57 Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990 (CRC).

58 See Association for the Prevention of Torture, *OPCAT Country Status Ratification and Implementation* 08 September 2009.

recognised the jurisdiction of the International Criminal Court – although the law to implement this measure has yet to be approved by the Brazilian Congress.

In 2003 Brazil upgraded the Special Secretariat for Human Rights, which had previously been based in the Ministry of Justice, to give it ministerial status based in the President's office. It also created the Special Secretariat for Policies of Racial Equality Promotion, and the Special Secretariat for Women Policies. In 2007 the government announced that it intended to create a National System of Human Rights Indicators, in collaboration with the two main Brazilian official research institutions – the Brazilian Institute of Geography and Statistics (IBGE) and the Institute of Applied Economic Research (IPEA) – which are intended to help guide the planning and monitoring of government policies.

The Brazilian Government has also consulted civil society groups in drawing up some of its more recent human rights reports, such as the one submitted to the UN Universal Periodic Review process, which discussed Brazil's record in 2008.[59] This report reflected a number of good practices of openness and inclusivity involving a comprehensive review of practices by a range of government departments and entities, coordinated by the Special Secretariat for Human Rights of the Presidency of the Republic (SEDH) and the Ministry of Foreign Affairs (MRE). It also involved discussions with civil society via the internet and public meetings, including a public hearing in the Brazilian Senate in February 2008.

Brazil was one of the first countries in the world to draw up a national plan for human rights in 1994, in accordance with the recommendations of the UN World Conference on Human Rights in Vienna in 1992. This plan was revised and updated in 2002 and, in January 2008, the government announced the beginning of a nationwide discussion to produce a third edition which was launched on 15 December 2009. In 2006 Brazil revamped its long-standing Council for the Protection of the Human Being into a National Human Rights Council. Brazil has also extended open invitations to UN Special Rapporteurs to visit the country in recent years. Since 1998, Brazil has received visits by 11 Special Rapporteurs on 10 different areas, in addition to a visit by the Committee against Torture (CAT). Former UN High Commissioners for Human Rights, Mary Robinson and Louise Arbour visited Brazil in 2002 and 2007, while the current High Commissioner, Navi Pillay, visited in 2009. The Brazilian federal government has fully cooperated with all these visits.

A UN Special Rapporteur, Asma Jahangir, has noted that Brazil's 1988 Constitution 'is the basic framework which institutionalizes human rights in Brazil. In the 1990s, President Fernando Henrique Cardoso adopted a comprehensive national policy for the promotion of human rights which included the ratification of most key international and regional human rights treaties. Gradually the policy advanced under subsequent Governments. The start of President Luiz Inácio da Silva's term at the beginning of 2003 has given a new impetus to the Government's commitment to human rights, with a particular emphasis on economic and social rights.'[60] In its submission to a UN review of the Brazilian government's record, Amnesty International also states that Brazil has enacted 'some of the most progressive laws for the protection of human rights in the region . . . [these laws] have all been

59 National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil, Working Group on the Universal Periodic Review, First session Geneva, 7-18 April 2008, A/HRC/WG.6/1/BRA/1, 7 March 2008.

60 *Civil and political rights, including the question of disappearances and summary executions, extrajudicial, summary or arbitrary executions, Report of the Special Rapporteur, Asma Jahangir, Mission to Brazil*, E/CN.4/2004/7/Add.3, 28 January 2004.

recognised as essential benchmarks for the protection of human rights. However, there remains a huge gap between the spirit of these laws and their implementation.'[61]

Many observers have noted the contrast between Brazil's formal commitment to liberal democratic norms and the violation of the basic rights of so many of its citizens. For example, Brazil introduced a specific law to criminalise torture in 1997, yet prosecutions have been rare despite repeated reports from monitoring bodies that the practice is 'widespread and systematic' in places of detention. In his most recent comment on Brazil's record, the UN Special Rapporteur on Torture, Manfred Nowak, again stressed that the most important failure was a lack of political will by the national authorities to enforce their own laws:

> 'First and foremost, the top federal and State political leaders need to declare unambiguously that they will not tolerate torture or other ill-treatment by public officials… They need to take vigorous measures to make such declarations credible and make clear that the culture of impunity must end... In particular, they should hold those in charge of places of detention at the time abuses are perpetrated personally responsible for the abuses.'[62]

Indeed, Brazil remains one of the most violent countries in the world, with one of the most unequal societies. As the US State Department Report for 2008 notes, the following violations of human rights are still considered routine:

> 'unlawful killings, excessive force, beatings, abuse, and torture of detainees and inmates by police and prison security forces; inability to protect witnesses involved in criminal cases; harsh prison conditions; prolonged pre-trial detention and inordinate delays of trials; reluctance to prosecute as well as inefficiency in prosecuting government officials for corruption; … Human rights violators often enjoyed impunity. In many cases police officers employed indiscriminate lethal force during apprehensions. In some cases civilian deaths followed severe harassment or torture by law enforcement officials. Killings by police occurred for various reasons. Confrontations with heavily armed criminals resulted in shoot-outs. Some police accused of killing suspects lacked the training and professionalism to manage deadly force. On other occasions the police behaved as criminals. Death squads with links to law enforcement officials carried out many killings, in some cases with police participation. Credible, local human rights groups reported the existence in several states of organized death squads linked to police forces that targeted suspected criminals and persons considered problematic or undesirable by land owners.'[63]

In a discussion at a UN working group in 2008 one government representative noted that 'Brazil's implementation of policy and legislation at the state and municipal level is poor' and systematic collection of data weak. Restating concerns about torture, excessive use of force and impunity, he recommended that the government, 'while continuing its positive initiatives in many of these areas, invest more rigour in evaluating the outcomes of planned activities'. [64]

61 AI Index: AMR 19/023/2007.

62 UN Commission on Human Rights, *Addendum to the Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Follow-up to the Recommendations Made by the Special Rapporteur; Visits to Azerbaijan, Brazil, Cameroon, Chile, Mexico, Romania, the Russian Federation, Spain, Turkey, Uzbekistan and Venezuela*, 21 March 2006, E/CN.4/2006/6/Add.2, available at: **www.unhcr.org/refworld/docid/45377b200.html** [accessed 4 February 2010].

63 *2008 Human Rights Report: Brazil*, Bureau of democracy, human rights and labor, 2008 Country Reports on Human Rights Practices, 25 February 2009.

64 UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Brazil*, UN Doc. A/HRC/8//27, 22 May 2008, para 51.

The Brazilian Government responded that torture, 'while unacceptable, was still present in places of detention.'[65] It also admitted that there are 'frequent accusations of abuse of power, torture and excessive use of force, committed mainly by police officers and penitentiary agents.' [66] An official investigation into one incident in June 2007 during a police operation in *Complexo do Alemão*, a *favela* in Rio de Janeiro, for example, 'confirmed signs of executions' among the 19 people shot dead by the police. The government also stated that official data of the states of São Paulo and Rio de Janeiro – the only states of the federation that keep such records – show that 8,520 people have been killed by police officers in the last five years. It was impossible to provide more detail about the extent of the problems of torture and extra-judicial killings due to the lack of statistical information.[67]

The Government announced that a national committee on torture has been created and that the country planned to adopt the Optional Protocol to the Convention against Torture, which provides for a system of inspections.[68] It also stated that it had launched a National Program of Public Security with respect to the Principles of Citizenship (*Programa Nacional de Segurança Pública com Cidadania* - PRONASCI), which intends to 'fight against the organized crime, focusing its strategies of corruption in the penitentiary system to ensure the security of citizens.' Its basic guideline would be to give priority to crime prevention and respect to the human rights. However, it concluded that:

> 'The main challenges for the full eradication of torture in the country are the resistance on the part of public agents to accuse and investigate cases which involve their mates, the fear of the victims and of their relatives of accusing torture and the mistakenly [sic] perception from the part of the public agents and the population in general that torture could be justified in the context of actions aimed at fighting against criminals… The fact that the country underwent a dictatorship regime for twenty years (1964-1985) contributes to explain the difficulties that are still faced today to conciliate an effective public security with the full respect to the human rights.'[69]

The Government also stated that:

> 'The Brazilian prisoners [sic] population is of about 420 thousand people, out of which 122 thousand are provisionally in prison, without having been judged. The prison system has a deficit of about 105 thousand vacancies. The prison overpopulation is an element that generates frequent rebellions, which eventually causes death of some prisoners. The Government has been encouraging the application of penalties and alternative measures (other than imprisonment), which, on the last ten years, have been applied to the benefit of more than 174 thousand people. Measures are being taken in order to increase the work opportunities to prisoners and to people leaving prisons. Currently, about 87 thousand prisoners work on a voluntary basis, which allow them, in addition to the income received, to reduce the time of their penalties. The network of penitentiary schools has also increased, which allow the prisoners to have access to education. PRONASCI includes among its actions the remission of penalty if the prisoners attend classes in these penitentiary schools.'[70]

65 Ibid, para 42.
66 National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1, Brazil, Working Group on the Universal Periodic Review, First session Geneva, 7-18 April 2008, A/HRC/WG.6/1/BRA/1, 7 March 2008, para 51.
67 Ibid, para 52.
68 Ibid. Brazil had actually ratified this Protocol in 2007.
69 Ibid, paras 56 and 57.
70 Ibid, para 61.

> 'In response to two recent events occurred in public jails in the State of Minas Gerais in 2007, in which a total of 33 prisoners died in a rebellion followed by a fire, a Federal Legislative Investigation Committee has been created, with the purpose of investigating the weaknesses of the Brazilian prison system and search for solutions to the effective compliance with the Law of Criminal Executions. One of the main measures adopted on the last years was the enactment of a law intended to control and reduce the sale, circulation and use of fire weapons in the country. In spite of the fact that the full prohibition of the commerce of fire weapons has not been accepted in referendum, the new legislation, followed by a campaign for collecting weapons, was responsible for the destruction of about 500 thousand weapons and, for sure, is one of the reasons of the reduction of 16.6% in the number of people murdered by fire weapons in the country.'[71]

While not all the claims can be accepted at face value, it would also be wrong to dismiss them as entirely cosmetic; they reflect a very real commitment to address Brazil's human rights record by many working in the federal government. The Brazilian Government has also embarked on a programme of judicial reform, to address some of the systemic weaknesses in the current system, which is discussed further below.

This report argues that judicial reform should be accompanied by tackling the problems confronting its penitentiary system, since unless the two are dealt with together, neither will be successful in isolation. An understanding of the challenges facing those involved in attempting to reform the criminal justice system in Brazil needs to look not just at the formal laws, institutions and review mechanisms, but also at how these institutions do their job in practice and in the specific political and historical context in which they have developed.

2.2 Human rights protections in the Brazilian criminal justice system

As discussed above, the formal protections provided to human rights in the Brazilian criminal justice system are considerable. On paper at least they are amongst the most progressive in the world. Brazilian law prohibits arbitrary arrest and detention, and limits arrests to those caught in the act of committing a crime or arrested by order of a judicial authority. The use of force during an arrest is prohibited unless the suspect attempts to escape or resists arrest. Suspects must be advised of their rights at the time of arrest or before being taken into custody for interrogation. The police are obliged to immediately inform a judge of an *em flagrante* arrest. The time limit for this is specified as 24 hours by the Brazilian Criminal Procedure Code (*Codigo Processo Penal* – CPP). The family of the prisoner shall also be notified of the arrest and the details of the case shall also be sent to Defensoria Publica.[72]

A judge should review the case at this point and assign it to a state prosecutor who will decide whether to issue an indictment. The case should also be assigned to a defence lawyer. If a defendant cannot afford a private lawyer, the court should send the case to *Defensoria Pública*, (the Public Defenders Office) a professionally structured agency, whose role in provided for in the current Constitution. Defendants have a right to legal representation at their trials. They also have the right to confront and question witnesses, the right to remain silent without adverse inferences being drawn, enjoy a

71 Ibid, paras 62 and 63.
72 *Codigo Processo Penal* 1941, Article 306, section 1.

presumption of innocence, and a right to appeal. The law recognizes the competence of a jury to hear cases involving capital crimes. Judges try those accused of lesser crimes.

Brazil's 1988 Constitution specifies that the judiciary is duty-bound to treat pre-trial prisoners as innocent, which means that they should only be detained as a last resort.[73] However, the *Codigo Processo Penal* gives judges the power to impose 'precautionary measures' (including imprisonment) on suspects which may be decreed during police investigations or the discovery stage of criminal proceedings.[74] Preventative imprisonment can only be decreed in three circumstances: to 'uphold the public or economic order', to allow a criminal investigation to proceed without inhibition, and to guarantee the future application of criminal law.

The first of these grounds is obviously extremely wide-ranging and subjective, and many Brazilian human rights activists believe it to be unconstitutional. The law also spells out the factors which judges should consider in detail. These include the type of crime that the defendant is accused of – and the maximum punishment prescribed for it – and the particular circumstances of the defendant. Judges are required to take into account whether the defendant has any previous convictions, but also whether he or she has a steady job, a fixed address and other factors which might make him or her more or less likely to abscond. Clearly these factors make it more likely that a poor defendant will be subject to pre-trial detention than a rich one. Similar provisions can be found in the criminal procedure codes of many other countries and are not inconsistent with international human rights law. However, the high levels of homelessness in Brazil together with the huge numbers of people living in informal settlements, such as *favelas*, which do not have legally recognised addresses, means that this provision has a massive impact on the prevalence of pre-trial detention in Brazil.

The preliminary case against the defendant should be presented by the prosecution. After this the law does not provide for a maximum period for pre-trial detention, which is defined on a case-by-case basis. However, the Inter-American Court and Commission of Human Rights have established that two or three years in pre-trial detention can violate the American Convention on Human Rights, to which is Brazil is a party.[75] Time in detention before trial is subtracted from the sentence. However, the long delays that take place in the conduct of trials means that people may end up spending longer in prison than their final sentence, taking into account the provisions of the law on prison sentencing *Lei de Execução Penal* (Law of the Execution of Sentences) 1984, which are described below.[76]

A fundamental concept on which Brazil's penal legislation is based is that all prisoners should be treated as individuals and their sentence should reflect their particular circumstances, with the ultimate aim being their rehabilitation and reintegration into society. The law provides fixed sentences for different crimes, but judges should also take into account the circumstances of particular cases, any previous convictions of the defendant and other such issues, which will affect their sentencing decision. If a prisoner is sentenced to a term of imprisonment, the sentencing judge should also consider the security level within which it should be served.

73 *Constituição da República Federativa do Brasil de 1988* (Constitution of Brazil) Article 5, LVII.
74 *Codigo Processo Penal* 1941 Article 312.
75 For example *Anthony Briggs v Trinidad and Tobago*, Case 11.815 Report No 44/99; *Neptune v Haiti* Series C No 180 (Judgment of 6 May 2008).
76 *Lei de Execução Penal* 7209/84.

Brazilian law states that a prison sentence should be regarded as a dynamic process, not simply a fixed term of years. The judge should, therefore, continually monitor the prisoner's case, adjusting the terms of sentence according to the prisoner's conduct. Normally, a prisoner who begins a sentence in a closed prison should be transferred to a semi-open facility after a certain period and from there, to an open facility, and finally to release into society. Judges are required to rule on requests for prison transfers – often from closed to semi-open facilities – and also to regularly evaluate whether prisoners should be granted furloughs, early releases, or the conversion of one type of sentence to another.

Some states have specialist judges to focus specifically on prisoners, either full-time or as a specific part of their workloads, known as the judge of penal execution (*juiz da vara de execução penal*). In other states the judge who sentences the prisoner remains responsible for handling his or her case during the period of imprisonment. Judges also have a role in monitoring prison conditions, carrying out inspections and interdicting prison administrations who are in breach of the prison rules or sentencing law. *Lei de Execução Penal* also specifies that judges should carry out monthly inspections of penal institutions.[77]

Brazil's prison rules *Regras Mínimas para o Tratamento do Preso no Brasil* (Minimum Rules of the Treatment of Prisoners in Brazil) 1994 are based on the UN Standard Minimum Rules, which largely reflect international best practice.[78] They contain numerous provisions mandating individualised treatment, protecting inmates' substantive and procedural rights, and guaranteeing them adequate food, medical, legal, educational, social, religious and material assistance, as well as contact with the outside world, education, work and voting rights. The laws state that the main purpose of imprisonment should be re-socialisation and rehabilitation, rather than punishment. They also encourage judges to use alternative sanctions to prisons such as fines, community service and suspended sentences as often as possible. In November 1988 a new law expanded the range of non-custodial sentences available to judges for non-violent offenders.[79]

The Brazilian Constitution and Criminal Procedure Code both draw on the language of international human rights law regarding the presumption of innocence and safeguards for those in being held in prison or detention. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which Brazil is a party, states that: 'Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.'[80]

People who have not been convicted of a crime are being deprived of their liberty as a precautionary measure and not as a punishment. Such detentions should only take place where it can be shown that there are objectively defined reasons for thinking that they would interfere with their own trial. The presumption of innocence contained in Article 9 of the ICCPR is reinforced by Article 10, which

77 Ibid, Article 66.

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

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

80 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

states that un-convicted prisoners are entitled to separate treatment. 'Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as un-convicted persons.'[81] However, as the above discussion shows, many of these rights and safeguards are ignored in practice.

Not only do judges often fail to provide effective judicial oversight of the system as a whole, there are also several credible reports that they sometimes collude in violations of basic rights. An Amnesty International report, for example, has documented cases in which prison guards have administered beatings to detainees while a judge looked on. Its researchers were also effectively denied access to a prison by the judge responsible for overseeing sentences, the state Council on Penal Affairs, and the local legal aid lawyers, all of whom seemed determined to prevent them talking directly to the prisoners in a detention facility in which several prisoners had been killed and dozens more injured during violent episodes in the preceding nine months.[82]

The Amnesty International report noted that:

> 'There is no routine and comprehensive data collection on deaths in custody, and most go uninvestigated. Almost complete impunity enables police and prison officers to continue inflicting torture and ill-treatment on those in their custody. Prisoners are left with nowhere to turn to report such gross human rights violations, because prisons and penal establishments are very rarely inspected, and a number of prisons and police stations have limited or denied access both to relatives and to human rights organizations. Many prisoners fear reporting torture or ill-treatment or asking for medical treatment because the Forensic Medical Institute is structurally linked to the public security apparatus. In some cases, prisoners have suffered reprisals and further violence as a result of making a complaint. It is, therefore, very rare for human rights violations committed in a prison or police station to result in a properly concluded investigation, a criminal prosecution or the conviction and punishment of those responsible.'[83]

Most sentenced prisoners in Brazil never see an open or semi-open facility; instead they serve their entire sentence in a high security facility or even a police lockup. Few judges ever carry out their responsibility to make prison inspections and the inspections that do occur are often cursory. As is discussed below other monitoring bodies are often not viewed as impartial or independent by the prisoners who are therefore afraid to report complaints to them. This appears not only to be in violation of Brazil's obligations under international human rights law, but also its own laws and Constitution.

This suggests that reform of the criminal justice system cannot be done simply through legislation. Chronic delays in the conduct of trials, lack of resources for the *Defensoria Pública*, corruption within the penal system and prejudicial attitudes on the part of some police, judges and public prosecutors require more deep-seated reform. The frequent failures of the Brazilian state to ensure that the rights contained within its own laws and Constitution are being upheld in practice is symptomatic of a larger failure of its governance institutions charged with this task. Before discussing these in more detail it is necessary to explain the historical and political context within which they developed.

81 Ibid.
82 Ibid.
83 Ibid.

2.3 An historical context

One of the paradoxes of Brazilian society is that while the state formally adheres to liberal democratic norms, the bodies tasked with upholding them have frequently disregarded them. Successive Brazilian governments have a long history of implementing reforms at the formal level, while maintaining policies, practices and institutions that rested on a denial of basic rights. This context is crucial for an understanding of the current challenges facing those involved in criminal justice reform.

Brazil's first Constitution, of 1824, was modelled on that of revolutionary Portugal (1822) and France (1814) and provided a basic framework for constitutional governance, a separation of powers and independence of the judiciary which has survived, with modifications, down to the present day.[84] Brazil's first Criminal Justice Code, of 1832, provided for the election of local justices, a jury system and the right of habeas corpus. In 1871 its *promotores de justica* (public prosecutors) were given the dual mandate of both enforcing the law and protecting the rights of the 'weak and defenceless' in Brazilian society.[85]

Yet Brazil was the last country in the Western hemispere to abolish slavery, in 1888, twenty-five years after its abolition in the United States. While the cause of abolitionism was a highly charged issue in Britain and the United States, its impact on political debate in Brazil was relatively minor. The Brazilian Government simply adopted a policy of repeatedly promising to take effective measures to end slavery, but doing as little as possible in practice for as long as possible. The phrase *para Ingles ver* (for the English to see), which is still a common expression in Brazil, dates from this period. As Roberto Schwarz has written it has deep historical roots within Brazilian society:

> 'Liberal ideas could not be put into practice and yet they could not be discarded. They became part of a special practical situation, which would reproduce itself and not leave them unchanged... Faced with these ideas, Brazil, the outpost of slavery, was ashamed – for these were taken to be the ideas of the time – and resentful, for they served no purpose. But they were also adopted with pride in an ornamental vein, as proof of modernity and distinction… To know Brazil was to know these displacements, experienced and practised by everyone as a sort of fate for which there was no proper name since the improper use of names was part of its nature.'[86]

Progressive Brazilian lawyers and political activists did fight for the freedom of individual slaves, and there were legal battles in parallel with slave rebellions and mass escapes. As the Brazilian human rights lawyer Oscar Vilhena Vieira notes, the founding moment of public interest legal advocacy in Brazil could be dated to 1869 when a former slave placed advertisements in several newspapers announcing his activities as a pro bono solicitor in cases linked with the liberation of slaves. This started a tradition amongst the most liberal sections of the Brazilian legal profession of 'resisting oppression through legal means and using legal strategies to promote and advance social justice'. [87]

It would be wrong, however, to overestimate the influence that such activists had on wider Brazilian society, which has remained predominantly conservative for most of its history. Although Brazil has been marked by considerable violence, most of its key constitutional changes were achieved

84 Boris Fausto, *Historia do Brasil*, Universidade de São Paulo, 2000, p.80-87.
85 Lei No. 2.040, de 28 de Setembro de 1871.
86 Roberto Schwarz, *Misplaced ideas: essays in Brazilian culture*, Verso, 1992, p.28 .
87 Oscar Vilhena Vieira, 'Public Interest Law. A Brazilian Perspective', *UCLA Journal of International Law & Foreign Affairs*. 224, 2008, p.223.

peacefully. The country transformed itself from colony to independence and then empire to republic, republic to dictatorship and then dictatorship to democracy with little social disruption.

Independence came in 1822 when the Portuguese crown prince refused a 'request' from the Portuguese parliament to return home and declared himself Emperor Pedro I of Brazil instead. The Brazilian Empire lasted until 1889 when a group of army officers forced his son, Pedro II, to abdicate and go into exile. The First Republic lasted until 1930, when it was overthrown in a peaceful coup that ushered in the *Estado Novo* (New State), which lasted until 1945 when democracy was restored. Another bloodless coup in 1964 led to twenty years of dictatorship, which gave way to the *abertura* (opening) that paved the way for the eventual restoration of democracy from 1982-1989.

This lack of sharp rupture accompanying regime-changes was probably because the process of building a modern nation-state primarily took place at the elite level with little involvement of the mass of the Brazilian people. The state may have benefited from this institutional continuity, but it also helped to preserve a certain mind-set within its governance institutions that has endured to this day. Alfred Montero, for example, argues that during the last two decades, 'What is most notable about the Brazilian transition to democracy is how unsuccessful efforts to displace the conservative elites of the bureaucratic-authoritarian period were.'[88] This will be discussed further in the section of this report on Brazil's legal and constitutional framework.

Brazil's police force can be dated back to the *bandeirantes* and militias who helped to colonise and defend the country.[89] The former were mercenary groups of slave-hunters and explorers.[90] The latter became the basis of the Brazilian National Guard and were usually organised by *coroneis* (colonels) in each district. The *coronel* tended to be the most powerful member of the local landed elite and some were descendants of the original *capitaes* (captains) who had been licensed by the Portuguese Crown to colonize Brazil. Their descendants continue to exert an important influence on contemporary Brazilian politics.

The first attempts to organise a specialist police force date back to the arrival of the Portuguese Royal Court – fleeing the invading Napoleonic army – in Brazil in 1808. The *Intendência Geral de Polícia* became the basis of the current civil police, while a military guard with police functions was formed in 1809, which was charged with upholding public order. As Mercedes Hinton has noted, the primary purpose of the police was to contain the threat of slave revolts, punish insurrection and capture fugitives.[91] Individual states started organising local military police forces which were gradually centralised into a single structure. In 1871 the functions of the police and judiciary were formally separated and two types of police forces were created at local level.

The responsibility for most policing issues today rests with the states, although there is also a federal police force which deals with inter-state issues such as terrorism, organised crime and border controls. The basic division between the two forces is that the military police respond to crimes while they are in progress, while the civil police investigate them after they have occurred. Both forces are under the control of the state governor, usually under the delegated authority of a secretary for public security, but the rivalry between them is notorious. The civil police are plainclothes officers in charge of

88 Alfredo Montero, *Brazilian politics*, Polity Press, 2005, p.61.
89 E. Bradford Burns, *A History of Brazil*, Colombia University Press, 1993.
90 Joseph A Page, *The Brazilians*, DA Capo Press, 1995.
91 Mercedes Hinton, 'A distant reality: democratic policing in Argentina and Brazil', in *Criminal Justice*, Sage publications, 2005, p.81.

criminal investigations – as well as some administrative functions such as issuing identification cards and licences – while the military police is in charge of uniformed street patrolling, maintaining order and preventing crime. Both forces may arrest suspects caught in the act of committing a crime or pursuant to an arrest warrant issued by a judge.

There is a very strong tradition of summary justice in Brazil, which continued long after the abolition of slavery.[92] Thomas Holloway maintains that 'beatings and arbitrary arrest' were considered to be an essential part of the police's strategy of deterrence and punishment. These practices continued even after the judicial authority to administer 'correctional detention' and 'corporal punishment' was removed from the police in 1871.[93] He also points out that people were frequently arrested for practicing of *capoeira* (an African dance ritual that also draws on martial arts), which was formally banned between 1890 and the 1930s, and that the police used this power disproportionately against poor, black Brazilians.[94] Boris Fausto notes that 'on average, between 1892 and 1916, misdemeanours (vagrancy, disorder and drunkenness) accounted for nearly 80 percent of all arrests, crimes against property around 11 per cent and crimes of violence around 8 per cent in Sao Paulo.'[95] Teresa Caldeira argues that 'the practices of violence and arbitrariness have been constitutive of the Brazilian police, to varying degrees, since its creation and that policing has largely been aimed at controlling the poorest and most vulnerable sections of Brazilian society. Such practices were permitted to continue because the weakness of Brazilian democracy meant their victims were largely powerless, while the Brazilian wealthy remained unaffected'.[96]

2.4 Dictatorship and the transition to democracy

Concern amongst Brazilian human rights groups about the treatment of prisoners is partly a legacy of the dictatorship. The police were placed directly under the control of the army between 1964 and 1985 and took on an overtly political role. Torture, imprisonment and harassment were officially sanctioned policies to deal with the 'threat of communist subversion' and the police played a key role in implementing these policies.

The prison system was also subordinated to national security policy and the arbitrary imprisonment of suspected subversives contributed significantly to the overcrowding of public prisons; a legacy from which they have never recovered.[97] The fact that the courts – and parliament – continued working, giving an appearance of democratic normality to the generals' rule, compromised them deeply. Although the Brazilian judiciary did declare the National Security Act 1968 unconstitutional, it proved largely quiescent towards the dictatorship.

The military passed 17 institutional acts and 100 complementary acts, reducing judicial independence and removing the powers of the courts to judicially review their actions. At a more basic level the courts failed to ensure justice for the dictatorship's many victims. As James Holston and Teresa Caldeira note, 'during the whole period of the military dictatorship, the courts routinely heard and recorded testimonies and accusations of torture and other illegal procedures such as

92 Guaracy Mingardi, *Tiras, gansos e trutas: cotidiano e reforma na policia civil*, Scritta, 1992. See also Roberto Kant de Lima, Legal theory and judicial practice: paradoxes of police work in the Rio de Janeiro city, PhD thesis, 1986, cited in Caldeira, p.110.
93 Thomas Holloway, Policing Rio de Janeiro: repression and resistance in a nineteenth century city, Stanford University Press, 1993, p.284.
94 Ibid., p.223-228. See also Thomas E. Skidmore, *Black Into White: Race and Nationality in Brazilian Thought*, Duke University Press, 1993.
95 Boris Fausto, *Crime e cotidiano: a criminildade em Sao Paulo 1880 – 1924*, Brasiliense, 1984, p.46.
96 Teresea Caldeira, *City of walls: crime, segregation and citizenship in Sao Paulo*, University of California Press, 2000, p.145.
97 Adorno and Salla, 2007.

unsubstantiated arrest… Yet, in spite of careful recording in the courts, no action was ever taken either to prevent the violations or to punish those responsible for them.'[98] A legal and democratic veneer was cast over the systematic violation of ordinary people's basic rights.

Conversely, many of the political prisoners were the sons and daughters of middle-class Brazilians who went on to play leading roles in the country's transition to democracy. Political prisoners noted in the accounts of their own imprisonment the number of ordinary prisoners who had been detained without due process, or held beyond the limits of their sentences.[99] The agitation of political prisoners inside Brazilian gaols helped to inspire the formation of *Commando Vermelho*, which started as a prisoners' rights group although it was to evolve into Rio de Janeiro's most notorious drug-trafficking gang.

Campaigns against torture and deaths in detention were also important in rallying opposition to the dictatorship in wider Brazilian society. In 1969 the Brazilian Confederation of Bishops created a Commission of Justice and Peace, which in turn formed a network of lawyers to defend the rights of political prisoners on a pro bono basis. More than 250 centres for the defence of human rights were established largely under the auspices of the Catholic Church. The first Amnesty International Report on Brazil, published in 1979, relied substantially on their information, which was also separately published in the seminal report on torture, *Brasil: Nunca Mais*.[100] Brazil became a stronghold of 'liberation theology' and its human rights groups were also strongly associated with 'new' trade unionism, and movements for landless workers and environmental activists who formed the nucleus of *Partido dos Trabalhadores* (PT) – the Workers' Party. As the country returned to democracy, therefore, Brazilian politicians were forced to pay increasing attention to human rights. The prominent role assigned to it in the 1988 Constitution is largely a result of these pressures.

2.5 Human rights, crime and political discourse

Meanwhile the police had returned to targeting their 'usual suspects' – who tended to be drawn from the margins of Brazilian society: poor, landless, darker-skinned, homeless and unemployed – using the type of tactics described above. This shift coincided with a sudden rise in violent crime, sparked by a serious economic crisis in which a combination of hyper-inflation and then a collapse in growth impoverished millions of Brazilians. Between 1980 and 1990 the real minimum wage decreased by 46 per cent and per capita income dropped 7.6 per cent in what is often referred to as the 'lost decade'.

The shock of the economic crisis was magnified because it had been preceded by an equally dramatic period of growth. Between 1870 and 1980 Brazil's economy grew at a faster rate than virtually any major country in the world. During the 1950s it was on a trajectory to overtake the United States by the end of the twentieth century. Its popular President Juscelino Kubitschek pledged his country would achieve 'fifty years in five' and created a brand new capital city, Brasília, in the country's interior. In fact such a growth rate was not sustainable and the inflationary pressures and growing public debt provided some of the background to the 1964 coup. Economic growth resumed under the dictatorship, after a period of brutally-enforced wage-restraint, but the debts run up during this

98 James Holston and Teresa Caldeira, 'Democracy, law and violence: disjunctions of Brazilian citizenship', in Felipe Aguero and Jerrey Stark, *Fault lines of democracy in post-transition Latin America*, North-South Center Press, 1998, p.286.

99 See, for example, Graciliano Ramos, *Memorias do Carcere,* cited in Elizabeth Canceli, *O mundo da violencia: a policia da era Vargas*, Universidade da Brasilia, 1993, pp. 206-215.

100 Paulo Evaristo Arns, *Brazil: Nunca Mais*, Vozes, 2003.

period were to effectively bankrupt the country by 1983.[101] Between 1940 and 1980, gross domestic product (GDP) had grown 6.9 per cent annually (4 per cent in capita terms). Between 1980 and 1992 it grew only 1.25 per cent per year.[102]

Brazil was also undergoing a dramatic social change, which transformed it from an overwhelmingly rural to a predominantly urban society in the space of a few decades.[103] Between 1950 and 1980 around twenty million people moved from the countryside to the cities, one of the biggest such movements in world history. Some Brazilians also became very rich and society stratified into what is now the most unequal major country in the world. The proportion of income appropriated by the richest fifth of the population grew from 54 per cent in 1960 to 62 per cent in 1970, 63 per cent in 1980 and 65 per cent in 1990, while that of the poorest half dropped from 18 per cent in 1960, to 15 per cent in 1970, 14 per cent in 1980 and 12 per cent in 1990.[104] Many of the new urban poor settled in self-built shacks clustered on vacant land. These *favelas* lacked all basic social services and soon fell under the control of crime gangs who staked out their territory through violence. Homicide is now the leading cause of death for persons aged 15 to 44 years, and the victims are overwhelmingly young, male, black or mulatto and poor.

An analysis of the involvement of children in the drug trafficking trade carried out by Luke Dowdney in 2003 concluded that the 'extreme levels of armed violence are generating numbers of firearm-related deaths in the city of Rio de Janeiro that are comparable, if not greater, than the number of conflict-related casualties in many armed conflicts.'[105] It also noted that the 'utilisation of high-powered weapons and the types of armed violence caused by inter-faction disputes and confrontations between the police and factions in Rio de Janeiro' mean that 'stark similarities exist between children employed in [the city's] drug factions and "child soldiers" in almost every functional and definitive aspect.'[106] Another study by Dowdney suggested that the term 'organized armed violence' should be used to describe situations of 'neither war nor peace' and that the criminal justice system was unable to deal with the scale of the problem. He recommended the adoption of approaches such as Disarmament, Demobilization and Reintegration (DDR) projects that have been developed in officially recognised conflict zones.[107]

Brazil did not collect official statistics on criminality for the country as a whole until the late 1990s. However, violent crime in the state of São Paulo increased as a proportion of total crime from around 20 per cent in 1980 to 30 per cent in 1984 to 36 per cent in 1996.[108] The homicide rate soared from around 15 per 100,000 in 1981 to 45 per 100,000 in 1995 and 54 per 100,000 in 2002. In Rio de Janeiro the murder rate reached a staggering 61 per 100,000 people in 1994, although it has declined since. The homicide rate (per 100,000 people) for Brazil as a whole nearly tripled – to around 30 per 100,000 in 2002 and a total of 49,570 homicides were documented in Brazil in that year.[109]

101 Francisco Vidal Luna and Herbert Klein, *Brazil since 1980*, Cambridge University Press, 2006, p.40.
102 Caldeira, 2000, p.45.
103 Michael Reid, *Forgotten continent: the battle for Latin America's soul*, Yale University Press, 2007.
104 The proportion of income in the hands of the richest 1 per cent of the Brazilian population has grown from 13.0 per cent in 1981 to 17.3 per cent in 1989, then fallen to 15.5 per cent in 1993. A recent study of the comparison of fifty-five countries showed that while for the majority of countries the income of the richest 10 per cent is on average 10 times higher than that of the poorest 40 per cent, in Brazil it is almost thirty times higher.
105 Luke Dowdney, *Children of the drug trade, a case study of children in organised armed violence in Rio de Janeiro*, Letras, 2003, p.117.
106 Ibid. p.117 and p.254.
107 Luke Dowdney, *Neither war nor peace, international comparisons of children and youth in organised armed violence*, Viva Rio, no date.
108 Calderia, 2000, p.119.
109 *Morbid and Mortality Weekly Report*, Homicide Trends and Characteristics –Brazil, 1980-2002, 5 March 2004. Figures cited from Brazil's Ministry of Health. See also Rodrigo Ghiringhelli de Azevedo, 'Criminal justice and public security in Brazil: causes and consequences of the public's demand for punishment' *Brazilian Journal of Public Security*, February/March 2009, p.97 which states that the death toll in 2003 reached 51,043.

The increase in violent crime had a huge impact on the political discourse during the transition to democracy. Defending human rights became increasingly associated with the defence of *bandidagem*, or criminality. Politicians who were seen as 'soft on crime' – to the extent that they upheld notions such as respect for the basic rights of suspects or acted to curb excesses by the police and prison guards – were outflanked on the right by those who favoured tougher measures. Leonel Brizola in Rio de Janeiro and Franco Montoro, in São Paulo, who were both elected governors in 1982 on platforms that included respect for human rights, became increasingly unpopular as their efforts to curb the mounting crime wave failed. Their successors gave verbal support to what were effectively shoot-to-kill policies, but these proved no more effective in bringing the crime rate down and led to some highly publicised atrocities. The result was that security policy became increasingly politicised as governors alternated between 'harsh' and 'soft' approaches. As Mercedes Hinton has noted, 'Amid such political whims, shifting standards and contradictory signals, it is difficult to imagine how any reform agenda could take root.'[110]

Governor Montoro did introduce some important reforms, such as disbanding a notorious special police unit, ROTA, and making the police keep better records over their use of guns and bullets, which succeeded in diminishing the number of police killings. However, his successors adopted a markedly different approach, re-establishing ROTA and welcoming an increase in the number of killings carried out by the police. Luiz Antonio Fleury Filho, for example, who served first as secretary of public security and then governor, stated in 1989: 'The fact that this year there were more deaths caused by the MP [military police] means that they are more active. The more police in the streets, the more chances of confrontations between criminals and policemen . . . From my point of view what the population wants is that the police act boldly'.[111] Other politicians adopted the slogan 'the only good criminal is a dead criminal' when running for office.[112]

These attitudes persist down to the present day. In his 2007 report, UN Special Rapporteur Philip Alston noted that: 'The degree to which the killing of "criminals" is tolerated and even publicly encouraged by high level Government officials goes a long way to explaining why the numbers of killings by police are so high, and why they are so inadequately investigated.' Alston noted that the current Secretary for Public Security in Rio had referred to the police killing innocent bystanders during security operations using the analogy of breaking eggs to make an omelette.[113] His first recommendation was that: 'State Governors, Secretaries for Public Security, and Police Chiefs and Commanders should take the lead to make publicly clear that there will be zero tolerance for the use of excessive force and the execution of suspected criminals by police.'[114]

Police violence is not the focus of this report, but it is clearly impossible to construct a functioning criminal justice system based on rule of law principles while the police are frequently accused of torturing and murdering criminal suspects – or simply poor people who can easily be categorised as such. Many of those facing charges are likely to be convicted solely or mainly on the basis of statements that they made in police custody and so the numerous credible reports that torture is widespread and systematic are a serious concern. Access to justice and the right to a fair trial become meaningless unless sufficient safeguards are introduced to protect detainees from torture and other

110 Hinton, 2005, p.87.
111 *Folha de Sao Paulo*, 28 November 1989.
112 Amnesty International, 1999.
113 A/HRC/11/2/Add.2 future, 28 August 2008, para 26.
114 Ibid., para 77.

forms of ill-treatment, and provide them with prompt access to legal advice and representation.

The police have also been involved in suppressing prison disturbances. Perhaps the most notorious incident was in October 1991 when military police killed 111 prisoners in the *Casa de Detencao* of *Carandiru Pavilhao 9*, which was subsequently found to have been a violation of the American Convention on Human Rights.[115] Most were killed by machine guns fired at point blank range from the doors of their cells.[116] The surviving prisoners were all stripped naked and many were attacked by dogs, specially trained to bite the genitals. Some were stabbed with knives by the police. Others were forced to watch executions and then to carry the bodies of the dead to collection points and to clean up the blood because the police were afraid of contracting AIDS. Photos were published showing these scenes. However, opinion polls showed considerable support for the police's actions.[117] The police commander responsible was subsequently included in a bloc of candidates who stood for election to São Paulo's state assembly on a platform of tougher security. Three of these candidates were elected, all of whom used the number '111' to identify themselves on the ballot paper. As discussed above the surviving prisoners formed *Primeiro Comando da Capital* (PCC), which is now the most powerful crime gang in São Paulo, in response to this massacre.

2.6 Fear of crime and undermining the rule of law: a vicious circle

A vicious circle has been established in Brazil in which public fear of crime leads to support for illegal methods to deal with it, which further undermines the rule of law and feeds a climate which in turn creates more violent crime. In 1992 the police killed 1,470 people in São Paulo. Although this was to prove the peak of killings, Teresa Caldeira argues that fear of crime remained an obsession for São Paulo's residents through the 1990s and beyond:

> 'Every-day life and the city have changed because of crime and fear and this change is reflected in daily conversation. Fear and violence, difficult things to make sense of, cause discourse to proliferate and circulate. The talk of crime – that is every day conversations, commentaries, discussions, narratives and jokes that have crime and fear as their subject – is contagious. Once one case is described, many others are likely to follow. The talk of crime is also fragmentary and repetitive. It breaks into many exchanges, punctuating them, and repeats the same history, or variations of it, commonly using only a few narrative devices. In spite of their repetition people are never bored. Rather they seem compelled to keep talking about crime, as if the endless analysis of cases could help them cope with their perplexing experiences or the arbitrary and unusual nature of violence. The repetition of histories, however, only serves to reinforce people's feelings of danger, insecurity and turmoil. Thus the talk of crime feeds a circle in which fear is both dealt with and reproduced and violence is both counteracted and magnified.'[118]

The only published victimisation survey of crime in Brazil dates from 1988 and was carried out by the Brazilian Institute of Geography and Statistics (IBGE). It found that in the metropolitan region of São Paulo over 60 per cent of the people who had been victims of robbery and theft did not report

115 Inter-American Commission of Human Rights Report, No 34- 00, Case 11291, dated 13 April 2000.
116 Amnesty International, *Death has arrived: prison massacre at the Casa de Detencao Sao Paulo*, Amnesty International, 1993.
117 Caldeira, p.177. One poll conducted by *Folha de Sao Paulo* showed a third of all respondents approved while another by *Estado de Sao Paulo* registered approval.
118 Caldeira, 2000, p.19.

these crimes to the police, with over 40 per cent of these citing their negative view of the police as the reason for this. Of those who had been victims of physical assault, over 55 per cent did not report this, with a noticeably higher rate of under-reporting by women than men (62 per cent compared with 56 per cent).[119] Another survey, from the mid 1990s, reported that 72 per cent of Brazilians involved in criminal conflicts do not use the justice system.[120] According to a more recent poll, 50 per cent of Brazilians state that they do not even report crimes to the police because it would be a 'waste of time'.[121]

A global survey on safety and security carried out by the Vera Institute of Justice in 2003 found that Brazil is the country where people say that they are most afraid to walk the streets at night (followed by South Africa, Bolivia, Botswana, Zimbabwe and Colombia, in that order).[122] Conversely, Brazil has the second lowest rate of reporting crimes of robbery to the police (19 per cent compared to 37 per cent in South Africa, 45 per cent in Argentina, 59 per cent in Australia and 69 per cent in the USA), implying a level of distrust of the police that is more usually observed in countries that do not respect democratic norms.

Many police are also engaged in corruption and extortion and there have been widespread credible reports that off-duty police are also deeply implicated in death-squad and militia activity in several parts of the country. *Ministério Público* in the state of Pernambuco, for example, estimated in 2008 that approximately 70 per cent of the homicides are committed by death squads, which are widely believed to be linked to the police. A federal parliamentary commission of inquiry found that extermination groups are mostly composed of government agents (police and prison guards), and that 80 per cent of the crimes caused by extermination groups involve police or ex-police.[123]

Meanwhile the transition to democracy brought another set of problems, associated with corruption by public officials and white collar-crime (*colarinho branco*) as well as a sense that the Brazilian justice system was biased in favour of the rich. One survey in the mid 1990s showed that over 95 per cent of respondents agreed that a poor person would be dealt with more harshly by the courts than a rich one.[124]

As discussed in the next section of this report, the 1988 Constitution gave the judiciary the right to manage its own financial, administrative and disciplinary matters. By the early 1990s it became clear that the senior ranks of the judiciary were taking full advantage of this lack of oversight to set extremely generous salaries, pensions and staffing resources for themselves. In the five highest courts, 88 senior justices were serviced by 5,000 staff and their headquarters was provided with a swimming pool and ballroom. Judges threatened to strike against a law outlawing the practice of hiring unqualified relatives in 1996 and did strike against the establishment of a Senate subcommission to investigate allegations of graft in 1999. The revelation, that year, that 75 per cent of the costs of a vastly expensive new Labour Court in São Paulo had been embezzled by a retired judge deepened the public perception that judges were a law unto themselves.[125]

119 Ibid., p.107.
120 James Holston and Teresa Caldeira, 'Democracy, law and violence: disjunctions of Brazilian citizenship', in Felipe Aguero and Jerrey Stark, *Fault lines of democracy in post-transition Latin America*, North-South Center Press, 1998, p.274.
121 William C Prillaman, *Crime, Democracy, and Development in Latin America*, Centre for Strategic and International Studies, Policy Papers on the Americas, Volume XIV, Study 6, June 2003, p. 9.
122 *Measuring progress towards safety and justice: a global guide to the design of performance indicators across the justice sector*, Vera Institute of Justice, November 2003.
123 UN Doc. A/HRC/8/3/Add.4, 14 May 2008, para 39.
124 Macaualy, 2003, p.93.
125 Ibid., p.92.

The constitutional protections given to a variety of social and economic rights has also involved the courts in a range of debates on a variety of contentious issues, which have principally benefited better-off Brazilians.[126] The Brazilian state is highly corporatist and has traditionally granted a range of economic benefits to categories of people – such as state employees – as a means of shoring up its political base.

The courts have been used to defend the almost unassailable rights of public employees to job security and the financial sustainability of Brazil's extremely generous pension provisions, which are skewed towards the rich. Corruption amongst the judiciary, its well-publicised problems of combating *colarinho branco* crime, and its perceived complicity in the country's worsening social and economic situation has deepened the pessimism of many Brazilians. Caldeira concludes that attitudes towards crime, justice and human rights were shaped by a growing sense of powerlessness and disenchantment within Brazilian society and the debate about how to deal with the issue reflected a broader malaise.

The talk of crime promotes a symbolic reorganisation of a world disrupted both by the increase in crime and by a series of processes that have profoundly affected Brazilian society in the last few decades. These processes include political democratisation and persistent high inflation, economic recession and the exhaustion of a model of development based on nationalism, import substitution, protectionism and state-sponsored economic development. Crime offers the imagery with which to express feelings of loss and social decay generated by these other processes and to legitimise the reaction adopted by many residents: private security to ensure isolation, enclosure and distancing from those considered dangerous.[127]

126 Norman Gall, *Lula and Mephistopheles*, Fernand Braudel Institute of World Economics, no date.
127 Teresea Caldeira, *City of walls: crime, segregation and citizenship in Sao Paulo*, University of California Press, 2000, p.2.

Chapter Three

Brazil's Constitutional, Political and Institutional Structure

3.1 Constitutional and political structure

Brazil is a constitutional federal republic with a population of approximately 190 million. It is composed of a federal district (Brasília) and 26 states. These are subdivided into approximately 5,500 municipalities (*municípios*), which are autonomous politico-administrative units governed by mayors (*prefeitos*) and municipal councillors (*vereadores*). The states have their own constitutions and are autonomous within the framework of federal constitution. The judiciary is also made up of state and federal courts. The national constitution defines the set of administrative and legislative powers for the central government as well as the states and cities. It also lists concurrent jurisdictions between central government, states, the federal district and the cities.

Congress is composed of two houses (the Senate and the Chamber of Deputies) and has authority over matters coming under the jurisdiction of the union – chiefly fiscal policy, political and administrative organisation. The states have their own elected assemblies. This basic constitutional framework has been in existence since Brazil gained its independence from Portugal in 1822, although the franchise for elections to Congress and its ability to hold the executive to account have varied during different periods of Brazilian history.[128] Elections for Congress and state assemblies continued to be held during the 1964-1985 dictatorship, although these were reduced to powerless debating chambers. Direct elections were held for the state governor positions in 1982 and a civilian president was elected – indirectly – in 1985. A National Constituent Assembly began drafting a new Constitution in 1987 and this was adopted the following year, providing the framework for Brazil's current governance arrangements. The transition from dictatorship to democracy is often referred to as the *abertura* (opening) and, although it was accompanied by popular pressure from below, the gradual nature of the process has had an impact on the way in which Brazilian society subsequently developed.

The current Constitution was promulgated in October 1988. The first direct elections for the presidency were held the following year. Elections to both the national Congress and the state governorships and assemblies take place at the same time as presidential elections. The President of the Republic is both chief of state and head of government. The President may initiate legislation and can also veto it, both on a line-by line or total basis. This can be overridden, by the two houses of Congress working together, although the process is difficult. The President can also introduce legislation through the submission of the annual budget and can introduce temporary legislation (*medidas provisorias*) by decree, on a 30 day renewable basis. Presidents also have considerable powers of patronage due to the large number of political appointments that they can make.

128 The first constitution, enacted by Emperor Pedro I, specified indirect elections and created the legislative, executive and judicial branches of government; however, it also added a fourth branch, the 'moderating power', to be held by the Emperor. Similar formulations have since emerged in some of its successors.

While Brazilian presidents, therefore, enjoy considerable power, they need to be able to assemble working majorities of support in both houses in order to govern effectively. Brazil's first directly-elected President after the dictatorship, Fernando Collor, was impeached for corruption by Congress in 1992, two years after he took office. The reform efforts of his successors have often been slowed down by the need to placate the various interest groups represented in Congress. For example, cross-party groups such as the agro-business lobby (*bancada ruralista*) or evangelical Christians (*bancada evangelica*) or groups representing particular states or regions are often better organised than the political parties themselves.

The Constitution initially prescribed that presidents could only serve one term in office, but this was amended under the presidency of Fernando Henrique Cardoso, Brazil's second directly-elected President, to enable him to run for a second term in 1998. In 2002 voters elected Luiz Inacio Lula da Silva of the Workers' Party as President. He was re-elected in 2006 and his current term runs until 2011 when he will step down from office. Elections will be held for his successor in October 2010.

The Chamber of Deputies is elected through an open-list system of proportional representation (PR), while Senators are elected on a first-past-the-post basis. In case an absolute majority of votes is not attained in the first round of the Presidential, gubernatorial and mayoral elections, a run-off takes place. The composition of both houses is skewed by the regional allocation of seats which heavily under-represents the more economically-developed south and south-east of the country in favour of the poorer and more sparsely populated north and north-east. One observer has described the Brazilian Senate as 'one of the most malapportioned upper houses among federal democracies, with the most populous state São Paulo, having 144 more times more inhabitants per Senator than the least populous state.'[129]

The over-representation of the north and north-east in both houses of Congress is often justified by the need to ensure regional balance, but is also partly a legacy of the dictatorship era. These two regions have also traditionally been the strongest bastion for patronage politics practised by landed elites. The *coroneis* would dispense favours in return for the loyalty of their voters and some ruled virtual nations complete with their own private armies. During elections *coroneis* controlled voters in return for influence and used this bargaining power to extract concessions at the national level, which, in turn, reinforced their local oligarchic powers. The first republic, which lasted from 1889 to 1930, is often referred to as the 'Colonels Republic' in reference to their influence. Although Brazil was formally a democracy, popular participation in elections was tiny and patronage became entrenched as a means of buying votes. As Norman Gall has noted, the total number of federal, state and local jobs in 1920 was about 200,000, which equalled the number of votes needed to win the 1919 presidential election.[130]

The first republic was overthrown by Getúlio Vargas in 1930, in what is variously described as either a revolution or a military coup. Vargas was a populist dictator whose *Estado Novo* has been likened to a hybrid between Mussolini's Italy and Salazar's Portugal. Brazil's powerful labour courts date from this period. Vargas lost power in 1945, but was re-elected President in 1951. He was succeeded by the charismatic Juscelino Kubitscheck, who served his full term in office, and then by the short-lived presidencies of Jânio Quadras and João Goulart, the latter of whom was overthrown by a

129 Alfredo Montero, *Brazilian politics*, Polity Press, 2005, p.61.
130 Norman Gall, *Lula and Mephistopheles*, Fernand Braudel Institute of World Economics, no date.

military coup. Rather than abolish Congress, the military dictatorship attempted to rule through it, manipulating both the electoral system and the organisation of political parties in an attempt to put a 'democratic veneer' over their rule. São Paulo and the south have traditionally been considered centres of 'democratic and progressive opinion' and so the generals diminished their influence while strengthening that of the north and north-east, whose elected representatives tended to be more sympathetic to the military.[131] The framers of the 1988 Constitution did not reduce this regional imbalance and a revision of the Constitution five years later also failed to deal with the anomaly.

3.2 The drafting of the 1988 Constitution

The 1988 Constitution was drawn up at a time when the central government was weak, both in relation to Congress and to the directly-elected state governors and mayors. It also faced pressures from a variety of Brazilian social groups, whose extra-parliamentary mobilisations had helped to bring down the dictatorship. The first draft of the Constitution was produced by a 'commission of notables', but this was abandoned by the Assembly, which chose to develop an entirely new draft from the ground up. More than 20,000 people attended its public sessions while the Assembly was sitting and participation of social movements, civil society organisations and interest groups was massive. President Cardoso has likened the drafting process to his time teaching at a Parisian university during the student unrest of 1968,[132] while Fiona Macaulay, a former researcher on Brazil for Amnesty International, has described the outcome as 'chaotic.'[133]

Conversely, Oscar Vilhena Vieira argues that it should be considered 'the most democratic moment of Brazilian political life.'[134] However, he also notes that in 'its language and scope, it [the Constitution] follows the tradition of the strong social state forged during the Vargas era (1930-1945)', which embodied some of the worst traditions of Latin American corporatism. Brazil was comparatively isolated from the broader discussions that influenced the discussions about the constitutional protection of rights in Eastern Europe and post-Apartheid South Africa a few years later. Instead it looked to the radical Portuguese Constitution of 1976 for inspiration including a detailed section on economic policy whose socialist provisions were largely abandoned in subsequent years.

Over 300 proposals were submitted for inclusion in the Constitution by a variety of civil society non-governmental organisations (NGOs) and advocates. These included trade unionists, land rights activists and groups campaigning for the rights of indigenous people, Afro-Brazilians, women, the urban poor and others who have traditionally been marginalised in Brazilian society. Their efforts ensured the inclusion of what Vilhena describes as an 'extremely generous and comprehensive charter of rights' including the rights of vulnerable groups such as indigenous people, the elderly, and children. The Constitution also recognised a new group of environmental and consumer rights.

While international human rights jurisprudence of recent years tends to regard the realisation of most social, economic and cultural rights as progressive and incremental, Brazil's 1988 Constitution declared that all fundamental rights were to have immediate application.[135] It also established that the law cannot exclude from judicial examination any threat or violation of a fundamental right,

131 Reid, 2007, p.187.
132 Fernando Henrique Cardoso, *The Accidental President of Brazil, a Memoir*, Public Affairs, 2006, p.166.
133 Fiona Macaulay, 'Democratisation and the judiciary', in Maria DiAlva Kinzo and James Dunkerley, *Brazil since 1985: economy, polity and society*, Institute of Latin American Studies, 2003, p.86.
134 Oscar Vilhena Vieira, 'Public Interest Law. A Brazilian Perspective', *UCLA Journal of International Law & Foreign Affairs*. 224, 2008, pp.231-237.
135 The Constitution of Brazil, Article 5, Paragraph 1.

which significantly expanded the role of the judiciary in public policy-making.[136] Fundamental rights cannot be abolished, even by constitutional amendments, which make them the core values of the Constitution, the reserve of justice of the Brazilian legal system. People can claim a violation of fundamental rights by an action or omission of the legislative or executive branch in implementing or regulating these rights. One consequence of this has been that constitutional challenges are often brought to the federal courts over government action or inaction on fairly mundane issues.

Many of these provisions required additional legislation and the adoption of the Constitution required the enactment of 285 ordinary laws and 41 complementary laws to put its provisions into effect.[137] This overwhelmed the law-making process in Brazil, and some of the legislative provisions envisaged by the Constitution have yet to be enacted. The Constitution also provided that binding percentages of the amount of taxes collected by all spheres of the federation must be spent on health and education.

However, Brazil now spends only about three per cent of its GDP on health and less than five per cent on education compared to 12 per cent on pensions, which is an extraordinary figure for a relatively young country. The richest fifth of Brazil's pensioners receive 61 per cent of this spending, roughly 40 per cent goes to only three million former public employees and 40 per cent is spent on people aged 40-60.[138] By contrast, people working in the informal economy – roughly 40 per cent of the workforce – get no state benefits whatsoever. Much of Brazil's taxation is indirect and so the burden falls proportionately hardest on the poorest while the privileges disproportionately benefit the wealthy. In practice the rights discourse has been used to entrench the corporatist benefits of the Brazilian elite and deepen the country's inequality.

After the period of centralised authoritarian rule, the framers of the Constitution decentralised power, granting considerable autonomy to state governors to tax and spend without reference to central government. The *abertura* began with the direct elections of governors in 1982 and these used their newly-found democratic legitimacy to argue for 'fiscal rights' for states.

Many of these governors had previously been appointed to their positions by the dictatorship and control of tax revenues gave them considerable resources for patronage and clientelism with which they were able to consolidate their support bases. It also made it extremely difficult for central government to control public expenditure. States and municipalities ran up huge debts and even printed money using their own state banks, which exacerbated the turmoil of economic policy-making during the 1980s and early 1990s. Central government only gradually regained control of the public finances by imposing structural adjustment and reforms on bankrupt states and a tight grip on the money supply by Brazil's central bank.

The Constitution also provides Brazil's politicians with considerable autonomy by protecting them against the constraints of party discipline, which, in practice, has increased the political fragmentation of the Brazilian Congress. No political party has ever achieved a majority in either house since Brazil returned to democracy. Governments tend to be based on fairly unstable coalitions whose leaders cannot be certain how even members of their own parties will vote. In the first two years of Lula's

136 Ibid., Article 5, XXXV.
137 Macaulay, 2003, p.87.
138 Gall, no date, Fernand Braudel Institute of World Economics; see above note 130.

presidency, for example, roughly one third of the members of Congress switched parties, several of them two or three times.

The weakness of party discipline increases the influence of cross-party blocks and regional groupings, makes the process of law-making particularly arduous. Backroom deals and 'pork-barrelled' politics are a standard way of doing business and corruption scandals – in particular the practice of vote-buying – have become routine under successive administrations.[139] The constraints which the Constitution places on the executive also makes it difficult to implement reforms which challenge vested interests, particularly those in the corporatist Brazilian state. As Montero notes, 'Oligarchical rule in all of its forms continues in modern day Brazil because of the pervasive use of clientilism, patronage and patrimonialism… The political use of public resources is the lifeblood of legislative practice, interest-based lobbying, political party organization, and the process of building political careers… The most enduring aspect of contemporary Brazilian political institutions is the capacity of minority interests to block institutional change.'[140]

3.3 The Brazilian judiciary

As one of the three powers of governance in the Constitution, the judiciary have a vital role in upholding the civil liberties of the Brazilian people and enabling them to hold their executive to account. The Federal Supreme Court (*Supremo Tribunal Federal* – STF), is the highest judicial authority in Brazil, charged with interpreting the Constitution. The Court has the power of judicial review and judges the constitutionality of laws. It also deals with complaints against higher authorities, such as the President or members of Congress and resolves differences between the central government and states. The STF comprises 11 judges nominated by the President of the Republic with the approval of the Senate.

Immediately below the STF is the High Court of Justice (*Superior Tribunal de* Justiça – STJ), which consists of 33 judges who are nominated by the President of the Republic from a list drawn up by the judiciary itself, along with *Ministério Público* and the Brazilian Bar Association (*Ordem dos Advogados do Brasil* – OAB). The STJ is highest appellate court for non-constitutional issues and was created in a, largely unsuccessful, attempt to reduce the number of cases going to the STF. A Special Appeal (*Recurso Especial*) can be made to the STJ when a judgment of a court of second instance offends a federal statute disposition or when second instance courts make different rulings on the same federal statute.

The 1988 Constitution contains 43 separate articles on the role of Brazil's judiciary and the structure and powers of the courts and public prosecutors. After the experience of the military dictatorship, its drafters were concerned to entrench judicial independence and the ability of the courts to hold the government to account through judicial review. However, the weakness of the executive at the time of the Constitution's drafting allowed judges to maximise their influence and minimise their accountability in what Macaulay describes as 'a classic case of producer capture'. She notes that the Brazilian judiciary now enjoy more political and operational independence than any other country in Latin America, but the resultant 'hyper-autonomy and insulation' has created more problems than it solved.[141]

139 Gall has a good analysis of the *mensalao* scandal of 2005.
140 Montero, 2005, p.51.
141 Macaulay, 2003, p.86.

There are a total of 15,731 judges in Brazil, of whom 11,108 serve at the state level.[142] Brazil has five parallel court systems each of which supports lower courts, state or regional appellate courts and supreme courts. These are: the ordinary civil and criminal courts organised at state level; federal courts, which deal with matters of federal or constitutional relevance; and a specialised justice system which consists of electoral courts, labour courts and military courts. Each of Brazil's states organize their own judicial systems although these must adhere to the same laws and basic constitutional principles. The Brazilian legal system relies heavily on constitutional guarantees, which means that a large number of cases are appealed all the way to the STF. While *direct* challenges to the constitutionality of laws can only be made in the STF, any judge can rule on the constitutionality of a law as a matter *incidental* to any type of court case under consideration, and this may then be appealed all the way up to the STF.

Every judge in lower-level courts is free to interpret the law regardless of previous rulings by higher-level courts. Lower courts routinely overturn or stall legislative decisions and are free to set new precedents on civil and criminal issues and also constitutional questions. This diffusion of the power of judicial review combined with the complicated and overlapping structure of the Brazilian judiciary has made law and policy-making by central government difficult as the executive has to defend itself against multiple levels of judicial challenges every time it promulgates a new law. This has massively increased the number of cases that the judiciary deals with and often produces conflicting and ambiguous decisions.

Between 1988 and 1991 the number of cases entering the federal justice system rocketed from 193,709 to 725,993.[143] This was partly in reaction to an 'anti-inflation' *medida provisoria* issued by President Collor freezing all personal bank accounts in 1990, which meant that many people lost their entire savings. Tens of thousands challenged the measure in the courts and the government responded by appealing every case all the way to the STF, which was completely paralysed as a result. The court system as a whole was also unable to cope with the huge increase in its workload and a massive backlog of cases built up.

The Collor Government attempted to restrict the power of judicial review to the STF, which had indicated that it would not rule against the government on this measure, and to impose binding precedent on the lower courts. This was resisted both by the lower ranks of the judiciary and many on the left who argued that judges in Brazil's lower courts are far closer to the people and so more in touch with their day-to-day concerns. Some of the more senior members of the judiciary are perceived as being implicated in the nepotism and cronyism that characterised the dictatorship era and since the STF are all political appointees, it was argued that this measure offended against the constitutionally-defined independence of the judiciary.

Although the vast majority of challenges to presidential or congressional legislative initiatives are unsuccessful, each must nevertheless be dealt with by the high courts, which overloads the system. In 2005, for example, the STF was hearing around 5,000 cases every week, many of which are identical injunctions that have been filed in dozens of state courts simultaneously.[144] As Macaulay notes, the STF deals with this by automatically applying pre-determined judgments, making a mockery of the

142 *Conselho Nacional de Justiça Departamento de Pesquisas Judiciárias, Justiça em Números 2008 Variáveis e Indicadores do Poder Judiciário,* CNJ, June 2009, p.209. There are a further 1,478 federal judges and 3,145 labour court judges.
143 Ibid., p.88.
144 Montero, 2005, p.40.

idea that every case is examined on its original merits. Many judges also tend to follow informally the decisions of higher courts, since they know that their decisions will otherwise be overturned on appeal. She concludes that, 'This sort of access for all has become the wrong sort of access and therefore results in access for none.'[145]

The number of cases has begun to fall, thanks to the reforms described below, although in May 2009 the *Economist* still described the STF as 'the most overburdened court in the world'.[146] The same could be said for the judiciary as a whole. A report commissioned for the Brazilian Ministry of Justice showed that in 2003 there were 17.3 million cases initiated and allocated to a judge – the equivalent of one case for every 10 inhabitants.[147] The courts had only managed to settle 12.5 million of these, creating a backlog of 4.7 million unresolved cases for that year alone.[148] This has led to a huge backlog of pending cases and means that trials are often subject to considerable delays.

A poll commissioned by the Brazilian Bar Association in May 2003 indicates that the judiciary is the second least-respected government institution in Brazil. Roughly 38 per cent of those consulted in the survey did not trust the judicial system.[149] A study carried out by the Brazilian Judges Association found that most people saw the judiciary as 'a mysterious black box impenetrable for the ordinary person, full of secrets that only special beings [judges] can decipher'.[150] In a poll conducted in February 2009 another research institute found that 69 per cent of respondents believed that judges in Brazil lack impartiality.[151] A report by the International Commission of Jurists in 2005 was similarly damming:

> 'The judiciary is slow and often corrupt, and the weakness of its disciplinary mechanisms inhibits its effectiveness. The failure over decades to introduce any type of judicial reform has led to increasing backlogs and trial delays. Bureaucratic congestion of the courts is a major hindrance. Besides, there is a shortage of judges – 7.62 for every 100,000 inhabitants as of May 2005 – and the population feels that the majority of the country's 16,900 judges (as of July 2003) is out of touch and unaccountable to the citizenry they serve.'[152]

The UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, visited Brazil in October 2004.[153] His report identified the Brazilian judicial system's main shortcomings as problems with access to justice, its slowness and notorious delays, and the fact that there are very few women or people of African descent or indigenous origin in top positions in the judiciary. He concluded that:

> 'of all these shortcomings, the most serious is without doubt the first, since a large proportion of the Brazilian population, for reasons of a social, economic or cultural nature or social exclusion, finds its access to judicial services blocked or is discriminated against in the delivery

145 Macaulay, 2003, p.91.
146 *Economist,* 'When less is more', 21 May 2009.
147 *Ministério da Justiça, 'Diagnóstico do poder judiciário*', Brasília, 2004, p. 34.
148 Ibid.
149 See '*Presidente do Supremo apresenta os indicadores estatísticos do Poder Judiciário e sugere mudança na atuação da Justiça',* 12 May 2005, **www.infojus.gov.br/portal/noticiaver.asp?lgNoticia=16852** (accessed 4 February 2010), The Cyrus.R. Vance Center for International Justice Initiatives Strategy Summit for the Americas, New York, 3–5 March 2005, Country Report Brazil.
150 AMB, *Pesquisa qualitativa 'Imagem do Poder Judiciário',* Brasília, 2004, p. 61.
151 *Economist,* 'When less is more', 21 May 2009.
152 International Commission of Jurists *Brazil - Attacks on Justice 2005*, ICJ, 2005. This figure for the total number of judges is not consistent with the Brazilian government's most recent statistics.
153 *Civil and political rights, including the questions of independence of the judiciary, administration of justice, impunity, Report of the Special Rapporteur on the independence of judges and lawyers,* Mr Leandro Despouy, Mission to Brazil, E/CN.4/2005/60/Add.3, 22 February 2005.

> of those services. . . . . Delays in the administration of justice are another big problem, which in practice affects the right to judicial services or renders them ineffective. Judgements can take years, which leads to uncertainty in both civil and criminal matters and, often, to impunity. . . . Brazilian justice does not have a positive image in society at large, though it has a long tradition of functional autonomy as a branch of government.'[154]

Judicial reform has been a controversial topic in Brazil over the last two decades, with critics arguing that the government's attempts to increase its control over the judiciary weaken a fundamental constitutional safeguard and that there are better ways of making Brazilian justice fairer, faster and more accessible. However, it is generally agreed that Brazil suffers from a chronic lack of judges at the local level and cannot deal with its current workload without greater resources.

President Lula indicated that judicial reform was one of his priorities when he first took office. In May 2003, the Government established the Secretariat for Judicial Reform (*Secretaria de Reforma do Judiciário*) within the Ministry of Justice charged with 'formulating, fostering, supervising and coordinating the process of reforming the administration of justice and fostering dialogue between the legislative, executive and judicial branches'. On 7 July 2004 the Senate approved a bill which included Constitutional Amendment 45: *Reform of Judiciary Power.*[155] This established the principle that some STF decisions can have binding precedent if this is explicitly written into the judgment and supported by a two thirds vote of its members.[156] This process is known as a *súmula vinculante.*

In 2006 a new law, *súmula impeditiva de recursos*, was approved which specifies that if a lower court decision is in line with a previous decision of higher court, appeals will not be permitted.[157] A further law, *Repercussão Geral do Recurso Extraordinário*, specified that extraordinary appeals to the STF will only be permitted-if the person or body requesting the appeal can show the case has a 'general repercussion in society'.[158] If this test is not met then the judgment of a lower court is accepted as final. The overall impact of these changes has been to cut the number of cases going to the STF, which fell from 97,400 between April 2007 and March 2008 to 56,500 between April 2008 and March 2009.[159]

Constitutional Amendment 45 also established a National Council of Justice (*Conselho Nacional de Justiça* – CNJ) to deal with complaints against judges.[160] This consists of 15 members appointed by the President of the Republic and approved by the Senate, of which nine will be judges selected from all levels of the state and federal branches; the remaining six members will be made up of representatives from *Ministério Público*, the OAB and wider civil society. The CNJ's legality was challenged by the Brazilian Judges' Association (*Associação dos Magistrados Brasileiros* – AMB) in December 2004, who argued that it was an unconstitutional threat to judicial independence, but the challenge was unsuccessful.

154 Ibid, summary of conclusions.
155 See **www.v-brazil.com/government/laws/recent-amendments.html** (accessed 4 February 2010).
156 Constitution of Brazil Article 103A.
157 Lei 11.276.
158 Lei 11.418/2006.
159 *Economist*, 'When less is more', 21 May 2009.
160 Constitution of Brazil Article 103B.

3.4 Public prosecutors

Ministério Público (the Public Prosecutor's Office) is the body constitutionally charged with promoting justice in Brazil, which involves both enforcing the law and protecting the rights of the people under it. The powers and institutional functions of *Ministério Público* are set out in the Constitution and this also protects its independence in line with the safeguards and privileges provided to the judiciary.[161] Constitutional Amendment 45 also established an external oversight body for *Ministério Público* – the National Council of the Public Prosecutor's Office. The establishment of this oversight body has been broadly welcomed and has not faced the type of legal and political challenges which the judiciary mounted to the establishment of the CNJ.

The structure of the *Ministério Público* also follows that of the judiciary. There are prosecutors' offices in each of the 27 states and in the federal district employing around 12,000 attorneys both at federal and state levels (which means that there are around 4.22 public prosecutors to deal with every 100,000 Brazilians).[162] *Promotores de justiça* act as prosecutors at courts of first instance while *procuradores de justiça* attend appeals. The *Procurador Geral da República* (Prosecutor General) heads the federal body and tries cases before the STF. There is also a Superior College of Prosecutors, a Higher Council of Prosecutors, and a control agency (*Corregedoria-Geral do Ministério Público*). Military prosecutors officiate at military tribunals (including cases involving the military police).

The origins of *Ministério Público* date back to colonial times when public prosecutors had responsibility to apply and monitor the enforcement of the law in the name of the Portuguese crown. This role gradually expanded as they were granted powers to protect the rights of vulnerable groups in Brazilian society including freed slaves, indigenous Brazilians, orphans and the 'mentally incapacitated'. *Ministério Público* was also charged with monitoring prisons and mental health institutions, and protection of the interests of minors during the Imperial period. It was given a more general public interest monitoring function by several laws enacted during the first republic. In 1939 the Civil Procedure Code specified its role as monitoring the implementation of the law in the interests of the public.[163] This gave *Ministério Público* a responsibility to intervene in every case in which there was a public interest aspect and it took on many of the functions of an ombudsman in Brazilian society including protection of the environment, cultural and historic heritage, and the public patrimony.[164]

The 1988 Constitution considerably enhanced and expanded the role and status of *Ministério Público* as a guarantor of citizen's rights. As Oscar Vilhena has observed, it has achieved the status of almost a fourth branch of power within the Brazilian state. The Constitution recognises *Ministério Público* as 'a permanent institution, essential to the jurisdiction of the state, being responsible for the protection of the legal order, the democratic regime, and social and non-disposable individual interests.'[165] All its members are public servants for life, selected through a public contest, with the same guarantees of independence as the members of the judiciary. The President of the Republic appoints the *Procurador Geral da República* from within the ministry, subject to the ratification of the Senate, for a mandate of two years and state governors adopt a similar procedure. *Ministério Público* sets its own budget, which

161 Constitution of Brazil Articles 127-129.
162 Defensoria Publica, Diagnostic II, Ministry of Justice, 2006, p.106.
163 Decreto-Lei No. 1.608, 18 September 1939.
164 Vilhena 2008, p.238.
165 Article 127.

is sent directly to Congress for consideration in much the same manner as the executive and judiciary do so.

Like the Brazilian judiciary, members of *Ministério Público* enjoy exceptionally good pay and conditions by Brazilian standards. Many of its members have become involved in public interest litigation in the fields of environmental, consumer and children's rights as well as championing the causes of indigenous and Afro-Brazilians, challenging discrimination and addressing issues such as violence against women. *Ministério Público* also has a high public profile as the body charged with tackling corruption and organised crime.

In his preliminary report on extrajudicial, summary or arbitrary executions, UN Special Rapporteur Philip Alston said he 'was especially impressed with the professionalism and dedication of the *Ministério Público*.'[166] He concluded that, 'the *Ministério Público* is a dedicated and professional body. It must play a key role from the very outset in the investigation of every single incident involving killing by the police.'[167] However, as Oscar Vilhena notes, *Ministério Público* may be falling victim to 'the bureaucratic tendency of large institutions to become self-serving.' Despite the fact that its members have the legal obligation to keep their doors open to the public, there is no mechanism by which civil society organisations can hold them to account. Indeed Vilhena argues that the initial enthusiasm about its potential may help to explain the failure of most Brazilian civil society organizations to develop their own legal advocacy strategies.[168]

Ministério Público's public interest litigation is largely focused on consumer rights and environmental issues, which are principally of interest to middle class Brazilians. However, the overwhelming majority of the work of Brazil's public prosecutors, at the state level, remains that of ordinary criminal prosecution or civil litigation. Prosecutors have overall responsibility for supervising the conduct of criminal investigations by the police and for prosecuting a case when it comes to court. It is their responsibility to decide whether or not to bring charges against someone and they are duty-bound to request the acquittal of a defendant if they become convinced of his or her innocence.

Public prosecutors are legally required to ensure that all evidence gathered in the course of a criminal investigation has been properly obtained, to monitor for irregularities and malpractice and to ensure that the rights of the criminal suspect have not been violated during the process. If public prosecutors come into possession of evidence against suspects that they know, or believe on reasonable grounds, was obtained through recourse to unlawful methods, they should reject it, inform the court and take all necessary steps to ensure that those responsible are brought to justice.[169] Any evidence obtained through the use of torture or similar ill-treatment can only be used as evidence against the perpetrators of these abuses.[170] In practice this rarely happens.

The police and public prosecutors usually work together in bringing forward criminal prosecutions, although there have been some legal challenges regarding their division of responsibility and there is not, as yet, a consolidated jurisprudence on this matter. UN Special Rapporteur Alston has noted that:

166 *Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr Philip Alston, Addendum, Mission to Brazil, 4-14 November 2007*, UN Doc. A/HRC/8/3/Add.4, 14 May 2008, para 19.
167 Ibid., para 21 (f).
168 Vilhena, 2008, pp.240-241.
169 UN Guidelines on the Role of Prosecutors, Guideline 16.
170 The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 15.

> 'In practice, the prosecutors' investigative role has often been discouraged by Civil Police and impeded by legal controversy over prosecutorial powers. First, Civil Police show little awareness of the value of consulting with prosecutors to make sure that the evidence they are gathering will suffice to sustain criminal charges. For this reason, they seldom inform prosecutors until they reach a stage at which the law requires them to do so. This will typically not be until 30 days after the crime took place, by when the crime scene will almost certainly be destroyed, bodies are likely to have been buried, and witnesses may have fled. Second, some have challenged the legal power of prosecutors to gather evidence, arguing that only the Civil Police have the right to conduct investigations. While this argument appears to be motivated more by institutional jealousies than constitutional analysis, the courts have not provided a definitive answer, meaning that prosecutors who gather evidence cannot be certain that it will prove admissible at trial.'[171]

Ministério Público clearly bears some culpability for the crisis in Brazil's criminal justice system. Prosecutors have a responsibility to ensure that they do not participate in interrogations in which coercive methods are used to extract confessions or information. They should also satisfy themselves that such methods are not used by law enforcement officials in order to obtain evidence to bring criminal charges against a suspect. Where a suspect or witness is brought before a prosecutor, the prosecutor should ensure that any information or confession offered is being given freely. A variety of safeguards should also be provided to people in detention based on international law and best-practices from other jurisdictions.[172] Judges and prosecutors have the responsibility to protect those at risk of torture, investigate allegations of torture, inspect places of detention where people may be at risk of torture, prosecute suspected torturers and provide redress to the victims of torture. As the evidence presented in this report makes clear, they are currently failing to fulfil their responsibilities in this regard.

Public prosecutors also have the power to inspect prisons, public jails and police stations on a monthly basis, although, in practice this does not happen. If evidence of malpractice emerges during inspections by other bodies, it is the duty of the public prosecutors to initiate investigations and possible prosecutions. As this report shows, there have been very few prosecutions against police officers and prison staff responsible for serious human rights violations and abuse of their positions on authority within the Brazilian penal and criminal justice systems. The failure of *Ministério Público* to pursue such violations more vigorously has contributed to the apparent culture of impunity that currently exists.

3.5 Public defenders

The 1988 Constitution stipulates that 'the State has to provide full and free legal assistance to whoever proves not to have sufficient funds.'[173] It also provides for the enactment of legislation to establish *Defensoria Pública* (Public Defenders' offices) in Brazil's various states.[174] This was established by *Lei Complementar nº 80 de 12 de janeiro 1994* (Complementary Law no. 80 of 12 January 1994), which laid

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

172 Conor Foley, *Combating torture: a manual for judges and prosecutors*, University of Essex Human Rights Centre, 2003. A version of this manual *Combate a tortura: manual para Magistrados e membros do Ministerio Publico* has been distributed by the Brazilian Government to every judge and public prosecutor in Brazil.

173 Constitution of Brazil Article 5.

174 Constitution of Brazil Article 134.

down general provisions for the creation of public defenders' offices in every state.

The idea of providing legal assistance to the poor is long-established within the Brazilian legal system and there have been various attempts to establish some form of *pro bono* representation by its Ministry of Justice and Bar Associations.[175] A constitutional right to legal assistance appeared in Brazil's short-lived 1934 Constitution, but the organisation of public legal assistance services only started in the 1950s, when a federal law set out the structure and principles by which states should organise this. The first offices of *Defensoria Pública* were established in Rio de Janeiro in 1954 followed, considerably later, by Minas Gerais and Bahia in 1981 and 1985 respectively. Most other states did not create offices of *Defensoria Pública* until after the passage of the 1994 law.

The basic function of *Defensoria Pública* is to provide free legal assistance to people who are not able to afford private lawyers – defined under Brazilian law earning up to three minimum salaries. This covers around 70 million Brazilians and so the need is obviously considerable. There are approximately 4,000 public defenders in the whole of Brazil, compared to 12,000 public prosecutors and almost 16,000 judges. This means that there are 1.48 public defenders for every 100,000 inhabitants of Brazil, considerably lower than the ratio of judges and public prosecutors – which are 4.22 and 7.7 respectively.[176] While the mandate of public defenders is a narrower one to that of judges and prosecutors – the need for their services is far greater than can be provided with current resources. *Defensoria Pública* provides legal assistance in civil as well as criminal cases and many of its offices have specialist units dealing with consumers' rights, and the rights of women, children and the elderly. This means that their work is very thinly spread and reduces the resources that can be devoted to criminal justice work.

The Ministry of Justice has estimated that 80 per cent of prisoners cannot afford a lawyer and so need to be provided with the service of either a public defender or private attorney at public expense.[177] Yet in practice, there are too few public defenders to perform this task effectively. An effective criminal justice lawyer needs to gain access to his or her client immediately after arrest, provide advice during interrogation and ensure that his or her client's constitutional safeguards are not violated in custody. He or she also needs time to review police reports and other evidence against his or her client, interview all witnesses presented by the prosecution and seek out additional evidence and witnesses. He or she needs time to consult with the accused and discuss the details of the alleged offence and all the evidence that is likely to be presented. The lawyer also needs to be able to prepare and present pre-trial motions as well as preparing the case itself for trial. If the case is a jury trial then the defence lawyer needs to take part in jury selection. As well as representing their client at the actual trial defence lawyers also need time to determine and pursue the appropriate basis for appeal, present written arguments at appeal and pursue such appeals for as long as is necessary to obtain justice for their clients. These are time-consuming and potentially expensive procedures, but are the basic minimum necessary in order to uphold the right to a fair trial as guaranteed by international human rights treaties to which Brazil is a party.

However, the offices of *Defensoria Pública* have nothing like the resources to fulfil these functions. Public defenders rarely visit police stations and usually only get to meet their clients – and read their case files – a few minutes before their initial court hearings. This gives them barely enough time

175 Vilhena, 2008, pp.241-243.
176 Defensoria Publica, Diagnostic II, Ministry of Justice, 2006, p.106.
177 Ibid.

for introductions and a cursory study of the evidence. It is clearly not sufficient time for them to present a proper defence, prepare an application of *habeas corpus*, or move that charges be dismissed. In practice it means that the influence of judges and prosecutors in determining the conduct of a particular case will largely go unchallenged by the defence. As the UN Special Rapporteur Leandro Despouy has noted, 'a country in which over half the population (70 million people) lives below the poverty line and in which there are glaring inequalities needs the Office of the Public Defender to be more dynamic than the rather limited, though commendable, present one… Notwithstanding the enormous amount of work done by this institution, it is unable to meet all needs. Wherever it works, it is short of the budget resources, staff and support structures (for example information technology, of which it has little if any) it needs to perform its huge task.[178]

Both the 1988 Constitution and the 1994 law give individual states considerable leeway in deciding when and how to establish offices of *Defensoria Pública*, which has raised concern about both their independence and whether they would be provided with adequate resources. The Constitution specifies that the office shall be independent of the Brazilian state, which implies that it should be financially and administratively autonomous; however, *Defensoria Pública* is a much smaller and weaker organisation than *Ministério Público,* with which it is often compared.

An analysis carried out by the Secretariat for Judicial Reform in 2006 showed considerable variations in the size, budgets, case-loads, salaries and recruitment patterns between different offices across the country.[179] It found that while the coverage of the offices of *Defensoria Pública* was increasing, it still only reached 39.7 per cent of all the courts and tribunals in the country. The survey also found that there were a total of 6,575 positions for public defenders in the country as a whole but only 3,624 of these had been filled, which meant that around 45 per cent were vacant at the time when the survey was carried out. Various *Defensoria Públicas* are experiencing problems in filling vacancies, which may be partly due to the fact that salaries are much lower than for judges and prosecutors. Although the survey showed some progress from a similar one two years previously, it is clear that the offices remain chronically under-resourced and are weakest in the poorest states, where the need for them is probably greatest. Two of Brazil's most populous states, Rio Grande do Norte and São Paulo, did not establish offices of *Defensoria Pública* until 2005 and 2006, respectively. The southern state of Santa Catarina still has not established a *Defensoria Pública*.

In order to alleviate this need, some states have used private lawyers enlisted by the Brazilian Bar Association (OAB) to supplement the service. São Paulo, the largest state in Brazil, was also one of the last to create an office of *Defensoria Pública*. However, it has run a legal assistance service since the 1950s using private lawyers. This scheme is now extremely extensive with OAB contracting around 43,000 lawyers every year who all receive some public resources to represent the poor. Unfortunately there are a number of problems with this pro bono service. Lawyers are only paid R$500 per case, which is a tiny fee given the amount of time that is usually involved in representing someone in a criminal case and means that they are not likely to devote sufficient time to do a proper professional job. There is little monitoring and evaluation of the effectiveness of the service although the evidence that is available suggests a low degree of user satisfaction.[180]

This service also does not offer the same guarantees of autonomy and independence as a properly-

178 Despouy, E/CN.4/2005/60/Add.3, 22 February 2005, para 38.
179 Defensoria Publica, Diagnostic II, Ministry of Justice, 2006, p.106.
180 Vieira, 2008, p.243, citing research by Luciana Gross Siqueira Cunha, *Acesso a justica e assistencia juridical em Sao Paulo,* 2001.

resourced *Defensoria Pública*, but it has created some institutional rivalry with OAB in some places. At the time of publication of this report there was an ongoing case at the STF between *Defensoria Pública* and OAB in São Paulo. Meanwhile the provision of legal aid for criminal defence work remains extremely patchy across the country. Indeed there appear to have been few improvements since Amnesty International made the following assessment in its 1999 Report:[181]

> 'All states should offer legal aid to prisoners who cannot afford a private defence lawyer. Most do, but the service is woefully under-resourced and unable to meet demand. Ceará state had a total of 10 legal aid lawyers to deal with over 3,600 prisoners. In Rio de Janeiro state, as of March 1998, the state employed 700 prosecutors and 425 active legal aid lawyers. The state had 180 unfilled places for the latter, although some of the shortfall has been made up by Bar Association lawyers and other volunteers. Detainees can wait for months, or even years, before their case comes to trial, and they are allocated a defence lawyer. Many defence lawyers offer only a cursory defence, due to time limitations. Many prisoners are not transferred to a lighter prison regime at their due date or do not receive parole because of the lack of legal representation and a shortage of other vital personnel such as judges, public prosecutors and professionals, who are required to give expert opinions on the prisoner's progress. Some prisoners even serve a term longer than their original sentence because the paper work needed to release them is delayed, resulting in effect in illegal imprisonment. Lack of legal aid and extreme slowness in considering requests for transfers or entitlements is a major source of frustration to prisoners, and a complaint commonly voiced during protests.'

In states such as Pernambuco, which has no legal aid office, or others where there is a serious deficit, law students make up some of the shortfall, and work on a voluntary basis with local human rights organisations to review prisoners' legal situation and see whether they are eligible for release, parole or transfer. The Ministry of Justice has encouraged a nationwide effort, anticipating that 16,000 prisoners illegally detained would be released. In October 1997 Rio de Janeiro state transferred 486 convicted prisoners from the police stations to the prison system, and eight wrongfully arrested detainees were released. In Pernambuco, GAJOP, a human rights NGO coordinated voluntary legal aid in three prisons in 1997/1998 in conjunction with the Secretary of Justice. However, they noted that they had encountered resistance and obstruction from prison employees, demonstrating that, while such voluntary action may be a useful short-term measure, it is not a permanent solution.

In October 2009 a new federal law was passed by Congress to strengthen *Defensoria Pública* at the federal level. It used the newly-created office in São Paulo as a model, guaranteeing its financial and administrative autonomy and introducing an ombudsman function to oversee the workings of federal public defenders. There are currently less than 100 federal public defenders compared to 1,478 federal judges.

Defensoria Pública is also arguing, both in a case at STF and through lobbying Congress, for an expansion of its role and powers so that it can take 'public interest' cases on a similar basis to *Ministério Público*. This would enable its attorneys to conduct investigations, demand information from public authorities, and expose non-compliance with the law by public bodies. It would also strengthen its case for equal salaries and similar guarantees of independence to *Ministério Público* which, unsurprisingly, is opposed to such a move.

181 Op cit 45, para 4.5.

3.6 Prisons and penal reform

Although Brazilian penal policy is governed by a federal law, *Lei de Execução Penal,* the country does not have a centralised prison authority with executive powers and the administration of prisons is primarily carried out at state level. The state governor usually manages the prison system via his or her secretary of justice, while the governor's secretary of public security is generally in control of policing, which includes responsibility for police stations and lockups. However, this is subject to some variations. The structure of state penal systems also does not follow a single model and there are considerable variations on issues like levels of prison overcrowding, monthly costs per inmate, and guards' salaries.

The two federal agencies concerned with prison policy are located within the Ministry of Justice: the Penitentiary Department (*Departamento Penitenciário*) or DEPEN and the National Council on Criminal and Penitentiary Policy (*Conselho Nacional de Política Criminal e Penitenciária*); the former is primarily charged with practical matters such as the funding of new prison construction, while the latter focuses on guiding policy. States may also create local DEPENs. The National Council is responsible for the publication of the national prison census, which contains useful information and statistics on prisoners, prison staff, incarceration costs, and the state of the prison infrastructure in Brazil. This should guide prison policy at the state and federal level although the separation of the different bodies sometimes leads to fragmentation. *Lei de Execução Penal* also specifies that the judiciary, *Ministério Público*, local prison councils (*Conselho Penitenciário*), and local community councils (*Conselho da Comunidade*) also all play an important monitoring, administrative or supervisory role.[182] A few states have also established prison ombudsmen positions and a federal ombudsman position was created in 2004.

Brazil's prison population is distributed among several categories of facilities, including penitentiaries and prisons (*penitenciárias* and *presídios*), jails (*cadeias públicas* and *cadeiões*), houses of detention (*casas de detenção*), and police precinct lockups (*distritos policiais* or *delegacias*). Criminal suspects upon arrest should be brought to a police lockup, for booking and initial detention, where they should be held for a maximum of a few days before being charged or released. If the suspect is not released, he or she should be transferred to a jail or house of detention to await trial and sentencing. If convicted, the prisoner should be transferred to a separate facility.

Convicted prisoners should be held in one of three basic categories of institution: closed facilities, semi-open facilities and half-way houses. The usual closed facility is a prison. Semi-open facilities include low security units where the prisoner is expected to work and receive training. Half-way houses are places where a prisoner will sleep at night, but be allowed to come and go from during the day. The sentencing judge will specify which facility the prisoner should be placed in initially – in accordance with the type of crime, length of sentence, previous convictions, perceived dangerousness, and other characteristics – but, by law, a prisoner should expect to move from a high security to lower security facility during the course of his or her sentence. The aim of Brazilian penal policy is the rehabilitation and reintegration of the prisoner back into society and so the move to an increasingly less restrictive type of facility is to prepare the prisoner for eventual release.

The law specifies a prisoner's route through the penal system in considerable detail. After sentencing

182 *Lei de Execução Penal*, Article 61.

a prisoner should spend his or her first weeks or months in an observation centre, where a corps of trained personnel can conduct interviews and carry out personality and criminological exams to assess his or her behaviour and attitudes in order to select the most appropriate penal facility to reform that particular individual. In practice, however, Brazil's prisons lack both the staff and infrastructure to comply with the law. Many states do not have half-way houses or anything like the number of low security units to cope with the number of sentenced prisoners – who overwhelmingly serve out their entire sentences in high security facilities instead. In fact Brazil does not even have enough spaces in prison to accommodate all of its prisoners, despite the massive over-crowding that exists, and so many convicted prisoners remain for years in police lock-ups instead. During the course of the research for this report a police lock-up was visited in Rio de Janeiro in which one police officer was guarding around 600 pre-trial detainees. The conditions in which they were being held appeared to violate Brazil's laws and constitutional provisions.

Lei de Execução Penal specifies that every state should establish a local prison council (*Conselho Penitenciário*) and a local community council (*Conselho da Comunidade*). The prison councils are responsible for providing recommendations to the judges about whether individual prisoners should be paroled, pardoned or have their sentences commuted and whether and/or when they should be moved to lower levels of security. Although every state should have such a council, research carried out in 2004 indicated that eight states still did not.[183] The duties of the community councils should include visiting every penal institution, interviewing prisoners and presenting monthly reports to both the *Conselho Penitenciário* and the *juiz da vara de execução penal*.[184] In practice many states have not established *Conselho da Comunidades* and even where these do exist they are of limited effectiveness. They are often chronically under-resourced – since the law does not specify the allocation of a minimum level of support – and their lay members often do not have the time or interest to work for them.[185] There have also been instances where the prison authorities have denied access to community councils attempting to make visits.[186]

The *Conselho Nacional de Política Criminal e Penitenciária* is also supposed to visit sites of detention, although the frequency of such visits is not specified by law.[187] It appears that such visits are carried out on a fairly limited and infrequent basis and neither their annual report nor their schedule of visits is routinely made public. As these councils also process prisoners' requests for parole and other benefits, this creates such an excessive workload that prison inspection cannot be carried out in any in-depth or routine manner. The law also specifies that DEPEN should carry out prison inspections, although these are more related to administrative matters concerning the running and maintenance of prisons.

The results of inspections are rarely made public and, although some individuals show considerable commitment to monitoring prisons, lack of coordination between the different inspecting bodies means that they often duplicate each other's efforts. They are often also constrained by a lack of staff and resources. As Amnesty International has noted, inspections are generally regarded as secondary

183 Fernando Salla, Paula Ballesteros, Olga Espinoza, Fernando Martinez, Paula Litvachky and Anabella Museri, *Democracy human rights and prison conditions in South America*, Centre for the Study of Violence, University of Sao Paulo, June 2009, p.76.
184 *Lei de Execução Penal,* Article 81.
185 Fernando Salla, Paula Ballesteros, Olga Espinoza, Fernando Martinez, Paula Litvachky and Anabella Museri, *Democracy human rights and prison conditions in South America*, Centre for the Study of Violence, University of Sao Paulo, June 2009, p.74.
186 AI Index: AMR 19/023/2007.
187 *Lei de Execução Penal,* Article 64.

to other official duties which receive priority and which may create a conflict of interest.[188] The Amnesty report noted both some good and bad practices in relation to prison monitoring:

> 'In São Paulo state, the judge inspector and 12 assistant judges are responsible for monitoring prisons in the Greater São Paulo area and investigating complaints of ill-treatment and maladministration, as well as for overseeing the sentences of some 50,000 prisoners, and processing requests for parole, remission, pardons and so forth. This combined responsibility leaves little time available for inspecting the prisons in the Greater São Paulo region. In some states, however, the offices of the judge inspector of prisons and the judge who oversees the serving of sentences are separate. Not only does this decrease the workload, allowing the judges to carry out their duties with greater efficiency, but it also eliminates the potential for conflicts of interest. At present a number of bodies with powers to inspect prisons, such as the Councils on Penal Affairs, the judges responsible for overseeing the serving of sentences, and the public prosecution service, also decide on aspects of the prisoners' sentence. As a result, prisoners may not have confidence in the independence of these bodies. Where states have only the office of the sentencing court judge, judges may restrict themselves to processing the prisoners' cases, rather than taking an active interest in prisoners' wellbeing.'[189]

Ministério Público and the judiciary also have a monitoring role over prison conditions and both bodies are supposed to carry out monthly inspections. As described above this obligation is generally not observed although the two bodies are working together on the *mutiroes*. Amnesty quoted one judge inspector in São Paulo who said that at the rate of one visit a month, each police station under his charge would be visited less than once every three years. In reality, his team of eight staff only visited police precincts about which they had suspicions or had received complaints. Investigations mainly consisted of interviewing prisoners and their relatives as well as prison staff. The judges had no medical training and no medical expertise on which to draw, nor was there any requirement on prison staff to keep photographs or other records of injuries, which could be inspected at a later date. Judges do not have the power to initiate prosecutions against prison staff or police officers, but instead pass any material that may be relevant to *Ministério Público*, which has a mixed record of initiating criminal investigations in such cases.[190]

The Amnesty International report noted that the establishment of prison and prison ombudsman's offices in some states had brought some improvements, but these bodies often lacked sufficient resources and powers to be effective. Judges were often also too over-burdened investigating allegations of police malpractice to fulfill their prison monitoring role. The judge inspector in São Paulo quoted above also had responsibility for checking the progress of some 55,000 police investigations a year, leaving little time available for inspecting police stations or investigating complaints by prisoners.

The report argued that penal reform is achievable without great extra cost and that there are numerous examples of good practice which could be built upon at the national level. It called for a greater use of alternative sentencing, 'dynamic security' within prisons and more involvement by prisoners' families and community groups in the monitoring of places of detention. It concluded that

188 AI Index: AMR 19/023/2007.
189 Ibid.
190 Ibid.

the key challenge facing both the state and federal governments was in identifying, analysing and learning from these positive experiences in order to reproduce them within government policy.[191]

Amnesty International also recommended the establishment of 'a dedicated body that would carry out regular visits, using a consistent methodology, with well-defined objectives. Such a body should preferably be composed of penal experts, and the aim of inspection would be to prevent abuse and encourage good daily practices. Visits should be both routine and unannounced. Inspection should also be quite distinct from the investigation of complaints, which is a matter for the judiciary and for the police.' It concluded that 'Prisoners' rights and conditions of detention could, however, be considerably improved, in some cases at little or no additional cost, if prisons were regularly and effectively inspected. Such inspections should be carried out both by a government body and by representatives of the local community and human rights groups. The examples of good practice cited throughout this report demonstrate that many positive changes can be introduced when prisons are run in a transparent and accountable manner, with respect for the human rights of the inmates, and the active involvement of the local community and judiciary.'[192]

191 Ibid.
192 Ibid.

Chapter Four

Jeitinho brasileiro – Finding a Way Forward

4.1 The reform agenda

As the previous three sections of this report show, it is difficult to consider the specific problems regarding access to justice in pre-trial detention in isolation from the context of the crisis in the Brazilian criminal justice and penal systems, and the broader problem of tackling crime in society. Indeed, focusing solely on trying to fix one specific area, through new laws or the creation of new institutions, could make the current situation worse, by adding fresh layers of bureaucracy and confusion to an already dysfunctional system.

Since there is widespread agreement that the system is both inaccessible and over-burdened, neither problem can be addressed in isolation from the other and a successful reform agenda will need to tackle both problems holistically. Measures to increase access to justice, for example, by ensuring that defendants in criminal trials receive adequate legal representation must be accompanied by measures to deal with the back-log of cases confronting the judiciary or the system will simply grind to a halt. Similarly, judicial reform aimed at increasing the system's efficiency cannot ignore the fact that the current system is not only seen as remote and unfair by most Brazilians, but is also perceived as having been unable to check corruption and impunity amongst those responsible for making and enforcing the law.

Reducing the number of Brazilians being sent to prison will require the development of more effective alternatives to pre-trial detention with adequate oversight as well as non-custodial sentencing and programs that encourage the rehabilitation of offenders. This needs to be accompanied by social projects, which tackle the roots of violence and crime. At the same time the justice system needs to be made more accessible and effective in safeguarding people's rights in practice. Many previous attempts at reform have come about as a result of external pressure, such as the reports of international human rights monitoring bodies. While these have had some successes there are limits as to how effective externally-imposed top-down solutions can be. More effort instead needs to be put into making the existing parts of the system work better together and encouraging the development of incremental and home-grown reform.

The *mutirão*, for example, has succeeded in freeing over 15,000 people who should not have been in prison. Although it is only a stop-gap solution, the experiences of those who have been involved in it should be used to identify systemic failures or areas of concern in particular states and focus reforms on them. The *mutirão* also shows what can be achieved, with comparatively few resources but good political leadership from the top of the judiciary. The research conducted for *Associação dos Magistrados Brasileiros* (AMB), by Maria Tereza Sadek, cited in the introduction of this report, also showed that better management within the courts could achieve a far more efficient and effective

judiciary even within the constraints of the current lack of resources. As is described below, the coordinated efforts of those working within state institutions and Brazilian civil society have brought some tangible advances to the justice system overall – although these have largely failed to deal with the particular problems of criminal justice described in this report.

The basic problem with implementing all justice sector reforms is mobilising the political will needed to overcome the entrenched institutional resistance they are likely to encounter. There is a long history of special-interest lobbying by various parts of the Brazilian corporatist state and it is one of the reasons why previous attempts at reform have failed to tackle the underlying problems within the system. UN Special Rapporteur Leandro Despouy noted in 2004 that he 'found a great readiness to debate the issue [of judicial reform] in judicial circles and among other legal professionals, which shows how the extremely well-qualified people working in this dynamic sector are closely involved and keenly interested in this issue. However, although most of them agreed on the analysis, the same could not be said of the proposed changes, which tend to give priority to protecting the immediate interests of each group.'[193]

Fiona Macaulay points out that the issue of judicial reform 'has appeared intermittently and insistently on the political agenda, but never at the top.'[194] She notes that judicial reform has been a stop-start process in which the government has often been reactive in its responses, rather than driving the process forward. There has been an extremely high turnover of Justice Ministers in Brazil – 17 between 1985 and 2002 – which has made political continuity difficult. She also notes that Brazil excluded itself from the type of judicial reform programme that international donors have promoted in other parts of Latin America and that 'nationalism at the highest levels of the judiciary has created an attitude of self-sufficiency and suspicion of external reform blueprints.'[195]

4.2 Strengthening the justice institutions: challenges and responses

The current government has, nevertheless, had some successes in driving the process forward. The eventual enactment of Constitutional Amendment 45 in 2004 was controversial, but its two main reforms seem to have generally had positive results. The introduction of binding precedent does appear to have cut the number of cases going to the STF. The CNJ has also shown its effectiveness in promoting initiatives such as the *mutirão*. As is discussed at length in this report, the case for greater oversight and accountability of the Brazilian judiciary is strong and the CNJ will need to be prepared to take tough action to prove that it is an effective monitoring body.

One of the key challenges of judicial reform in Brazil is that the legal, constitutional and institutional framework governing the system must be set at the federal level, but the actual provision of justice is a responsibility of the states. This means that while it takes one set of political battles to accomplish a policy or legislative reform, another set are required at the state level to implement it. In the case of criminal justice this involves addressing wider sets of public security concerns and coordinating reform between the justice sector and the police. It also means engaging with a public who are overwhelmingly hostile to the concept of defending the rights of people in prison.

193 Despouy, E/CN.4/2005/60/Add.3, 22 February 2005, para 66.
194 Macaulay, 2003, p.84.
195 Ibid., p.100.

The judiciary's perceived failure to deal with rising levels of crime is often used as an argument for reducing the theoretical 'rights' that defendants supposedly enjoy in the criminal justice system. Yet the appalling catalogue of violations suffered by prisoners in Brazil, show that their ability to exercise these rights is almost entirely illusory. A more efficient system would be more effective both in upholding the basic rights to which all people deprived of their liberty are entitled and in preventing some of the well-publicised abuses that characterise the present arrangements.

Strengthening the institutions of justice will obviously require more resources, but this needs to be accompanied by reforms which make them fairer, faster, more accessible and cost-effective. As discussed above, better management and political leadership could make the existing system work much better. The experience of local community groups and human rights NGOs, who have provided legal aid services and developed community justice services, has shown what can be achieved on a small-scale and which could be built upon at the national level.

The astonishing increase in the number of people being held in pre-trial detention in Brazil has added some urgency to the debate about how to achieve this. Brazil's courts and prisons have been overwhelmed by the sheer number of cases and prisoners that they have had to deal with. Even a vast acceleration of its prison-building programme is not likely to keep up with the current rise in numbers and is likely to be a costly and ineffective response, given the documented impact of imprisonment on recidivism.

The Brazilian Government has repeatedly declared itself in favour of limiting custodial sentences to those guilty of serious offences and has promoted the use of alternative non-custodial sentences by judges. As noted above, a law passed in November 1988 expanded the range of non-custodial sentences available to judges for non-violent offenders who would otherwise receive a prison sentence of under four years.[196] It was predicted at the time that this would reduce pressure on the prison system by releasing some 20,000 prison places. However, other laws, usually enacted due to public revulsion at a particularly well-publicised crime, have imposed tougher sentences for a range of offences, with a result that penal sentencing policy has become increasingly contradictory. Meanwhile, the continuing rise in the number of pre-trial detainees has more than cancelled the effects that alternative sentencing could have had in reducing the overall prison population.

Although 'alternative sentencing' policies have failed to prevent the continuing rise in the number of Brazilian prisoners, courts in some states are making increasing use of them and the evidence appears to show that they reduce the rate of reoffending. Some states have also pioneered a range of innovative social programmes aimed at the rehabilitation of offenders. Another project initiated by the CNJ, *Comecar de Novo* (fresh start), aims to obtain the support of Brazilian businesses who will agree to employ ex-prisoners to help with their rehabilitation and reintegration to society. The aim is to offer 30,000 jobs or specialist courses to ex-offenders every year with the strategic goal of reducing rates of reoffending to 20 per cent – down from their current estimate of 70 per cent.[197]

The CNJ is also supporting a project entitled *Nucleos de Advocacia Voluntaria* (centres for voluntary lawyers), which provides a rudimentary criminal justice legal aid service in some states, particularly in the north and north-east. This uses students, law professors and other volunteer lawyers to provide basic legal advice to prisoners in pre-trial custody. Although both projects are still in their infancy,

196 Lei 9.714/98, which amended Lei 7209/84.
197 Conselho Nacional de Justiça *The Brazilian Prison System*, CNJ, 25 November 2009.

they complement the activities of a variety of other Brazilian civil society groups that are described below. These projects are part of a wider initiative by the CNJ and Ministry of Justice to promote change within the criminal justice system to ensure that it fulfils its current legal obligations to ensure that everyone enjoys the right to a defence and the right to social rehabilitation.[198] Brazilian human rights and civil society groups need to link up with similar projects which combine political advocacy with front-line support for pre-trial detainees.

The need for 'joined-up thinking' on this issue can be illustrated by Brazil's experiences so far in attempting to tackle violent crime. In 2003, under pressure from civil society groups, the government introduced a measure to restrict the sale and possession on handguns. After a long parliamentary debate, Congress approved a Bill which imposed several restrictions on individuals carrying guns. A subsequent amnesty and gun buyback programme took half a million weapons off the streets. Although a nationwide referendum to restrict the sale of guns was lost, it is widely believed that the restrictions in place have led to a steady decline in shootings. The Bill also contained a more sweeping provision which would have prohibited any kind of trade in guns, but specified that this would only enter into force if approved in a national referendum. The result of the referendum was negative, with most observers agreeing that fear of crime amongst middle class Brazilians was the main cause of the large 'no' vote. Consequently, today the sale of guns is legal, although the restrictions on carrying a gun are still in force.

Nearly 70 per cent of murders in Brazil involve firearms. Opponents of the restriction said that the best protection for 'law-abiding citizens' was to be able to carry their own guns. They also advocated a more punitive approach to crime. Supporters of the restriction argued for getting as many guns out of circulation as possible and more effective social programmes to tackle crime at its roots. The referendum defeat showed the strength of populist arguments on this issue. Nevertheless, the restrictions which were introduced are widely credited with reducing firearm deaths, which peaked in 2003/2004 and have declined in subsequent years. The murder rate per head of population in São Paulo halved between 2003 and 2008, while Rio de Janeiro has also seen a significant, although more modest decline.[199]

The referendum campaign also brought together an array of Brazilian human rights and community groups, many of whom are directly involved in running these types of social programmes. According to opinion polls there was a strong vote in favour of the ban in the *favelas* and some of the poorest parts of the country, but this was offset by a heavy 'no' vote in richer areas. The campaign showed that those most affected by violent crime are amongst those most likely to support effective measures to reduce it. This points to how similar advocacy works for reform of the criminal justice system.

Although it is difficult to obtain completely accurate statistics, crime as a whole in Brazil appears to have either fallen, or at least remained static, in recent years.[200] Government investment in deprived areas, better provision of services, the changing demographics of Brazil's population and some pioneering civil society social programmes are all believed to have contributed to this. [201] Recent years have also seen a rise in living standards for the population as a whole, as a result of a long period of

198 See Article 1 of Lei 7.210.

199 *Economist*, 'Murder in Brazil', 21 August 2008.

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

201 Globo, 'Mapa da Violência dos Municípios Brasileiros mostra queda dos assassinatos desde 2004',29 January 2008.

stable economic growth, a rise in the minimum wage and the implementation of a large-scale cash transfer programme to poorer Brazilians known as *Bolsa Familia*. Brazil has become a more equal society, bucking a global trend towards greater inequality, and the numbers living in both absolute and relative poverty have declined. Birth rates are falling, which will also impact on crime levels according to the experiences of other countries, and so there are some good reasons for optimism that Brazil can achieve a long-term reduction in its crime rate.

4.3 The need for more effective policing

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

Some of these reforms are still encountering considerable resistance within the police itself, however, who are particularly resistant to more effective monitoring of their human rights violations. In many places, such as Rio de Janeiro, the police also still rely on a more confrontational militarised approach. Corruption is also still a major problem in many police forces and individual cases of torture and extrajudicial executions continue to be recorded across the country. The phenomenal success of the film *Tropa da Elite*, which glamorised the work of the infamous BOPE police unit, while attacking the work of NGOs running social projects in the *favelas*, shows that Brazilian society remains deeply divided on this issue.

It is obviously better for the police to arrest suspected criminals rather than to kill them. But if police detection and arrest rates go up and the courts become more effective at conducting trials, then this will put further strain on the penal system, which is already overburdened. It will also increase the risk of miscarriages of justice and so make the provision of effective legal defences more important. More effective policing, without reforms to other parts of the system, is likely to have a knock-on effect by increasing Brazil's prison population and shows why the issues of tackling crime, penal reform and human rights cannot be addressed in isolation from one another.

4.4 'Practical, home-grown solutions'

There is a general consensus within Brazilian society that the penal and criminal justice systems are stretched to breaking point by the increasing number of cases and prisoners that they are dealing with. One way of alleviating pressure on the prison population with this would be to reduce the numbers being held in pre-trial detention. Another would be to ensure that imprisonment really

is only used as a last resort for the most serious of crimes. Alongside both measures, more support needs to be given to projects which aim to divert potential offenders away from the criminal justice system and strengthen community-based justice, focusing on making the existing system fairer, faster and more cost-effective. UN Special Rapporteur Leandro Despouy concluded that there was 'an urgent need to strengthen the Office of the Public Defender' and that the medium- and long-term impact of the reforms enacted so far on the operational capacity of this Office should be monitored. He also highlighted some examples of more general good practice, such as advice centres and mobile courts, which he noted were all 'practical, home-grown solutions' developed in particular parts of Brazil 'that could be replicated in other parts of the country experiencing similar problems.'[202] Their common theme was that they aimed to 'bring justice closer to the people'.

Some of these projects, such as the *juizados especiais*, or small claims courts, are now a well-established part of the Brazilian justice system.[203] Originally set up in 1984, their role was enshrined in the 1988 Constitution and a federal law of 1995, which assigned them the role of dealing with minor civil and criminal cases. By 1999 there were over 2,500 'small courts' and they had handled over a million civil cases. There are civil and criminal courts (*juizado especias civis*) and (*juizado especias criminais*) and they deal with claims up to a certain financial barrier or crimes of a non-serious nature. The courts use fast-track procedures to process cases. They are guided by the principles of speed, informality, self-representation, oral argument and direct interaction between plaintiffs and defendants with the judge exercising a mediating role. The courts waive all fees and are often located in poorer neighbourhoods – although they have also proved very popular with the middle class for use in consumer rights cases.

Brazil's all-women police stations (*Delegacias de Mulhers* – DMs) have also become internationally famous as providing an environment in which women feel confident enough to report incidents of violence that they have suffered – often from their partners – and to assert their rights in divorce, custody and child maintenance cases. The first DM was set up in São Paulo in 1985 and by 2004 there were 339 such stations across the country. Their coverage of the country is still patchy, with most DMs concentrated in the more prosperous south-east, and they often lack sufficient resources to function effectively. A pioneering study of the DMs conducted by Sarah Hautzinger, focused in the north-eastern state of Bahia, warned that 'the presumption that policewomen would provide a different kind of policing – one more reflective of democratic rule of law governance than the brutality and repression Brazilians still associate with the paramilitary organizations under military dictatorship – has been true only insofar as specialized training about violence and gender dynamics has been provided.'[204] Nevertheless she concluded that their weaknesses should not detract from the fact that they are 'still the most important means by which violent crimes against women are being criminalized to an unprecedented degree.'[205] Brazil has recently enacted a new law on domestic violence which provides for tougher sentences for perpetrators and the more frequent use of pre-trial detention of suspects. Research is urgently needed on the impact of this law. The DMs tended to promote conflict resolution and mediation between couples, rather than a punitive legal approach. It remains to be seen whether this will change as a result of the new law.

202 Ibid., para 82.
203 Mary Tereza Sadek, 'Access to justice: small claims courts in Brazil', unpublished manuscript.
204 Sarah Hautzinger, *Violence in the city of women: police and batterers in Bahia, Brazil*, University of California Press, 2007, p.217.
205 Ibid., p.208.

More recent projects include the *Centros Integrados de Cidadinia* (integrated citizenship centres – CICs) in São Paulo, which offer a range of public services in areas where the poorest population lives. The CICs were introduced in 1996 as a joint initiative of the executive, the judiciary and the *Ministério Público* in São Paulo. Seven centres have been created, strategically placed on the outskirts of the city. The centres give the public access to a judge, a prosecutor, a police officer and representatives of employment, housing, consumer protection and welfare agencies. The local community elects a council, which is responsible for taking decisions on the use of the centres. The CIC project has been the subject of two research studies by the Ministry of Justice and the Brazilian Institute for Criminal Sciences, which have highlighted their role in reducing levels of violent crime in the areas in which they are located.[206]

Another innovation has been the establishment of 'mobile courts' (*justiça itinerante*) in buses and, in some cases, on boats, which aim to bring justice much closer to the people, particularly in remote or socially-excluded areas. These were pioneered in both the Amazon and the federal district of Brasília, where the experiences of a mobile court led to the creation of a community justice (*justiça comunitária)* project which operates in satellite cities around the capital.[207]

This *justiça comunitária* project was created in 2000 as a partnership between the judiciary *Ministério Público*, the *Defensoria Pública*, the law faculty at the University of Brasília and the Human Rights Commission of OAB in Brasília, supported by the federal government's Special Secretariat for Human Rights. It has opened three centres and trained over 100 community agents, drawn from these areas. These satellite cities have grown up rapidly in recent years and are experiencing many of the same social problems of the *favelas* around other Brazilian cities. The community agents, who are supported by a team of lawyers and psychosocial staff, are now able to provide legal advice and information to their neighbours and also to act as mediators in disputes. The aim is not just to try and resolve disputes peacefully, but also to use them to identify the underlying needs of the community and to advocate for change. The *Secretaria de Reforma do Judiciário* and CNJ have drawn on these experiences to develop a model that can be used to spread good practice throughout the country.

A survey by the Ministry of Justice in 2005 identified 67 similar 'access to justice' programmes located in 22 of Brazil's states.[208] The common themes uniting them is that they try to make people more aware of their rights, provide mechanisms for alternative dispute resolution and empower previously marginalised communities. Many are operating with minimal resources and the existence of some was described in the report as 'precarious'. Nonetheless the survey concluded that they were providing services with a high take-up amongst the poorest sections of Brazilian society – particularly women – and their activities were also relieving the judiciary from some of the workload pressures that it is facing.[209] This list of projects is only partial and it is fairly likely to already be out of date, due to the high burn-out and turn-over rate with which groups are formed and collapse. However, the reports and publications that individual groups have produced themselves also provide an impressive testimony to the increasingly dynamic efforts of Brazilian civil society's efforts to address this issue.

206 Eneida de Macedo Haddad, Jacqueline Sinhoretto, Frederico de Almeida and Liana de Paula, *Centros Integrados de Cidadania: desenho e implantação da política pública (2003-2005)*, Ministerio da Justica – Secretaria Nacional de Seguranca Publica e Instituto Brasileiro de Ciencias Criminais, 2006; and Eneida de Macedo Haddad, Jacqueline Sinhoretto, Luci Gati Pietrocolla, *Justica e seguranca na periferia de Sao Paulo, os centros de integracao da cidadania*, Instituto Brasileiro de Ciencias Criminais, 2003.

207 *Justiça comunitária, uma experience,* Ministerio da Justica, 2006.

208 *Accesso a Justica por sistemas alternatives de administracao de conflitos, mapeamento nacional de programas publicos e nao governmentais*, Ministerio da Justica, 2005.

209 Ibid., p.14.

In Rio de Janeiro, for example, an initiative by the non-governmental organisation (NGO) Viva Rio led to the establishment of a Legal Aid Counter (*balcão de direitos*) where a network of lawyers provided free assistance to people living in a number of *favelas* on civil – although not criminal – issues and helped to mediate conflicts which otherwise might have become more violent.[210] In Pará the *Defensoria Pública*, supported by the Special Secretariat for Human Rights opened the Belém Rights Bureau in the state capital whose services include the issuance of basic civil documents, reconciliation and mediation in disputes, the provision of legal advice and assistance in human rights and civic issues. In Rio Grande do Sul, the Office of the Auditor-General is coordinating a 'community listening' project of open hearings where members of the public can discuss directly with judges, public prosecutors and defenders about the way in which the judicial system works and the need to address problems in particular areas.

Few of these projects work directly on the issue of criminal justice defence work, which remains one of the most difficult and controversial subjects to address in Brazilian society. However, there are some human rights and justice groups who are addressing this issue. Rio-based *Justica Global*, for example, has since 1999 been documenting cases of torture and mistreatment of prisoners, taking case to the Inter-American Court of Human Rights and sending reports to the United Nations documenting torture and other ill-treatment of prisoners as well as cases of summary executions other abuses. It has obtained several victories at the Inter-American Court some of which even led to the incarceration of the perpetrators of the violations.

GAJOP in Recife has carried out similar work as has the São Paulo-based group *Conectas*. The latter has initiated regular capacity-building activities for community organizations and for prisoners' family members. Its legal teams ran regular two-day courses, for up to 100 participants on how to monitor conditions and practices in one youth detention facility. These included information on the legal rights of juvenile inmates and how to obtain redress when those rights are violated. *Conectas* has also filed numerous amicus briefs to the STF covering, amongst other subjects the need to 'federalise' cases of human rights violations.

Other groups, such as *Pastoral Carceraria*, *Rio da Paz* and the *Instituto de Defesa do Direito de Defesa* (Institute for the Defence of the Right to a Defence) are providing direct legal advice and assistance to prisoners, including people in pre-trial custody. In the northern state of Maranhão the judiciary have encouraged the formation of a network of volunteers who visit prisons and provide the inmates with legal advice and humanitarian assistance.[211] These groups are also providing prisoners with services, such as healthcare, donating books to prison libraries, campaigning for the right of prisoners to be allowed to vote and helping released prisoners reintegrate back into society. IDDD is currently coordinating a campaign to ensure that people in police custody or pre-trial detention have access to telephones to contact their lawyers.

4.5 Finding a way forward

None of these programmes should be seen as a substitute for a properly resourced public legal aid service or the need for other reforms to the criminal justice system which are documented in this report. Rather they should be seen as part of a wider package of measures that strengthen the reform

210 Paulo Jorge Ribeiro e Pedro Strozenberg, *Balcão de direitos, resolucoes de conflitos em favelas do Rio de Janeiro,* MAUAD, 2001.
211 *Manual de boas practicas em acoes para a inclusao social de presos e egressos do sistema carcerario do Maranhao,* Tribunal de Justica do Maranhao, 2009.

process. *Defensoria Pública* is the constitutionally-mandated body to provide free legal assistance to those who need it and the International Bar Association strongly endorses the repeated calls that have been made for this to be strengthened.

However, the work of these various groups show the creative ingenuity, or *'jetinho'*, with Brazilians attempting to develop responses to the current crisis within their criminal justice system through finding a way around the various obstacles that exist. Their work reflects a widespread recognition that the supposed dichotomy between the need for greater security and respect for human rights is a false one. A criminal justice and penal system which respects human rights and the rule of law is likely to be a more effective one than tolerating the current status quo. Although this will require greater investment, the benefits to society as a whole far outweigh these costs.