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Pretrial Detention and its (ab)use in Brazil: pathways to overcome prison overcrowding and a rule of law issue

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Abstract Brazil has substantially increased the number of pretrial detainees over the past years, with 650,000 people in jail awaiting trial. The practice, surrounded not only by violations against international legal standards but also national laws, has placed Brazil among the top three countries in the world with the highest numbers of pretrial detainees, only behind the United States and China. First, this paper offers an overview of overcrowding prisons, the drivers of the problem in Brazil, and how they contribute to undermine the country's rule of law standards in criminal justice and fundamental rights, as assessed by the World Justice Project. The role and practice of justice authorities, from police officers to judges, is put into context as factors contributing to widen the problem. Policy-oriented, this paper subsequently lays out tentative solutions and options that, being based on international best practices and tailor-made to Brazil's current justice system landscape, aim to alleviate the quandary that not only has not contributed to make streets in Brazil safer but that are indeed prone to increasing violence in prisons.

Keywords pretrial detention, Brazil, overcrowding prisons, rule of law, criminal justice, human rights violations

Introduction

When discussing Brazil’s penal system, the numbers can take many people aback. The country has a prison population of over 650,000 people — that’s the third largest number of prisoners in jail in the world, only behind the United States and China, and ahead of Russia.¹ This number is much higher than the number in prison in 2000, when around 230,000 people were detained.² Furthermore, in Brazil’s prisons, there are 67% more detainees than its penal system can afford³. Almost half of those 650,000 — or 41% — have never been acquitted or convicted, because they are pretrial prisoners.⁴ Many consequences have emerged since the 2014 numbers came out: Brazil’s prisons are synonymous to human rights violations, with prisoners having no access to medical care, being abused by an authoritarian police, and being kept in places where the living conditions were described by the BBC in 2004 as being “medieval”.⁵

This paper has two main focuses. First, it will identify some of the problems and causes of a high number of pretrial detainees — and why this trend violates international standards that, among others, establish prisoners’ rights and the use of pretrial detention as a last resort. Although Brazil passed a bill in 2007 following suit on such international standards, in practice judges have continued the practice of sending petty crime offenders or drug users (particularly marijuana users) to prison, which kept increasing Brazil’s prison population. Subsequently, the attempts of the government to overcome the problem will be discussed. This paper will then propose that Brazil’s

¹ “Highest to Lowest - Prison Population Total | World Prison Brief,” accessed April 12, 2017, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All.

² “Brazil | World Prison Brief,” accessed April 12, 2017, <http://www.prisonstudies.org/country/brazil>.

³ “Brazil,” *Human Rights Watch*, December 21, 2016, <https://www.hrw.org/world-report/2017/country-chapters/brazil>.

⁴ “National Numbers of the Penal System INFOPEN - JUNE 2014” (Brasília: Ministry of Justice, June 2015), <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>.

⁵ COHA, “Inhumane, Ineffective, Intolerable: Brazil’s Prison System,” accessed April 12, 2017, <http://www.coha.org/inhumane-ineffective-intolerable-brazil%e2%80%99s-prison-system/>.

government should instead bet on a bail supervision committee and modify legislation on drugs to match international standards as a way of effectively tackling the problem of overcrowded prisons. Most prisoners under pretrial detention are accused of petty crimes.

The recommendations suggested here won't solve the whole problem in Brazil's prisons, such as violence in jails; organized crime is currently spread over the country's penal system⁶ — the most prominent example being the First Capital Command (PCC)⁷, formed in the nineties and acting in Brazil's prisons since then⁸. Such problems are likely to demand greater reforms; thus, they fall outside of the scope of this paper. However, the proposed changes might help the country give pretrial prisoners the right of waiting for trial outside prisons, in accordance with article 282 and 321 of Brazil's Criminal Procedure Code⁹, which establishes that an individual should wait trial in prison only when other options cannot be sought and with the Universal Declaration of Human Rights, which says that everyone has “the right to be presumed innocent until proven guilty according to law in a public trial”.¹⁰

⁶ Darke, Sacha. “Who Is Really in Control of Brazil’s Prisons?” *The Conversation*. Accessed April 14, 2017. <http://theconversation.com/who-is-really-in-control-of-brazils-prisons-71391>.

⁷ Claire O. Neill McCleskey, “Brazil Jailing People ‘Excessively’: UN,” accessed April 8, 2017, <http://www.insightcrime.org/news-briefs/united-nations-denounces-excessive-detentions-in-brazil>.

⁸ COHA, “Inhumane, Ineffective, Intolerable: Brazil’s Prison System,” accessed April 12, 2017, <http://www.coha.org/inhumane-ineffective-intolerable-brazil%e2%80%99s-prison-system/>.

⁹ “Law number 12.403” (Republic Presidency, May 2011), http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/111343.htm.⁹

¹⁰ UN General Assembly. United Nations, “Universal Declaration of Human Rights,” 1948, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

A problem bigger than Brazil's prison system

Despite international standards requiring states to use of pretrial detention as a last option,¹¹ this trend is followed by many countries like the Czech Republic, the UK, Greece, Ireland, and Italy, says a report of October 2011.¹² The same report argued that, in these European countries, there is a “gulf” between the legal interpretation that an individual must be deprived of his liberty only when absolutely necessary and reality—a suggestion to indicate that the use of pretrial detention is widespread. In spite of that, these countries have acquired better scores in indicators of fundamental rights and criminal justice, among others, than Brazil, according to the 2016 Rule of Law Index by World Justice Project.¹³

A slow and inefficient justice system may partly explain Brazil's poor scores in the Rule of Law standards, and it has certainly contributed for increasing numbers of pretrial detainees: Brazil counted 250,213 pretrial detainees by June 2014.¹⁴ A study published by the Institute for Applied Economic Research (IPEA) of Brazil shows that 37% of these detainees were never sentenced and are still under custody. On average, a pretrial detainee has to wait two years to be either acquitted or convicted.¹⁵ The study claims that 60% of

¹¹ Vereinte Nationen, ed., *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Pre-Trial Detention*, Professional Training Series / Centre for Human Rights 3 (New York: United Nations, 1994), http://www.ohchr.org/Documents/Publications/training3_en.pdf.

¹² “Detained without Trial: Fair Trials International’s Response to the European Commission’s Green Paper on Detention” (Fair Trials International, October 2011), http://www.antonio-casella.eu/nume/EU_detained_without_trial_oct2011.pdf.

¹³ The exception among the European countries mentioned in the report is Ireland, not assessed in this report. “WJP Rule of Law Index 2016,” accessed September 12, 2019, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf

¹⁴ “National Numbers of the Penal System INFOPEN - JUNE 2014” (Brasília: Ministry of Justice, June 2015), <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>.

¹⁵ “Penalty Application and Alternative Measures,” Research Report (Rio de Janeiro: IPEA, 2015), http://www.ipea.gov.br/agencia/images/stories/PDFs/relatoriopesquisa/150325_relatorio_aplicacao_penas.pdf.

pretrial detainees are held for more than 3 months.¹⁶ In other words, they are held without being given legal reasons.

Having more people in jail in Brazil proved not to cause peace nor safer streets. The study “Atlas of Violence” shows that the murder rate in Brazil increased 21,9% between 2003 and 2014, with the current rate at 29,1 murders per 100,000 people.¹⁷ According to a publication by the United Nations Office on Drugs and Crime, that’s the third largest number in South America (Brazil only performed better than Venezuela and Colombia).¹⁸

The consequences of the overuse of pretrial detention are far-reaching. According to research, these include an absence of proper medical care to untried detainees, social instability, and eventually have an impact on the rule of law in a country.¹⁹ Brazil is no exception. The increasing number of prisoners has overcrowded jails and led to human rights abuses, says a report by a 2009 Parliamentary Committee of Inquiry created to investigate the national prison system.²⁰ In prison cells, it was found that women and men in pretrial detention shared the same space; acquitted prisoners were held together with first-time offenders and pretrial detainees; cells dedicated to pretrial detainees were overcrowded.²¹ The same report listed at least 26 types of prisoner’s rights abuses in the prison, such

¹⁶ “National Numbers of the Penal System INFOPEN - JUNE 2014” (Brasília: Ministry of Justice, June 2015), <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>.

¹⁷ Daniel Cerqueira et al., “Atlas of Violence 2016,” Atlas da Violência 2016 (Brasília: IPEA and Forum Brasileiro de Segurança Pública, March 2016), <http://repositorio.ipea.gov.br/handle/11058/6529>.

¹⁸ United Nations Office on Drugs and Crime, *Global Study on Homicide 2013: Trends, Contexts, Data*, 2013, <http://search.ebsco-host.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=857990>.

¹⁹ Open Society Justice Initiative, “The Socioeconomic Impact of Pretrial Detention” (New York: Open Society, 2011), https://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf.

²⁰ Câmara dos Deputados, *CPI Prison System* (Brasília: Edições Câmara, 2009), <http://bd.camara.gov.br/bd/handle/bdcamara/2701>.

²¹ Câmara dos Deputados, *CPI Prison System* (Brasília: Edições Câmara, 2009), <http://bd.camara.gov.br/bd/handle/bdcamara/2701>.

as poor hygiene in cells, the practice of torture against detainees, an absence of judicial assistance, spread out diseases, and famine.²²

Such problems violate international legal standards and national laws; in the first case, in spite of Brazil having ratified the International Covenant on Civil and Political Rights in 1992²³, it has been clearly violating Article 14, which says that civilians are entitled to “the right to equality before the law; the right to be presumed innocent until proven guilty and to have a fair and public hearing by an impartial tribunal.”²⁴ In the second case, the right of being heard in a custody hearing is still missing in the country’s Criminal Code²⁵, known to be older than the current democratic period, which started in 1988 with the establishment of the new Constitution.²⁶ The absence of this right violates principles established by the United Nations Standard Minimum Rules for Non-custodial Measures as well²⁷.

²² Câmara dos Deputados, *CPI Prison System* (Brasília: Edições Câmara, 2009), <http://bd.camara.gov.br/bd/handle/bdcamara/2701>.

²³ United Nations, “International Human Rights Instrument - Core Document Forming Part of the Reports of States Parties: Brazil,” October 2003, <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=FhOD6sgqgzAh-FXD9F%2feKaFMm83LbFY75RhkIFGrig%2b4AJNLuIqRm2DieA4fOMgtq6HIQYKer9Jqhyu0Lalfg%2fvPiGdEYb8Z7zJdxDP2mXfsgL16oy0wxqRGKD-spKH%2bhauzUDkBiY7PNjtdMpNAotFA%3d%3d>.

²⁴ United Nations Human Rights Office of the High Commissioner, “International Covenant on Civil and Political Rights,” accessed April 13, 2017, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

²⁵ “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” - Visit to Brazil undertaken from 19 to 30 October 2015: observations and recommendations addressed to the State party (United Nations, February 2016), <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgvDz3SQy0TX%2f2ipA5CN39ga3g0pUa9A8tPel9Tu7aPZ%2bQGi9TYikL%2fUxDFbQLw1cHpAMYWohyyjdes45lKe2%2f2fzSSGcWiTpOkZXBddofOL>.

²⁶ ROSENN, KEITH S. “Procedural Protection of Constitutional Rights in Brazil.” *The American Journal of Comparative Law* 59, no. 4 (2011): 1009–50.

²⁷ “A/RES/45/110. United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules),” accessed April 14, 2017, <http://www.un.org/documents/ga/res/45/a45r110.htm>.

The latest report on Brazil by the Human Rights Watch also says that judges ignore prisoner's accounts of being abused by officers.²⁸ A study on Brazil's legal system says that a lack of supply of public defenders crashes the legal process, despite of the fact that the national constitution establishes the right of legal defense to any citizen.²⁹ Another research showed that, in Sao Paulo, 2,000 pretrial detainees had to rely on only three public lawyers during the trial phase on a monthly basis.³⁰ The same study has found that going through the trial can be unaffordable to pretrial detainees [would be good add the context with figures of cost v income, if available].³¹

Transparency in the penal system is also far from ideal, according to a comprehensive mapping of Brazil's prisons done by Conectas, a human rights organization in Brazil.³² This study says that there is a discrepancy between the information asked for by the Ministry of Justice about prisons and the information sent by the country's States where the prisons are located.³³ That began to improve in 2014.³⁴ However, a more automatized system would contribute to clearly identifying the number of pretrial detainees in the country. In an

²⁸ Human Rights Watch, "Brazil," *Human Rights Watch*, December 21, 2016, <https://www.hrw.org/world-report/2017/country-chapters/brazil>.

²⁹ KEITH S. ROSENN, "Procedural Protection of Constitutional Rights in Brazil," *The American Journal of Comparative Law* 59, no. 4 (2011): 1009–50.

³⁰ "Presumption of Guilt: The Global Overuse of Pretrial Detention" (New York: Open Society Foundations, 2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-execsum-eng-09122014.pdf>.

³¹ "Presumption of Guilt: The Global Overuse of Pretrial Detention" (New York: Open Society Foundations, 2014), <https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-execsum-eng-09122014.pdf>.

³² "Map of Prisons - Conectas Human Rights," *Conectas*, November 2014, <http://www.conectas.org/pt/noticia/25378-mapa-das-prisoos>.

³³ "Map of Prisons - Conectas Human Rights," *Conectas*, November 2014, <http://www.conectas.org/pt/noticia/25378-mapa-das-prisoos>.

³⁴ "What are the criminal justice numbers in Brazil?," Informativo Rede Justiça Criminal (Brazil: Conselho Nacional de Justiça, January 2016), <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>.

article that appeared on the Insight Crime foundation website, a local public defender said that the number of people in jail without a sentence might be greater than the official numbers, since the country's officers only count those prisoners who haven't started a trial and discount those in the middle of the process.³⁵

Overcrowded and inhumane prison conditions have had an impact on Brazil's rule of law scores that are alarming; among the eight components that form the Rule of Law Index of the World Justice Project, Brazil scored lower under Criminal Justice: 0.39 on a scale from 0 to 1, a number that puts the country in the 78th worst position out of 113 countries.³⁶

Mains drivers of the problem

In 2011, a law passed in Brazil established that pre-trial detention must be used only if other solutions such as house arrest, electronic monitoring, or a restriction on the accused not to be in public spaces are considered to be risky by judges.³⁷ Pretrial detention is often prescribed by local judges for minor crimes.³⁸ Many of the pretrial detainees held in prisons in 2015 were poor and could not afford bail, according to an article at Insight Crime on Brazil's prisons.³⁹ The

³⁵ Andrea Dip, "Behind Brazil's Arrest First, Ask Later Policy," accessed April 8, 2017, <http://www.insightcrime.org/news-analysis/brazil-pretrial-detention-prison-population>.

³⁶ "WJP Rule of Law Index® 2016," accessed April 12, 2017, <http://data.worldjusticeproject.org/#/groups/BRA>.

³⁷ Claire O. Neill McCleskey, "Brazil Jailing People 'Excessively': UN," accessed April 8, 2017, <http://www.insightcrime.org/news-briefs/united-nations-denounces-excessive-detentions-in-brazil>.

³⁸ KEITH S. ROSENN, "Procedural Protection of Constitutional Rights in Brazil," *The American Journal of Comparative Law* 59, no. 4 (2011): 1009–50.

³⁹ Andrea Dip, "Behind Brazil's Arrest First, Ask Later Policy," accessed April 8, 2017, <http://www.insightcrime.org/news-analysis/brazil-pretrial-detention-prison-population>.

number of pretrial prisoners has sharply increased from over 164,000 in 2010 to over 245,000 in 2017.⁴⁰

To make matters worse, an unclear law on drugs passed in the country in 2006 has resulted in sending many people to jail, according to the Human Rights Watch Report on Brazil,⁴¹ and an article in the magazine *The Economist*.⁴² The drug law makes a distinction between a drug user and a drug trafficker, with different penalties associated with each, but does not establish what amount of an illegal drug carried distinguishes users from dealers.⁴³ For drug users, alternative measures are used for sentencing, while for someone found guilty of dealing may be sentenced with up to 15 years in prison.⁴⁴ The problem is that the officer in charge of receiving a detainee is the one responsible for deciding which offense a person committed.⁴⁵

The role of the judges is another factor adding to the problem. According to a legal comparative study, judges in Brazil are prone to be severe when prescribing pretrial detention as a solution when other measures as described by national legislation and international legal standards should be pursued instead in the criminal procedure, a practice stemming from a punitive judicial system in Brazil.⁴⁶ The same study pointed out that Brazil's judges normally avoid the pretrial

⁴⁰ "Brazil | World Prison Brief," accessed April 12, 2017, http://www.prisonstudies.org/country/brazil#further_info.

⁴¹ Human Rights Watch, "Brazil," *Human Rights Watch*, December 21, 2016, <https://www.hrw.org/world-report/2017/country-chapters/brazil>.

⁴² "Welcome to the Middle Ages," *The Economist*, accessed April 12, 2017, <http://www.economist.com/news/americas/21594254-brazils-hellish-penal-system-overcrowded-violent-and-brutalising-welcome-middle-ages>.

⁴³ "Law number 11.343" (Republic Presidency, August 2006), http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/111343.htm.

⁴⁴ "Law number 11.343" (Republic Presidency, August 2006), http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2006/lei/111343.htm.

⁴⁵ "Welcome to the Middle Ages," *The Economist*, accessed April 12, 2017, <http://www.economist.com/news/americas/21594254-brazils-hellish-penal-system-overcrowded-violent-and-brutalising-welcome-middle-ages>.

⁴⁶ KEITH S. ROSENN, "Procedural Protection of Constitutional Rights in Brazil," *The American Journal of Comparative Law* 59, no. 4 (2011): 1009–50.

release as a rule in the legal system because they fear of being known as lenient to criminals by civil society.⁴⁷

The punitive legal-scape of practice and norms may have contributed even further to overcrowding prisons in Brazil. According to figures, from 2000 to 2005, the number of pretrial detainees increased from 80,775 to 102,116 but from 2005 (the year before the introduction of the law) to 2017, the number of people in pretrial detention more than doubled.⁴⁸

The government's flawed policy

In January 2017, Brazil woke up to news of a riot that left over 50 inmates dead in a prison in Manaus, the capital state of Amazonas, in the North of the country.⁴⁹ The country's president Michel Temer, following a debate about the horrendous prison system in the country that undermines the rule of law and basic human rights guarantees,⁵⁰ promised to build 30 prisons to tackle overcrowding in the country's prison system, according to a news article published by Deutsche Well.⁵¹ An article published by the national newspaper *O Globo* in 2012 found that to offset the deficit of places in cells in the country,

⁴⁷ KEITH S. ROSENN, "Procedural Protection of Constitutional Rights in Brazil," *The American Journal of Comparative Law* 59, no. 4 (2011): 1009–50.

⁴⁸ "Brazil | World Prison Brief," accessed April 12, 2017, http://www.prisonstudies.org/country/brazil#further_info.

⁴⁹ Robert Muggah and Ilona Szabó De Carvalho, "Brazil's Deadly Prison System," *The New York Times*, January 4, 2017, <https://www.nytimes.com/2017/01/04/opinion/brazils-deadly-prison-system.html>.

⁵⁰ "Brazil," *Human Rights Watch*, December 21, 2016, <https://www.hrw.org/world-report/2017/country-chapters/brazil>.

⁵¹ "Temer promises to deliver new prisons in up to one year," January 17, 2017, <https://www.dw.com/pt-br/temer-promete-entregar-novos-pres%C3%ADdios-em-at%C3%A9-um-ano/a-37153245>.

it would be necessary to spend 4.2 billion reais (about \$1.3 billion dollars at current prices)⁵² on new prisons.

Only at the national level, the government spends 3.6 billion reais (or \$1.1 billion dollars, in current values) to keep the penal system working.⁵³ In an article published by the National Justice Council (NJC), the president of the NJC and the Supreme Court of Brazil, Carmen Lucia, said that each prisoner costs 2,400 reais per month (or about \$800 dollars), which is more than it costs to send a student to school in the country in an entire year.⁵⁴

As the number of prisoners increases year by year, it seems imprudent to spend so much money on prisons. Research published by the Ministry of Justice of Brazil claimed that it will be necessary to create yet another 250,000 cells to accommodate the excessive number of prisoners currently held in local jails.⁵⁵ One of the judges of Brazil's Supreme Court pointed out the problem with this issue in an interview with the BBC Brazil, saying that "a prison will take three, four years to be built up" and that "the matter is not solved with the construction of prisons".⁵⁶

This information should be taken into account since the construction of new prisons and their administration in Brazil is highly expensive.⁵⁷ Despite the apparent infeasibility of the

⁵² "Eliminating Overcrowding in Prisons Would Cost R\$ 4,2 Bilhões," *O Globo*, November 30, 2012, <http://oglobo.globo.com/brasil/fim-da-superlotacao-em-presidios-custaria-42-bilhoes-6880202>.

⁵³ Câmara dos Deputados, *CPI Prison System* (Brasília: Edições Câmara, 2009), <http://bd.camara.gov.br/bd/handle/bdcamara/2701>.

⁵⁴ "Cármén Lúcia says that a prisoner costs 13 times more than a student in Brazil," accessed April 13, 2017, <http://www.cnj.jus.br/noticias/cnj/83819-carmen-lucia-diz-que-presos-custa-13-vezes-mais-do-que-um-estudante-no-brasil>.

⁵⁵ "National Numbers of the Penal System INFOPEN - JUNE 2014" (Brasília: Ministry of Justice, June 2015), <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>.

⁵⁶ Felipe Souza, "'The Matter Is Not Solved with the Construction of Prisons', Says Gilmar Mendes about the Penal System Crisis," *BBC Brasil*, January 6, 2017, sec. Brasil, <http://www.bbc.com/portuguese/brasil-38492779>.

⁵⁷ Câmara dos Deputados, *CPI Prison System* (Brasília: Edições Câmara, 2009), <http://bd.camara.gov.br/bd/handle/bdcamara/2701>.

president's plan, a welcome idea that followed the massacre in Manaus was the creation of a committee aimed at reforming the chaos in Brazil's prisons, in a joint group formed by the Executive, the Legislature, the Judiciary, and civil society groups, according to a national decree published by the president on January 18th, 2017.⁵⁸

The government and its branches have a great opportunity to discuss the matter with civil society. Research on public security published in 2016 shows how the matter is sensitive in the country.⁵⁹ According to a public opinion poll in this research, 57% of Brazilians believe that a "good thief is a dead thief", and also found that 76% of the citizens fear being murdered.⁶⁰

In the following section, this paper analyses how some solutions could help the penal system be more effective and compliant to international standards on the rights of a fair trial and legal assistance for pretrial detainees.⁶¹

Recommendations

To tackle the apparent causes of the excessive use of pretrial detentions in Brazil, this paper proposes the creation of an automatized system to identify pretrial detainees and their current legal situation. That would contribute to reducing the excessive number of people in the country's prisons and, as an expected

⁵⁸ Temer, Michel, "Decree of January 18 of 2017 to create the committee of the reform of the national penal system" (Republic Presidency, January 2017), http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/dsn/Dsn14435.htm.

⁵⁹ "10º Brazilian Yearbook of Public Security 2016" (Fórum Brasileiro de Segurança Pública), accessed April 14, 2017, http://www.forumseguranca.org.br/storage/10_anuario_site_18-11-2016-retificado.pdf.

⁶⁰ "10º Brazilian Yearbook of Public Security 2016" (Fórum Brasileiro de Segurança Pública), accessed April 14, 2017, http://www.forumseguranca.org.br/storage/10_anuario_site_18-11-2016-retificado.pdf.

⁶¹ European Court of Human Rights, ed., "GUIDE ON ARTICLE 6," 2013, http://pak.hr/cke/seminari/Guide_Art_6_ENG.pdf.

consequence, the overcrowding issues. The solution might involve using a new database to ease the identification of pretrial detainees, their time spent in prison, and necessary legal proceedings needed for pretrial inmates for the use of the Ministry of Justice. That would work as a bail supervision committee.

In April 2017, Brazil's Senate approved the creation of a document that unifies the country's citizens personal identification, such as biometric information recorded by the Electoral Justice and civil records held by the National Justice Council, according to the local publication *Epoca Negocios*.⁶² According to the same article, a database will also be created to store this information and will be managed by the Electoral Justice. This database should be shared with the Ministry of Justice and the committee here suggested.

With more and trustworthy information, the bail supervising committee is better able to make the identification of risky and non-risky pretrial detainees for releasing prisoners who can wait for trial in freedom. This idea should be brought up in the discussions of the committee for reforming the penal system. A similar project was set up in Mexico by the Open Society Initiative Justice.⁶³

The new system would collect and automatize information to speed up the evaluation of existing pretrial cases. Then it would be easier to tell where a pretrial detainee is held and whether he has a lawyer or public defender assigned to represent him in court. This way, it would be equally easier to identify whether a trial has started, so that authorities could analyze his case, and how long the detainee has been kept under custody. The system can be set up to send automatic alerts to those involved in the trial — the center of detention, the prosecutor, lawyer or public defender, and the judge — when the pretrial detention reaches 5 days without having been analyzed by the Judiciary; an alert that keeps being sent every day until it reaches 10 days, to match a national law which says that pretrial detention should

⁶² Epoca Negocios, "Approved Unification of RG, CPF, and Voter Identification," *Epocanegocios.globo.com*, accessed April 13, 2017, <http://epocanegocios.globo.com/Brasil/noticia/2017/04/aprovada-unificacao-de-rg-cpf-e-titulo.html>.

⁶³ Open Society Justice Initiative, "The Socioeconomic Impact of Pretrial Detention" (New York: Open Society, 2011), https://www.opensocietyfoundations.org/sites/default/files/Justice_Initiati.pdf.

not exceed this period without legal reason.⁶⁴ In a scenario where there is a scarcity of public defenders (a study shows that there are only 5,000 in Brazil⁶⁵), this system would make it easier for the legal professionals to identify urgent cases, making the legal process more transparent and efficient. The registration of current pretrial detainees with such information will help the judiciary to identify urgent cases that must be analyzed as a priority.

A second component of the bail supervising committee is socio-economic. If the detainee wishes, he might disclose his personal income tax return to the judge to justify his economic power in case he could be out on bail during the trial; the idea is that the amount to be paid by the pretrial prisoner ranges according to his financial capacity and should not exclude lower-income informal workers. An amendment in the Criminal Code is necessary to allow for this possibility in a type of part payment according to the detainee's income and assets. However, it's essential that public authorities discuss this. Furthermore, that solution is supported in the article 21 of the United Nations Standard Minimum Rules for Non-Custodial Measures, which addresses alternative solutions for detention and a constant monitoring of such policies.⁶⁶

The proposed committee would be more effective if supervised by a dedicated secretary for penal issues. Its creation can come about during the establishment of the aforementioned committee aimed at reforming the national penal system. There are studies that have found the benefits of pretrial release. One of them found evidence that the release of pretrial prisoners diminishes the likelihood of conviction,

⁶⁴ Jose Sarney, "Law number 7.960 of December 21, 1989 about pretrial detention" (Republic Presidency, November 1989), http://www.planalto.gov.br/ccivil_03/leis/L7960.htm.

⁶⁵ Tatiana Whately de Moura et al., "Map of the Public Defender in Brazil," 2013, <http://repositorio.ipea.gov.br/handle/11058/2419>.

⁶⁶ The article, subdivided in three sections, says that 21.1: "*Programmes for non-custodial measures should be systematically planned and implemented as an integral part of the criminal justice system within the national development process*", and 21.2: "*Regular evaluations should be carried out with a view to implementing non-custodial measures more effectively*", and 21.3: "*Periodic reviews should be conducted to assess the objectives, functioning and effectiveness of non-custodial measures*". "A/RES/45/110. United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)," accessed April 14, 2017, <http://www.un.org/documents/ga/res/45/a45r110.htm>.

help former detainees to get a job in the formal market, which in turn benefits the country throughout the payment of taxes — especially in the case of first-time offenders or defendants who had a job up to a year before being bailed out.⁶⁷ Not only would this benefit society at large in the long-term; it would also substantially contribute to a more efficient and less discretionary justice system that keeps less people in prisons on an unjustified basis while allowing for better prison conditions for those sentenced for serious crimes.

The creation of a national committee could also give rise to opportunities for debating and if necessary changing some legislations. This debate can lead the Chamber of Deputies to ratify a bill passed by the Senate in 2011 (and yet to be analyzed by the Chamber of Deputies) that gives pretrial prisoners the right to be heard in custody hearings, as prescribed by the United Nations after visiting the country's prisons in 2015.⁶⁸ Civil society groups have been playing an important role in advocating for the custody hearings lately. By establishing a deadline of 24 hours for a pretrial detainee to be heard before a judge, as laid out in the 2011 bill discussed, the Institute in Defense of the Right to Defense says that it would achieve the goal of avoiding illegal prisons, let alone the beneficial consequences that this change brings about, such as a fairer criminal justice in compliance with what the International Covenant on Civil and Political Rights establishes.⁶⁹

⁶⁷ Will Dobbie, Jacob Goldin, and Crystal Yang, “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges” (National Bureau of Economic Research, 2016), <http://www.nber.org/papers/w22511>.

⁶⁸ “Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” - Visit to Brazil undertaken from 19 to 30 October 2015: observations and recommendations addressed to the State party (United Nations, February 2016), <http://docstore.ohchr.org/Self-Services/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsgvDz3SQy0TX%2f2ipA5CN39ga3g0pUa9A8tPel9Tu7aPZ%2bQGi9TYikL%2fUxDFbQLw1cHpAMYWohyyjdes45IKe2%2f2fzSSGcWiTpOkZXBddofOL>.

⁶⁹ IDDD, “10 Reasons to Approve the Law 554/2011 That Establishes Custody Hearings in Brazil,” *IDDD - Instituto de Defesa Do Direito de Defesa*, November 2016, <http://www.iddd.org.br/index.php/2016/11/23/10-razoes-para-aprovar-o-pls-5542011-que-institui-as-audiencias-de-custodia-em-todo-o-brasil/>.

Also when discussing legislative reform, it is crucial to change the law on drugs. It should clearly determine the limit of illegal drugs a person can carry to be considered as a user. As judges abide by law, the clarity in the legislation will help change the discussed punitive culture in Brazil and the adoption of alternative sentences. A national Secretary for Penal System Reform, subordinate to the Ministry of Justice, could oversee such reforms and create education campaigns on the importance of reducing the number of pretrial detainees in the country.

Conclusion

This paper had two aims. First, to analyze the issues that has been giving rise to an astonishing increase of pretrial detainees in Brazil in the past decades, from 80,775 in 2000 to over 245,000 currently.⁷⁰ A slow and inefficient penal system in the country has resulted in more jailed people that could otherwise be waiting for trial in freedom. That is mainly because of a punitive penal system, the scarcity of public defenders, and a new law on drugs in Brazil⁷¹; one that establishes an unclear distinction between drug users and drug dealers and that leaves to the officer to decide between sending a person to jail or releasing him⁷²; the absence of custody hearings immediately after a detainee is held by officers⁷³; and poor data collection and transparency, which misleads policy solutions.⁷⁴ Such issues in Brazil

⁷⁰ “Brazil | World Prison Brief,” accessed April 12, 2017, http://www.prisonstudies.org/country/brazil#further_info.

⁷¹ Tatiana Whately de Moura et al., “Map of the Public Defender in Brazil,” 2013, <http://repositorio.ipea.gov.br/handle/11058/2419>.

⁷² “Welcome to the Middle Ages,” *The Economist*, accessed April 12, 2017, <http://www.economist.com/news/americas/21594254-brazils-hellish-penal-system-overcrowded-violent-and-brutalising-welcome-middle-ages>.

⁷³ Human Rights Watch, “Brazil,” *Human Rights Watch*, December 21, 2016, <https://www.hrw.org/world-report/2017/country-chapters/brazil>.

⁷⁴ “Map of Prisons - Conectas Human Rights,” *Conectas*, November 2014, <http://www.conectas.org/pt/noticia/25378-mapa-das-prisoas>.

affront international standards on the right of prisoners before the law, such as the presumption of innocence, as established by the International Covenant on Civil and Political Rights.⁷⁵ This has been contributing to weakening of the rule of law in Brazil, whose criminal justice system was poorly rated by the World Justice Project's Rule of Law Index (0.39; the highest possible score is 1).⁷⁶

Second, this paper discussed the creation of a committee to help reform the penal system,⁷⁷ which can help speed up the approval of a law that establishes public hearings in Brazil for pretrial detainees,⁷⁸ meeting international standards such as the Article 6 of the United Nations Standard Minimum Rules for Non-custodial Measures, which says that the use of pretrial detention should be used as "last resort".⁷⁹ A more ambitious proposal discussed in this paper would involve creating a bail system committee. By speeding up the identification of first-time offenders from risky detainees and identifying those eligible for release, it can release a greater number of pretrial detainees than is now the case.

Furthermore, the creation of a Secretary for the Penal System Reform would help oversee the application of such reforms and raise public awareness for the necessity of reducing the pretrial population. If debated and publicized by the government, the benefits of a lower or inexistent number of pretrial prisoners can persuade for deeper

⁷⁵ United Nations, "International Covenant on Civil and Political Rights," accessed April 13, 2017, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>.

⁷⁶ "WJP Rule of Law Index® 2016," accessed April 12, 2017, <http://data.worldjusticeproject.org/#/groups/BRA>.

⁷⁷ Temer, Michel, "Decree of January 18 of 2017 to create the committee of the reform of the national penal system" (Republic Presidency, January 2017), http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/dsn/Dsn14435.htm.

⁷⁸ IDDD, "10 Reasons to Approve the Law 554/2011 That Establishes Custody Hearings in Brazil," *IDDD - Instituto de Defesa Do Direito de Defesa*, November 2016, <http://www.iddd.org.br/index.php/2016/11/23/10-razoes-para-aprovar-o-pls-5542011-que-institui-as-audiencias-de-custodia-em-todo-o-brasil/>.

⁷⁹ United Nations, "United Nations Standard Minimum Rules for Non-Custodial Measures," 1990, <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>.

changes in the justice system in Brazil in the future. Less overcrowded prisons and more pretrial releases will help empower Brazil's Judiciary and currently poor scores of rule of the law. If successful, it might even decrease the likelihood of riots in the country's overcrowded prisons that still shock the world for their brutal reality.

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