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Neo-liberal influence on the justice sector and human rights reform under the Cardoso government

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Abstract

The federal government under Cardoso was not ideologically committed to adoption of specific 'neo-liberal' policies in the field of crime control and criminal justice, through the reform of the courts, police, and prison system. Its failure to curtail institutionally-driven human rights violations resulted from a more diffuse 'environmental' effect of neo-liberalism, whereby fiscal management concerns monopolised the government's economic and political capital, and to structural constraints in domestic political and governance configurations, such as federalism and the character of the Ministry of Justice. Penal policy in Brazil, as elsewhere, was incoherent and volatile due to the confluence of two distinct political ideologies, economic neo-liberalism, and social neo-conservatism, with the federal government pursuing strategies of delegation and denial. Policy transfer and norm convergence were affected positively by the international human rights regime and its domestic allies, and negatively by local moral conservatives and producer groups, acting as policy blockers, not entrepreneurs.

Resumo

O governo de FHC não tinha um compromisso ideológico com a adoção de políticas especificamente “neoliberais” nas áreas de controle da criminalidade e de justiça penal, por exemplo através de reformas no poder judiciario, na polícia e no sistema penitenciário. Ao contrário, sua incapacidade de reduzir abusos institucionais de direitos humanos derivou-se de um efeito muito mais difuso e “ambiental” do neoliberalismo. A preocupação predominante com a responsabilidade fiscal acabou monopolizando o escasso capital econômico e político do governo. Aspectos de arquitetura institucional – por exemplo, o federalismo e o caráter interno do Ministério da Justiça – constituíram fortes limitações estruturais. A política penal no Brasil, como em outros paises, foi incoerente e volátil devido à confluência de duas ideologias distintas, o neoliberalismo econômico e o neoconservadorismo social, enquanto o governo seguia uma estratégia dupla, de delegação e de negação. O regime internacional de proteção aos direitos humanos e seus aliados brasileiros exerciam uma influencia positiva em relação à transferência de políticas públicas como à convergência de normas. Porém, conservadores morais no âmbito local se comportaram como atores de veto e não como defensores de novas iniciativas.

INTRODUCTION

By the end of Fernando Henrique Cardoso's government in 2002, Brazil was continuing to suffer egregious levels of human rights abuses, many generated by the very criminal justice institutions tasked with preventing and punishing such violations. Police violence against criminal suspects and members of socially marginal communities remained high in the major urban centers and went generally unpunished, whilst those same urban communities experienced intolerable levels of collective insecurity in relation to crime and social violence. Death squads composed of off-duty policy officers were said to operate in at least half, possibly most, of Brazil's states. The prison system laboured under major structural problems of overcrowding, cruel, inhuman and degrading conditions and poor management, and the judiciary branch failed to perform its vital watchdog role over other areas of the criminal justice system in order to guarantee due process and uphold basic civil liberties (Amnesty International, 2003; Human Rights Watch, 2003; United Nations Commission on Human Rights, 2001, 2004; US State Department, 2003).

This article analyses why, during his eight years in office, Cardoso was unable to curtail such institutionally-driven human rights violations.[i] Was the government's analysis deficient, were its policies misguided or distorted by the various influences of neo-liberalism, or was it constrained by structural factors related to domestic political and governance configurations? It asks, specifically, to what extent and in what way his government's policy choices were influenced by neo-liberalism, and whether this had a positive or negative impact on human rights protection.[ii] This begs the question of whether there is, in reality, an identifiable package of 'neo-liberal' policy prescriptions for the criminal justice sector as exists for macro-economic policy. What, also, are the mechanisms by which such ideas and prescriptions transfer across policy fields, or from one country context to another (Newburn and Sparks, 2004), for example, through coercion and imposition, adoption and adaptation, and through the actions of policy entrepreneurs (Dolowitz and Marsh, 2000)? One must also distinguish between the direct impacts of neo-liberalism, through explicit and conscious policy adoption, its more diffuse intellectual influences on policy-makers, and its indirect shaping of the domestic political and fiscal environment in which policy preferences about crime, justice, citizen security and human rights are operationalized. Finally, the article examines the policies adopted – and avoided – for the reform of each of the critical criminal justice institutions (the courts, police, and prison system). These play a key role in the protection of most fundamental of human rights, the individual right to life and physical integrity, as well as the collective right to freedom from high levels of crime, violence and insecurity.

HUMAN RIGHTS: LIMITED POLICY CONVERGENCE

The article begins by considering how and why the Cardoso government accelerated a process initiated by Brazil's first neo-liberal President, Fernando Collor de Melo, in actively pursuing policy and norm convergence not just with the international trade and financial regimes, through its neo-liberal economic policies, but also with international human rights regimes. Both have become hegemonic in the last two decades due to the geo-political influence of the USA, and diffusion and export through multi-lateral institutions. Risse, Ropp and Sikkink (1999) suggest, in their 'spiral' model, that policy and norm convergence in the area of human rights is heavily influenced by the advocacy of domestic and international non-state actors and occurs in a series of stages. Brazil passed through the first phase (state-sponsored gross human rights violations) under the military regime, at the end of which it moved into the second phase (denial that abuses had occurred or were occurring) that characterized the Sarney government (Pinheiro, 2000: Piovesan, 1996).The third phase, that of tactical concessions, was initiated by the Collor government, which, in response to external pressure over issues such as police/death squad killings of street children, introduced the Statute of the Child and Adolescent, modeled on the Convention on the Rights of the Child. His government also brought human rights language into domestic political discourse, and sought an active role for Brazil in international arenas such as the 1993 United Nations Conference on Human Rights in Vienna. This article argues that the Cardoso government deepened this third phase. Why, however, was it unable to move into the fourth phase, that of substantive policies that would tackle the deeper, *structural* factors that Cardoso the sociologist understood to be necessary to sweep away what he had famously termed the institutional 'authoritarian débris' left by the military regime?

While IMF intervention and imposition of economic conditionalities may be classified as a direct and coercive mode of neo-liberal policy transfer (Dolowitz and Marsh, 2000, 9), the Cardoso government also promoted both human rights and neo-liberal economic reforms as a result of indirect and coercive policy transfer, that is, voluntary adoption driven both by a perception that there are no viable alternative paths and that resistance would lead to exclusion by the international community, and by principled conviction.

Convergence with international human rights standards became a crucial component of foreign policy, establishing the Brazilian state's legitimacy in the international arena, and its authority as a rule-abiding player within global and regional political and economic structures (Whitehead, 2001). The Cardoso government signed the Mine Ban Treaty and strongly supported the establishment of the International Criminal Court, for which it was rewarded with

one of the rotating seats on the United Nations (UN) Security Council, which it has long been lobbying to convert into a permanent one. It opened the door to monitoring by the UN, Inter-American system and non-governmental human rights organizations, so that Brazil became one of the most inspected countries in the hemisphere.[iii] The acceptance of the 'soft power' of the international human rights regime (Hurrell, 1999) enabled the Cardoso government to overcome the hostility of nationalist-conservative sectors of the state towards this regime. The Supreme Court remains divided in opinion as to whether Brazil's international treaty obligations legally override the 1988 Constitution, whilst the Foreign Ministry for years regarded submission to international scrutiny as an infringement of Brazilian national sovereignty. Nevertheless, in December 1998 the government finally recognized the jurisdiction of the Inter-American Court of Human Rights, and started to accept one by one the oversight mechanisms of the six principal human rights conventions ratified by Brazil.[iv] The Cardoso government was also the first to submit some key implementation reports, albeit as a result of pressure from human rights activists.[v] This shift from an obstructionist to a more cooperative relationship with the monitoring bodies (Cavallaro, 2002) enabled the government to reach 'friendly' solutions to cases before the Inter-American Commission on Human Rights, agreeing to demolish the notorious Carandiru prison and accepting, even if grudgingly, in the Committee on Torture that police abuse of detainees was 'widespread and systematic'.[vi]

In terms of an ideological sympathy with the cosmopolitan rights agenda, Cardoso and some key players in his government[vii] had themselves been victims of the military government's repression, and had been active in NGOs, the Church or in government during the *abertura* period, protesting against human rights violations by the security forces,. Thus the government's actual domestic policy preferences may have extended beyond the largely instrumental character of tactical concessions, that is, to respond to international criticisms, appease vocal domestic critics, and improve the country's image – *para inglês ver*, as the Brazilians say -- in which it partly succeeded.

NEO-LIBERAL PENAL POLICY

Comparative criminological opinion is divided as to whether there exists a coherent set of 'neo-liberal' crime control prescriptions emanating from the governments and institutions of the global North, and derived from the core philosophical tenets driving economic neo-liberalism: a privileging of the market and of the individual, and a reduction of state responsibilities (Wacquant, 2003: 198). Since the late 1970s, there has been a shift away from

the penal-welfarist consensus, which emphasized rehabilitation of offenders and minimal use of incarceration, allied to social assistance policies. This includes a rejection of structural theories of crime, which stress the situational and cultural factors, such as educational deprivation, unemployment, and social exclusion that marginalize social groups and encourage offending behavior, and a shift towards a more volitional theory, which sees crime as a choice made by individuals. However, some argue that this has been replaced by penal policy and practices characterized by a high degree of incoherence and volatility (Garland, 1996), in a form of heterodoxy that would be unthinkable in economic policy. O'Malley (1999) attributes this to the confluence of two distinct political ideologies, neo-liberalism, with its emphasis on the market, and neo-conservatism, with its stress on social authoritarianism, which have not fused into a single political rationality, but rather produced pendular swings in criminal justice policy.

Economic neo-liberals differ from moral conservatives in their tightly prescriptive approach to fiscal management and state downsizing. Their crime control policies are often mixed, pragmatic, and concerned only with the economic bottom-line. They are not hostile to convergence with international regimes and norms and to policy transfer and innovation. Conversely, moral conservatives tend to support increased state spending in the name of restoring law and order, and propound a more readily identifiable policy package, essentially symbolically tough measures such as a greater and more repressive police presence on the streets, higher arrest rates and longer prison terms. They often counter concerns raised by human rights advocates either with nationalist rhetoric, or accusations that the latter are 'soft' on crime and criminals and therefore aiding and abetting the violation of law-abiding citizens' collective right to security.

This article argues that the orientation of Cardoso's government's justice policies was weakly economic neo-liberal, whilst it failed to suppress pre-existing moral conservative policies or those adopted by state-level governments. On the other hand, the neo-liberal macro-economic policies pursued by his administration placed severe constraints on the federal government capacity to commit itself to protecting core human rights, not just rhetorically but also in practice. Contrary to Wacquant's (2001: 407; 2003) proposition, Brazil does not fit the US neo-liberal/conservative model of 'a sharp and brutal substitution of the social-welfare treatment of poverty by penal treatment', nor a modified European neo-liberal/social model that combines 'both the social regulation and the penal regulation of social relations'. The first presumes an extensive welfare system being progressively dismantled, whereas Brazil's historically only protected formal sector urban workers. Indeed, since 1988, welfare benefits have actually been extended through non-contributory pensions to rural workers, domestic

workers and informal sector workers. Whilst the Cardoso government attempted to tackle the fiscal and distributive distortions of the public sector pensions system, it also introduced an expanded system of unemployment insurance with relatively broad coverage, and widened the welfare safety net through various targeted income transfers, such as the School Stipend (*bolsa escola*).[viii] These latter were either unconditional or weakly conditional, and broadly designed to support positive action, rather than police transgressive behavior, on the part of the poor, as the second model proposes.

On the other hand, neo-liberal economic restructuring led to rising urban unemployment and informalization, reducing the proportion of those protected by the old corporatist system of social security. Whilst the Real Plan brought about a sharp reduction of poverty in the mid 1990s, this 'new poverty' began to affect the lower middle classes, and hit job prospects for young people. However, it would be highly reductionist to blame rising drug-related criminality and social violence purely on unemployment levels or on reduced, or poor, social spending. There is a relationship, but a complex, multi-variate one. The logics and causalities linking the discrete policy areas of social investment, criminal justice and economic management requires teasing out at greater length than this article allows.

DOMESTIC GOVERNMENT ENVIRONMENT

I argue that three main factors shaped the domestic governance environment for crime control and human rights policies under Cardoso: federalism, the governance of the Ministry of Justice, and a scarcity of fiscal and political capital.

Garland (1996) proposes that oscillations in crime control policy in an age of neo-liberalism are attributable to problems of state capacity. Once a state realizes that it is limited in its ability to guarantee citizen security it engages in one, or both, of two strategies. When high levels of crime become accepted as 'normal', the central state rejects full responsibility for crime control, and adapts by delegating to other agencies, either non-state actors, or actors at other levels of government. While macro-economic policy is a core prerogative of the federal government and agenda-setting and policy entrepreneurship is restricted to a very tight group in the executive branch, essentially the Finance and Planning Ministers, in the field of criminal justice the federal government shares policy-making powers with many more potential policy entrepreneurs. These include: the Ministry of Justice and its dependent agencies; the judiciary, through its chief justices, but also its professional cohorts; the legislature, which holds power

over new legislation and constitutional reforms; the state governors, who hold the day-to-day operational responsibility for the state police forces and prisons; and, finally, the professionals in direct charge of the police and prisons.

The 1988 Constitution enforced this 'adaptation' through the shift from a centralized authoritarian government to a notably decentralized one. Although the normative framework for the justice system (legal codes, organizational norms) is national in scope, the key institutions of the criminal justice system are operationalized principally at sub-national level. The bulk of the court system is located primarily at state-level, where the courts of first instance and appeal operate, although the court system has national governance structures in the Supreme Court and courts of final appeal. Policing is even more dispersed, through four distinct forces. There is a relatively small federal police force to tackle cross-border crime, a state-level police comprised of the civil, investigatory police and the uniformed military police, which forms the bulk of the country's police forces, and some larger cities have now built up their municipal police into a more preventive, community-oriented force. The prison system has, until now, operated purely at state-level.

The second strategy hypothesized by Garland is one of denial, whereby the government responds to the evidence that new police powers or harsher sentencing have not reduced crime with ever more punitive policies intended as a public display of state power to mask its failure. This strategy has been the one adopted at the sub-national (state) level of government in the areas of highest urban crime. As the federal government holds the ultimate responsibility for human rights protection, failure to oppose such denial strategies operates in tandem with its delegation of blame and responsibility.

The Cardoso government did put in place significant institutional domestic architecture for human rights. This began with the National Human Rights Programme (NHRP), launched in 1996 and revised in 2002, one of the first produced worldwide following the Vienna Conference. [ix] It in turn spawned a new government department, the National Human Rights Secretariat, set up in 1997 inside the Ministry of Justice.[x] However, the NHRP was immediately criticized as being little better than a shopping list, mentioning piecemeal police, prison and court reforms with no targets, division of responsibility, or clear intra-governmental co-ordination. The PSDB-PFL government had come into government empty-handed in relation to the justice sector, by contrast to its blueprint for global integration and privatization. This resulted in the administration responding reactively and weakly to a deepening crisis in this area, despite the fact that the inspection reports published by various international and domestic human rights organizations quickly built up a picture of the range and extent of the structural reforms required.

The ability of the Human Rights Secretariat to push for these structural reforms relied on the Ministry of Justice, whose head would be the most obvious policy entrepreneur. Its function has, however, traditionally been political, encompassing the functions of an Interior Ministry, its office-holder acting as a 'fixer' for the President of the Republic. Since the return to democratic rule in 1985, it had seen one Minister a year, on average, and the period 1995-2002 saw nine ministers.[xi] Cardoso's appointments -- a mixture of political appointees and reforming jurists – undermined efforts to give it a more modernizing, justice-focused role. His first and longest-serving Justice Minister, Nelson Jobim, did pursue a number of essential reforms, setting up national commissions to revise the criminal code, criminal procedure code and law governing prison regimes and sentence serving. These were neglected by all other incumbents apart from the two other reforming ministers, José Carlos Dias and Miguel Reale Jr. However, they had not been the President's first choice for the post and received minimal political backing, as we shall see from the circumstances of their departure, when powerful veto players within the federal government were allowed to block reform initiatives. Such a Ministry was therefore incapable of imposing any kind of coherent direction, neo-liberal or otherwise, on the country's criminal justice system, due to a lack of both political power and technical capacity.

The impact of neo-liberalism was felt most strongly in depriving justice sector reforms of federal government political attention and cash. The Cardoso administration adopted a 'Big Bang' approach to economic restructuring, attempting to push through almost simultaneously both the first and second generation reforms deemed necessary for market-opening, rather than sequence them (Melo, 2005: 851). This included the re-election amendment, sought in the latter part of Cardoso's first term, which he saw as crucial for pursuing reforms through a second term. All this absorbed an enormous amount of political capital, which was only available for crime control during sporadic conjunctural crises.

The government also underspent on all social policy areas due to tight fiscal targets, whether endogenously imposed (by the all-powerful Planning and Finance Ministries) or exogenously imposed (by the IMF agreements).[xii] In consequence, staffing and capacity could not be increased in the Ministry of Justice in key areas such as the penitentiary department. The Human Rights Committee in the Chamber of Deputies, dominated by the political opposition, even found itself in the position at one point of stopping the executive branch from cutting funding to its own Secretariat of Human Rights.

CRIMINAL JUSTICE REFORMS BY SECTOR

Judiciary: Attempts to reform the judiciary may be divided into three types: those intended to improve economic performance, those aimed at human rights protection, and those affecting penal policy. It is in this first area that, arguably, the Cardoso administration attempted to adopt a reform agenda in line with neo-liberal policy prescriptions. Over the last decade, international financial institutions (IFIs) such as the World Bank, Inter-American Development Bank and USAID have funded and promoted a package of judicial reforms in the region as a core component of the 'second wave' of political reforms to reinforce and secure the first wave of financial structural adjustment reforms of the 1980s. A modern, functioning, efficient and transparent court system and set of legal procedures were viewed as crucial not just to governance, but also to providing a stable, predictable environment for foreign investors (Domingo and Sieder, 2001). Attention to the impact of the judiciary on civil liberties (access to justice and fair trials issues) came much later in the IFIs' agenda. The Cardoso government subscribed to this economically-focused agenda and backed a domestically-initiated reform process aimed at removing what were regarded as the distortions of the Brazilian courts (Arantes, 2000). The judicial branch had won for itself what came to be regarded as an excessive degree of autonomy in the 1988 Constitution (Prillaman, 2000). The diffuse and decentralized form of judicial review allowed any lower level court to rule incidentally on the constitutionality of any law in the course of a case (Arantes, 1997). In a system without binding precedent, multiple and repetitious legal challenges engaged the government in expensive and longwinded legal disputes over all manner of policy issues, clogging up the courts.

The first attempts to reform the Brazilian judiciary had begun in 1992 with a constitutional amendment submitted by a Workers' Party federal deputy,[xiii] aimed not at efficiency gains, but rather at democratizing the judiciary internally and increasing access to justice. However, in the midst of political upheaval, the bill was forgotten. Cardoso's first Minister of Justice, Nelson Jobim, took up the baton but focused instead on the governability issue. However, a draft bill produced by PFL deputy Jairo Carneiro was shelved and the Special Commission appointed to work on judicial reform ceased work until 1999, when the new rapporteur, PSDB federal deputy and close ally of Cardoso's, Aloysio Ferreira, submitted a new constitutional amendment. The latter went through several phases of modification, was approved in the Chamber in November 1999, but then ground to a halt in the Senate (Macaulay, 2003; Sadek, 2001). The government of Cardoso's successor, President Luiz Inácio Lula da Silva, decided that these revision cycles had left the amendment so incoherent that it returned to the drawingboard and set up a Secretariat for Judicial Reform within the Ministry of Justice.

With this new concentration of political resources, the judicial reform bill was finally passed in December 2004.[xiv]

This account of a long-winded, stop-start, uncertain judicial reform process does not betoken a government with clear neo-liberal policy objectives, as some have argued (Ballard, 1999). The Ministry of Justice was unable to head up a strong executive-led project, as its counterparts did in other policy areas. It did intermittently influence the process via the proposals put forward by coalition representatives, which included reconcentration of the power of judicial review and jurisprudence in the upper courts, introduction of binding precedent, and Supreme Court powers of jurisdictional and disciplinary control over the lower courts in each branch. Elimination or downsizing of the Labour Courts was to be a key plank in the flexibilization of the labour market.

However, the government was unable to control the output (recommendations and draft amendments) of the various parliamentary committees through which the bill passed, and thus at times the emphasis would shift towards competing models of reform. Producer capture allowed the lower ranks of the judiciary to exert corporate influence and persuade legislators to veto the government's centralizing reforms. Leftwing legislators focused on democratizing the judiciary, whilst the government espoused a verticalized conception of the Judiciary with minimal civil society control. The United Nations in 2003 criticized this approach and a number of critical human rights issues, such as the impartiality of the judges, their insensitivity to allegations of torture in custody, weak guarantees of fair trials and bias towards the police in cases of unlawful killing, aspects that the Cardoso government's judicial reforms had ignored.[xv]

The judiciary also plays a key role in penal policy and sentencing. An explosion in the narcotics trade has pushed up levels of crime and violence in urban Brazil in recent years. A 1990 law intended to tackle drug trafficking and kidnapping, and passed by the legislature in a climate of moral panic, created a special category of 'heinous crimes.'[xvi] Offenders so charged are routinely imprisoned and dealt with much more harshly, being denied bail, progression to semi-open regimes, parole or benefits. The hyper-penalization of drugs-related offences, especially of drug users and small-scale dealers charged with the much more serious offence of trafficking under this law, accounts for much of the increase in Brazil's prison population. Minister of Justice José Carlos Dias realized that this law tied the hands of the judiciary, created a major bottleneck in the criminal justice system, and was ineffective in curtailing the drug trade or associated crime. However, his campaign to repeal this law, and get offenders diverted to specialized drugs courts where they would receive treatment and rehabilitation, met with no support from the executive branch. The President had insufficient political capital available to

pay the cost of such a move, which would have brought the ire of the moral conservatives among the many stakeholders noted above. Dias' attempts to assert the federal government's authority in this area actually brought about his downfall. He was forced out after nine months following a clash with the military hierarchy when he argued that the federal police, not the army, should be primarily responsible for policy on drug trafficking. In some senses the draconian nature of this law, which predated Cardoso's term, obviated any temptation to adopt a US-style policy such as 'three strikes', and it fits well Garland's 'denial' strategy, which Cardoso did nothing to counteract.

On the other hand, the Cardoso government did introduce measures that were aimed at diversion and decarceration. In 1995 Law 9.099 saw the very successful introduction of small claims criminal courts (*juizados especiais criminais*) (Azevedo, 2000). Individuals accused of minor offences that would otherwise be punishable by up to two years in prison agree to a mediation process with the alleged victim, do not acquire a criminal record and receive sanctions such as a fine, warning, restrictions on movement, community or public service, or participation in programmes aimed at changing offending behavior, or treatment for drug, alcohol or mental health problems. The Cardoso government and federal judiciary cannot claim credit for its genesis, which began with a small group of legal experts (technocratic policy entrepreneurs) long before he took office. They did, however, support the roll-out and expansion of the programme, whose aims - to reduce the workload on the mainstream courts, increase efficiency and access – certainly coincide with the IFIs' global judicial reform agenda.

So too do non-custodial sentences such as community service, which the Cardoso government also promoted. First-time offenders who are convicted of intentional crimes committed without violence or serious threat for which they could serve up to four years in prison may be sentenced, once convicted, to a range of sanctions similar to the measures applied at the pre-sentencing stage in the small claims courts. Such sentences accounted for 2 per cent of all sentences in 1995 and nearly 10 per cent in 2002. They divert offenders away from the prison system and are estimated to be ten times cheaper to administer than prison terms, according to the Ministry of Justice. The re-offending rate is allegedly as low as 2 per cent, compared to around 80 per cent with custodial sentences.[xvii] Thus, from a neo-liberal point of view, these diversion strategies constitute excellent value-for-money. However, judges were reluctant to make full use of non-custodial sentences, partly due to an initial lack of infrastructure, [xviii] which required a release of scarce government funds, but also due to moral conservative influences, more marked in some states than others, that view a prison term or preventive detention as the only real forms of punishment and deterrent.[xix]

In summary, whilst the proposed judicial reform would have made the courts a more amenable environment for business than for the common citizen, particularly criminal suspects, the government did not mobilize enough of its political capital to push through even the most identifiably neo-liberal aspects of the package. On the other hand, the other reforms introduced demonstrate the incoherent nature of penality in neo-liberal times, with policies of decarceration and diversion existing side-by-side with super-punitive measures. Whilst Cardoso would probably not have supported a Heinous Crimes law, on the other hand, the cost of removing it proved insuperable.

Police: Even though physical security is an important aspect of the investment environment, the Cardoso government never placed crime control policy on a par with economic policy. Although excessive use of force by police was the issue on which the administration suffered most pressure internationally, the domestic costs were higher still, as structural reforms to the police required constitutional amendments. Without a reform project at federal level, his administration continued to delegate responsibility to sub-national governments, which in turn engaged largely in a denial strategy, employing more of the same, failed, crime control policies. Where the federal government was jolted into direct action by high-profile human rights violations or campaigns, the measures taken were ad hoc and fragmentary.

One of Cardoso's achievements in office was to bring the armed forces finally under civilian control,[xx] and they were symbolically challenged by one of his first moves in office. Urged by the Secretary General of Amnesty International, he set up a commission to compensate the relatives of those who had been killed or forcibly 'disappeared' by state agents during the military dictatorship. However, this did not address the problem of authoritarian legacies since it left the 1979 Amnesty Law intact, and so those responsible for the abuses could neither be identified nor prosecuted, and often remained on active service in the police or military. Whilst the law allowed for the executive branch to require military archives to be opened and examined in search of the truth, this did not occur until 2002.

Moreover, the armed forces retained some enclaves of power in the field of crime control, such as cross-border drug trafficking, where they won a turf war with the federal police, and control of crime data within the Ministry of Justice.[xxi] Military courts continued to guarantee near total impunity for military police officers (Macaulay, 2002a).

It was only in 1996, following the massacre of 19 landless peasants by military police, that the government intervened to speed up passage of a legislator-sponsored bill (Bicudo, again) seeking to transfer jurisdiction over crimes committed by uniformed military police from

the military to ordinary courts. Nonetheless, the police lobby in the Senate was strong enough to distort the intent of the bill and limit civilian jurisdiction to intentional homicide. The federal government could not, or would not, prevent this, and did not push in its judicial reform project for complete removal of military court jurisdiction over the military police.

The same reactive dynamic occurred with the criminalization of torture. A bill stuck in Congress for several years was rushed through in response to a televised episode of police brutality in 1997. This incident spurred the government to consider total restructuring of the police, and a working group proposed the elimination of the military courts, 'deconstitutionalization' of the police (to allow the states to choose whether to retain separate civil and military police, unify them, or abolish one branch), and the establishment of a witness protection scheme. Only the last proposal was ever implemented. The same fate befell the bills intended to curb gun ownership and to give federal officials jurisdiction over egregious human rights cases, where state authorities were unwilling or incompetent to act.[xxii] In all of these cases, the police corporations acted as policy blockers rather than entrepreneurs, whilst their allies in congress, often linked to the state-level governments, engaged in denial behavior and mobilized moral conservative sentiment.

In 2000, the Cardoso government eventually launched a National Plan on Public Security, consisting of 124 different policy proposals, the result of an earlier, and more ambitious, consultation aimed at a root and branch review of the criminal justice system, aborted after Minister of Justice Dias' resignation. This watered-down version was criticized -- like the National Human Rights Programme -- for lacking a central unifying vision, clear priorities, measurable outputs, or a timetable for implementation, and for avoiding all mention of structural reforms. It contained no rational criteria for the allocation of funding, such as crime rates or specific crime control policies.[xxiii] It is a conservative document in so far as it emphasized the repressive rather than preventive aspect of policing and focused on providing more funding and equipment to the police without imposing conditions on their performance, whether measured in terms of respect for human rights, or of crime prevention or clear-up. Although in the final year of his government the National Public Security Fund released the unprecedented sum of R$ 396 million, it arrived too late to have much impact.[xxiv]

In the absence of strong federal-level policing policies, the state-level administrations simply followed their own ideological preferences, as illustrated by three states under PSDB governors. In São Paulo, Mário Covas sought to curb the very high levels of police violence through institutional reforms, setting up Brazil's first police ombudsman's office to oversee investigation and disciplining of offending officers, as well as a programme intended to

discourage police officers from shooting without good cause and using excessive force (Carneiro, 2003). Meanwhile in Rio de Janeiro, Marcello Alencar allowed an extreme 'denial' policy, with his head of public security encouraging a 'shoot to kill' policy that resulted in police officers being rewarded for the summary executions of those they deemed 'criminal suspects.' Many of those killed in police operations turned out to have no criminal record, and to have been shot in the back or head at close range (Cano, 1997). Tasso Jereisatti, in the northeastern state of Ceará, was meanwhile seduced by the promises of 'zero tolerance' policing, the most heavily touted of US-exported 'neo-liberal' control policies. This delegation/abdication of responsibility to state-level was so marked that it caused the fall of yet another of Cardoso's Justice Ministers, Miguel Reale Jr, who resigned when Cardoso suddenly and unilaterally reversed an agreement they had reached to order federal government intervention against a police death squad in Espírito Santo state (Global Justice, 2002). Whilst the state police remained unreformed, delegation to the private sector also increased. By 2000 the ratio of police to private guards was 1:3.[xxv]

This omission by the federal executive allowed much-needed core reforms to be blocked by the producer groups, which protected both their own corporate identities and path-dependent institutional practices. Other branches of the criminal justice system, such as the courts and prosecution service, are also responsible for engaging in destructive delegation practices. For example, few police have been prosecuted and convicted under the torture law (United Nations Commission on Human Rights, 2001) and the penetration of political and justice institutions by organized crime networks has maintained impunity for violent and corrupt police (United Nations Commission on Human Rights 2004). Thus, whilst this article analyses the criminal justice system institution by institution, successful reform requires a joined-up inter-institutional approach.

Prisons: The prison system is frequently regarded as a more peripheral component of the criminal justice system than either the courts or the police service, both of which present apparently much greater governance problems and economic externalities. Consequently, the Cardoso government initially paid it no attention, even though in 1995 it already contained twice as many prisoners as places available. The Brazilian prison population then doubled, rising from 148,760 in December 1995 to 308, 304 in December 2003, [xxvi] as did the incarceration rate, from 95.5 to 181 per 100,000 population. This surge is consistent with global and regional trends and reflects both structural factors, such as the rise in serious and drug-related crime, as well as the changes in sentencing analyzed above. It caused crisis by the late 1990s, as

overcrowding in the police stations and prisons reached unbearable levels, prompting almost weekly jailbreaks, riots and hostage-taking episodes.[xxvii]

Although national and international human rights groups began to exert pressure on the government (Human Rights Watch, 1998, Amnesty International, 1999), policy responses consisted solely of public investment in building new prisons, creating over 60,000 new prison places, at a cost of around R$10,000 apiece. At this juncture, the Cardoso government might have opted for the current neo-liberal solution to prison management, some form of privatization as adopted primarily by the USA and a number of other, mainly northern, countries. However, opinion among legal system operators in Brazil has been firmly against prison privatization on ethical and juridical grounds. Whilst never a policy proposed by the federal government, individual states started to experiment with different modalities of private involvement from1999.[xxviii] By 2005 there were 13 facilities in five states. Some, such as that in Bahia, adopted the 'European' model of semi-privatization, where the state retains control of internal security. Paraná state went furthest, adopting the US model and building six new prisons with public money (a combination of federal and state finance), with internal security and all services necessary for the daily functioning of the prison contracted out to private security companies, only retaining military police for the external guard. These units not only ran along US lines, but also copied the architectural style, which relies on remote-controlled high-technology to maintain security. However, the results have been mixed. Paraná officials decided not to renew the contracts as it turned out that privately-run prisons cost fifty per cent more to administer than the public sector ones. Interestingly, São Paulo state, which alone houses over 40 per cent of Brazil's prisoners, did not turn to private sector involvement save in the case of very limited collaboration with NGOs in the running of some small local jails.

If the explicit policy influence was limited, fiscal neo-liberalism seriously affected management of the prison system. The National Penitentiary Fund (FUNPEN) was set up in 1994 to provide ear-marked funding for the prison system, with revenues mainly from court fines and from local and national lotteries. Legally, this money could not be touched by the federal government, yet throughout the Cardoso government, these funds were held back by the Treasury as a means of balancing the books. In 1995, FUNPEN was able to spend only 15 per cent of its accumulated revenue. This rose to nearly 97 per cent in 1998, election year, only to plummet back to 22.2 per cent in 1999 after the steep devaluation of the Real. Overall, the government released only 72 per cent of FUNPEN's income.[xxix] These fluctuations in funding hit São Paulo hardest: whilst its prison population was growing at an average net rate of 700 prisoners a month, it received only 31 per cent of FUNPEN's funds. Fiscal targets also hindered

the institutional strengthening of the Federal Penitentiary Department in the Ministry of Justice. With its skeleton staff and subordination to an advisory council on penal affairs, it was unable to produce reliable national data, policy guidelines, operational procedures, or to carry out inspections and diagnoses of the system. By contrast to the cases of the judiciary and police, the prison service had no corporate lobby power to protect its interests.

CONCLUSION

This article has argued that the federal government under Cardoso was not strongly committed to active adoption of specific policies that could be termed neo-liberal in the field of crime control and criminal justice. Indeed, it had little clarity of purpose in this policy area. Neo-liberal policies were either not chosen (prison privatization), pursued but not attained (judicial reform) or enacted by sub-national actors over which the federal government could not, or would not, wield veto power. The same holds true, in large part, for the flipside of neo-liberal penality, moral authoritarianism. In short, the federal government's sins were more often of omission rather than of commission. As Panizza and de Brito note for human rights policy in Brazil (1998: 21), justice system policy 'occurs in an extremely fragmented and heterogeneous polity which limits the central state's capacity to implement effective strategies.' Such an 'institutional patchwork' is extremely challenging to manage without an overall vision, and where the sector is starved of economic and political capital. It was this 'environmental' effect of neo-liberalism, where fiscal management concerns hogged all the government's energies, that had the greatest negative impact on attempts to reform the justice system.

Extrapolation from a governance philosophy so strongly rooted in market economic thinking to other policy areas can make 'neo-liberalism' work too hard as an explanatory frame, when many policies in this area have a mixed etiology. We need to understand the dynamics of adoption in different policy fields, which involve distinct sets of policy entrepreneurs, in different arenas and levels of government. The influences on the Cardoso government's criminal justice and human rights came from various, contradictory, directions, from the international human rights regime and its domestic allies, from other multilateral agencies, and from homegrown moral conservatives and producer groups. The power of the latter allowed reform efforts to be derailed. The judiciary blocked external oversight and upheld repressive police tactics, whilst the police blocked attempts at 'deconstitutionalization', civilian oversight and demilitarization. This has prevented Brazil from achieving the final stage in Risse, Ropp and Sikkink's schema,

whereby the institutions of the state come to internalize the normative values of human rights and reflect them in new organizational formations, practices and cultures. The Cardoso government did not so much enact the wrong policies as fail to take or make opportunities to enact the *right* policies that would have improved civil liberties in Brazil during his eight years in office.

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NOTES

[i] Many of the observations in this article are based on (often unattributable) conversations with senior officials in the Ministry of Justice, including three Ministers of Justice and two Secretaries of State for Human Rights, whilst the author was Brazil Researcher at Amnesty International, and subsequently as coordinator of the Human Rights programme at the Centre for Brazilian Studies, University of Oxford.

[ii] This article cannot address the full range of rights nor enter into debate on the philosophical or practical intersections between neo-liberalism and the discursive and normative-legal fields of human rights.

[iii] Inspection visits were made, at the invitation of the Brazilian government, by the following officials and bodies: Inter-American Commission on Human Rights, 1995; United Nations Special Rapporteur (UNSR) on Violence against Women, 1996; UNSR on Torture, 2000; UNSR on the Right to Food, 2002. The government also issued an invitation to the UNSR on Extrajudicial Executions, who visited in 2003, and extended a standing invitation to the UN Commission on Human Rights to send thematic rapporteurs to carry out human rights inspections. The United Nations High Commissioner for Human Rights, Mary Robinson, visited twice, in 2000 to agree technical assistance, and in 2002 to discuss implementation of the recommendations of the World Conference against Racism.

[iv] These allow individuals or NGOs to take human rights abuse cases to the treaty bodies overseeing the conventions on women, racial discrimination, torture, economic, social and cultural rights, and civil and political rights, once all domestic remedies have been exhausted.

[v] Brazil's first report in ten years to the Committee on Torture was submitted in 2001, the first report on the Women's Convention was submitted 17 years late in 2002, and the government only reported on the International Covenant on Economic, Social and Cultural Rights after local human rights groups had first submitted a 'shadow' report.

[vi] This approach has paid diplomatic dividends, with Brazil's attitude and reports praised in various UN committees as 'remarkably frank and self-critical,' 'candid' and 'constructive'.

[vii] Including his first Secretary of Human Rights (later Justice Minister), José Gregori.

[viii] Whilst the PT and PSDB contest – and effectively share – the parentage of this scheme, the Cardoso government did roll it out nationally, assisting 5 million children by the end of 2002 (Ministry of Education data), whose parents received R$15 a month to keep them in school.

[ix] The drafting of the NHRP was conducted by the Centre for the Study of Violence, a leading human rights research unit at the University of São Paulo, in consultation with the human rights community.

[x] Its status was gradually increased, with its office-holder promoted to the rank of Secretary of State.

[xi] This contrasts sharply with the length of tenure of the Ministers of two successful and key social ministries, those for Agrarian Reform and Education.

[xii] The government routinely spent less on social policy areas than mandated in the annual budget approved by Congress.

[xiii] Well-known human rights lawyer deputy, Hélio Bicudo.

[xiv] The final bill included external oversight of the judiciary and prosecution services, and measures to

reduce corruption of judges and prosecutors.

[xv] The report by the UNSR on Extrajudicial, Summary or Arbitrary Executions recommended that the Special Rapporteur on the independence of judges and lawyers undertake a mission to Brazil (United Nations Commission on Human Rights, 2004).

[xvi] The law was passed as a hard-line, knee-jerk response to a series of high profile kidnappings.

[xvii] Source: Comissão Nacional de Apoio às Penas e Medidas Alternativas.

[xviii] As of April 2002, 34 units for non-custodial sentences had been set up across the country.

[xix] For example, it was Rio Grande do Sul, whose judges are notably more progressive, that pioneered non-custodial sentences.

[xx] There is a debate about the degree to which the military retained reserves of power after the transition. See Hunter (1997) and Zaverucha (2000).

[xxi] An observation made by crime data analyst, Renato Sérgio de Lima (Centre for Brazilian Studies, 2002).

[xxii] In 1995 Cardoso had set up a new division within the Federal Police to investigate human rights abuses.

[xxiii] Fórum Nacional Contra a Violência, August 2000.

[xxiv] Source: http://contasabertas.uol.com.br.

[xxv] Source: Private Security Companies Union.

[xxvi] Source: DEPEN.

[xxvii] The murder rate in the state of São Paulo rose from 17.9 per 100,000 population in 1980 to 59.3 in 1998, with a similar pattern in other big cities.

[xxviii] These reflect the balance of resources and control between the public and the private sector.

[xxix] Based on DEPEN data. Overall the Cardoso government spent R$792 million on the prison system.