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Problems of police oversight in Brazil

By

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PROBLEMS OF POLICE OVERSIGHT **IN BRAZIL**

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Abstract

This paper analyses the problem of subjecting the Brazilian police to truly effective control and oversight. It highlights three key dimensions of police accountability within the Brazilian context -- *transparência*, *fiscalização* and *responsabilidade* -- through which to measure the effectiveness of oversight mechanisms. The paper then analyses the strengths and weaknesses of the current institutional mechanisms of police control, focusing on the military police courts, the internal affairs departments of the police, and the police ombudsmen's offices and the prosecution service. Finally the problem of accountability is set within a wider historical, social and cultural context.*

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Resumo

Este texto analisa o problema de expor/submeter as polícias estaduais a um controle verdadeiramente efetivo. Se destacam três dimensões-chaves de 'accountability' policial no contexto brasileiro -- *transparência, fiscalização and responsabilidade* -- através do qual medir a os pontos fortes e fracos dos existentes mecanismos de controle interno e externo das polícias militar e civil. O paper focaliza a justiça militar, as corregedorias da polícia, as ouvidorias da polícia e o Ministério Público.

A autora utiliza o esquema de Goldsmith para categorizar os mecanismos por nível de autonomia e considera a diferença entre processamento de reclamações ('oversight'), a um lado, e uma abordagem mais diagnóstica e preventiva ('review') ao outro lado. Finalmente se contextualiza o problema em elementos sociais, históricos e culturais.

O controle civil da polícia faz parte de um debate global a respeito de 'accountability' dos governos, um debate que adquiriu mais importância na América Latina num contexto de democratização, uma explosão de crime e violência e a tentativa de impor o estado de direito. No Brasil o 'entulho autoritário' do regime militar se evidencia na estrutura, modus operandi e impunidade da polícia.

A justiça militar representa um enclave de impunidade que protege a polícia militar das disciplinas civis. Os tribunais militares são fechados ao escrutínio de externos e a cultura militar enfatiza a responsabilidade dos militares para com a própria instituição, não a população em geral. As corregedorias da polícia funcionam como um filtro para antecipar e prevenir investigações mais completas de abusos policiais. Elas operam de uma maneira atomizada e defensiva, e colaboram pouco com outras entidades investigadoras.

As ouvidorias da polícia são órgãos civis mas não completamente autônomos que recebem denúncias sobre abusos policiais, e monitoram os inquéritos internos e sindicâncias disciplinares conduzidos pelas corregedorias. Também iniciaram um processo de análise dos defeitos operacionais e estruturais do atual modelo de policiamento no Brasil. O sucesso das ouvidorias depende em grande medida dos recursos institucionais, a autonomia e o apoio político que recebem.

O Ministério Público tem as mais amplas atribuições, em teoria, de controle e monitoramento da polícia. Porém não se exercem completamente estes poderes por causa de conflitos institucionais e falta de regulamentação desta área de atuação.

Os defeitos dos mecanismos de controle da polícia no Brasil são também resultantes de fatores culturais, tais como a justificativa utilitária da brutalidade policial, e atitudes preconceituosas em relação às vítimas. As respostas institucionais ainda são tímidas e incompletas, mas tendem a seguir o caminho correto.

1. Introduction

The contemporary Brazilian state now has excellent formal guarantees for civil liberties expressed in the 1988 Constitution and it has signed up to all the major international human rights conventions and instruments (Piovesan 1996; Pinheiro 2000). However, none of the above has managed to diminish police brutality and abuses, which appear to have actually increased since the return to democracy and civilian government in 1985. The Brazilian police have been constantly criticised by local and international organizations for persistent gross human rights violations and for enjoying a high level of impunity.

For example, although torture was outlawed both in the 1988 Constitution and in a 1997 alteration to the penal code, in 2001 the Brazilian government reluctantly accepted the conclusions of a report by the United Nations Special Rapporteur on Torture that characterised torture as a 'widespread and systematic' police practice (United Nations 2001). Despite hundreds of documented cases, only a handful of police officers have been successfully prosecuted since 1997. Similarly, levels of lethal force by police have tended to remain constant, despite some fluctuations and reform attempts. Fatal police shootings of civilians add around ten per cent to the total number of homicides in São Paulo and Rio de Janeiro states (Cano 1997; OPESP 2000; U.S Department of State 2002).¹

There is an enormous opportunity cost involved in failing to control police behaviour. The autonomy granted to police, which varies greatly from country to country, inevitably leads them to test the boundaries of liberal guarantees and rights. When the police are left to their own devices, the logic of police activity parts company from the intention of the policy makers and the letter of the law. The Brazilian public meanwhile distrust and fear the guardians of the law and have resorted to taking the law into their own hands, or take expensive measures to insulate themselves from rising crime and violence in the surrounding society (Caldeira 2000). Police efforts are often expended more on the control of those socio-economic groups regarded as the pathologically criminal classes than on crime prevention or crime solving. Significant sectors of the police are actively involved in extortion and organized crime, which has increased dramatically over the last decade (Mingardi 1992). It would appear that overall the Brazilian police have become less efficient, more corrupt, more abusive and less controllable even than in the period of military rule (1964-1984). Evidently there is an underlying unresolved problem of accountability.

The universally acknowledged gulf between the *pays légal* and *pays réel* in Brazil and other Latin American countries has prompted increasing attention to crafting institutional means of closing that chasm. This paper examines the structure and functioning of the multiple oversight mechanisms put in place since 1985 by a democratic Brazilian state to handle complaints about police misconduct. It analyses the reasons for the almost complete

¹ In 2001 police in São Paulo state killed 837 people. An analysis of the 664 individuals killed in 1999 shows that 31 per cent were committing a crime at the time, 56 per cent had no criminal record and 51 per cent were shot in the back (U.S Department of State 2002).

failure of the current system of police oversight, and concludes by looking at some of the newest proposals for improving the system.

Dimensions of accountability

The issue of democratic control of the police may be tackled from two distinct directions. On the one hand, there is a burgeoning literature that looks more broadly at the notion of accountability ('vertical' and 'horizontal') in Latin American state institutions, both political and administrative, within the context of democratisation and state reform in the region (O'Donnell 1999). This field of enquiry deals more broadly with notions of state-civil society relationships, citizenship, republicanism, constitutionalism and the construction of discourses and practices of rights (Bresser Pereira 1997). On the other hand, a more specialist literature on police oversight has emerged from the USA, Western Europe and Australia that analyses the different modalities and contexts of the varying forms of police oversight thus far formulated and implemented. For reasons of space, this paper draws primarily on this latter literature, but roots the analysis within the very specific ways in which notions of accountability are understood in the Brazilian context.

The term 'accountability' is notoriously untranslatable in both Spanish and Portuguese, underscoring the weakness of the concept in Latin America society. It tends, in Brazil, to be rendered by three somewhat distinct terms: (1) *transparência* - the existence of clear rules and performance criteria, laid open to public scrutiny (2) *fiscalização* - internal or external checking mechanisms to assess performance against rules, procedures and explicit criteria (3) *responsabilidade* - both a willingness and obligation on the part of institutions and individuals (here, police officers) to own the consequences of their actions, or to apportion blame or praise, and the capacity to take the proportionate remedial action. Clearly these three elements are inter-related and inter-dependent. All three must pertain for accountability to be substantial and effective. This paper examines each of the present mechanisms of police oversight through the optic of these three separate dimensions

2. Police and democracy

In a modern democratic society the state is expected to hold a monopoly on force and to exercise it within legal limits for the purposes of upholding the rule of law. Accountability is the means by which citizens enforce the social contract and maintain state power within acceptable limits, the parameters of which are set now by not only domestic but also international law and public opinion. However, even in long-established democracies, the issue of civilian control of the police is a relatively new one (Goldsmith 1991; Stenning 1995; Goldsmith and Lewis 2000). There is also an increasing consensus that mechanisms designed to control police conduct must combine elements both of *oversight*, that is, reactive complaint handling, and of *review*, defined as a broader, more proactive and interventionist practice that seeks to identify patterns of abuse or misconduct and draw up prevention strategies (Lewis 1999:82; Goldsmith 1991). Here we focus primarily on the first element.

The issue of police oversight is a recent entrant on the democratisation policy agenda in Latin America (Mendes 1999). As prolonged civil conflict has been brought to an end in Central America and Haiti, the police forces have undergone a root and branch restructuring, spurred by considerable bi- and multilateral technical assistance, intended to purge those bodies of the authoritarian practices and agents of previous repressive regimes (Neild 1999). Latin American countries have also begun to adopt from other countries a number of external oversight and review mechanisms such as police civilian review boards, judicial councils, ombudspersons, inspectorates, and human rights commissions (Neild 1998; 2000). However, the classic criminal justice system accountability problem of 'quis custodiet ipsos custodes' (who guards the guardians) acquires additional complications in Latin America related to recent history. Impunity for state agents who committed gross human rights violations under military rule has been enshrined in the various amnesty laws introduced under those authoritarian regimes. Many violators remain in post in the police, armed forces or other public offices, a factor of particular importance in Brazil, where the military and civil police took an active role alongside the armed forces in the torture, murder and disappearance of regime opponents, and never underwent a restructuring or lustration process (purging) in the transition period (Amnesty International 2002).² Brazil's 1979 Amnesty Law exempting the armed forces and police from investigation and prosecution resulted from an initial demand of the political opposition to the military regime and thus has never faced a challenge to its legitimacy. This has left Brazil with an entrenched institutional culture of police impunity.

Police organisation in Brazil

In order to appreciate the specific challenges of police oversight in Brazil, an understanding of the history and structure of the Brazilian police service is useful. The country has a federal system of government and of administration of the criminal justice system. Penal law and procedure are established at federal level and applied across the entire country, but the institutions of the criminal justice system that enforce the law fall under the aegis of the 26 states and federal district. Each state organises and funds its own courts, prison system and police as established by the federal constitution. The state police force is in turn divided into the uniformed military police, responsible for 'the preservation of public order', and the civil police who have the functions of a 'judiciary police' and are responsible for investigating crimes. There is also a small federal police force, and a number of larger cities have municipal guards. However, we are here interested essentially in the state military and civil police. Both the military police, historically under power of each state's governor, and the civil police, under the power of the state secretary for public security, were placed under the centralised command of the armed forces in 1969, at the height of political repression under the dictatorship (1964-1985). With the 1980s transition to democracy, both police forces were returned to the control of state secretary

² For example, a senior police officer implicated in the torture of regime opponents under the military continues to work in the Theft and Robbery police station in Belo Horizonte, notorious for the use of torture against criminal suspects (Amnesty International 2002).

for public security. However, the military police remained functionally attached to national military structures, including military courts. These two police forces have quite separate institutional histories and distinct remits that are reflected both in the patterns of police misconduct³ and the specific limitations of each of the oversight mechanisms, to which we now turn.

3. Oversight mechanisms

Across the world a number of different formulae of police oversight have been attempted (Lewis 1999), all with advantages and disadvantages, depending on the structural and cultural variables affecting police organization and behaviour in each context. In this next section I examine the specific difficulties encountered by each one of the currently existing mechanisms of police accountability in Brazil, both in their internal design and performance, and in relation to one another.

Brazil has four distinct police oversight mechanisms, located in three separate branches of government (see Figure 1): the judiciary (military courts), the executive (internal affairs department and the ombudsman's office attached to the police department), and the *Ministério Público* (prosecution service) a peculiarly Brazilian institution that is functionally separate from both judiciary and executive and often termed a 'fourth power'. Thus in terms of Goldsmith's continuum of police oversight mechanisms ranging from exclusive police control over complaint investigations, to exclusive civilian control (Goldsmith 1988), Brazil has adopted a mix of mechanisms.⁴

Within Goldsmith's schema, the military courts and the police internal affairs department (*corregedoria*) of the civil and military police in each state correspond to the 'benchmark' model, a traditional bureaucratic, paramilitary approach that excludes all civilian input, the police investigate the complaint, and discipline and sanctions are determined in-house or in the military courts. This is even more accentuated in the case of the military police, which fall under the almost exclusive remit of the military courts. The work of the *corregedorias* is in turn monitored, in some states, by a police ombudsperson's office (*ouvidoria*) a body that corresponds to Goldsmith's 'civilian external supervisory' category, with civilians monitoring the complaint process. The *ouvidorias* have no power to direct that charges be laid, and the police carry out the investigation and determine sanctions. Truly external oversight is wielded by the *Ministério Público*, an institution that should not, however, be classified as a civilian 'external review body' as it is essentially a hybrid judicial institution and as such enjoys institutional independence and powers. We now examine each mechanism in turn to see to what extent they promote the three constitutive elements of accountability highlighted above: *transparência*, *fiscalização* and *responsabilidade*.

³ For example, the military police are more frequently accused of excessive lethal force and the civil police of using torture against criminal suspects. In both forces, officers engage in criminal activity. However, the character of both abuses and illicit activity is conditioned by the two forces' operational environment and duties.

⁴ For a discussion of the different models of complaints systems see Lewis (1999).

Figure 1: Summary Of Police oversight mechanisms

MECHANISM	INSTITUTIONAL STATUS + REMIT	POWERS, DESIGN AND IMPACT	ACTIVITY
Military Courts	Judiciary: Part of 'specialised' court system. Oversight of military police except on-duty intentional homicide of civilians	a) oversight only b) 'benchmark' model: police investigate police c) <i>transparência</i> – low <i>fiscalização</i> - low <i>responsabilidade</i> -low	Investigation and trial of 'military crimes' and military personnel who commit ordinary crimes. Preliminary investigation of intentional homicide conducted by military personnel before case passes to civilian courts
<i>Corregedoria</i> (internal affairs)	Executive: Subject to Secretary of Public Security inside police HQ. Oversight of civil and military police (separate or joint units)	a) oversight only b) 'benchmark' police investigate police c) <i>transparência</i> - low <i>fiscalização</i> – low <i>responsabilidade</i> - low	Internal disciplinary investigations (<i>sindicância</i>) Preparation of criminal case (<i>inquérito policial</i>) for prosecution service
<i>Ouvidoria</i> (Ombudsperson's office)	Executive: Under secretary of public security but often with civilian input and leadership Oversight of civil and military police	a) oversight only but taking on more proactive role b) semi-independent internal control: Mixture of 'civilian in-house and 'civilian external advisory' c) <i>transparência</i> – high <i>fiscalização</i> – medium <i>responsabilidade</i> - low	Monitors <i>corregedoria</i> 's investigations. Refers cases to <i>corregedoria</i> or prosecution service for action Interface with the population
<i>Ministério Público</i> (prosecution service)	Hybrid executive-judiciary 'Fourth power' Mainly civil police (military prosecutors investigate military personnel)	a) oversight and review b) 'external civilian agency' c) <i>transparência</i> – medium <i>fiscalização</i> – high <i>responsabilidade</i> -high	Monitors (but does not supervise) the <i>inquérito policial</i> Wide powers to defend civil liberties and constitutional guarantees May conduct separate criminal investigations

A. Exceptionalism: Military Courts

The most commented-on flaw in Brazil's attempts to control the police is the survival of a parallel system of military justice that has jurisdiction over the state military police, who form 78 per cent of all state police personnel.⁵ As might be expected, the military courts score very low on all three measures of accountability. Military institutions are resistant, by definition, to civilian oversight and *transparência*. The hermetic, introspective and defensive corporate culture of the Brazilian military police owes much to decades of national security ideology, and to the impunity enshrined in the 1979 Amnesty Law. It is therefore difficult – although not impossible – to obtain data on the inner workings of the military courts (Cano 1999).

Misconduct – as defined by a separate military penal code and the military police's own *regimento interno* – is examined in the first instance by a military *corregedor*. The case will either result in internal discipline or in a military police investigation, which will be passed on to the military prosecutor and collegiate *auditoria militar* (military tribunal of first instance) for prosecution. Only in the case of intentional homicide of civilians committed by on-duty military police does jurisdiction pass to the mainstream justice system, with the eventual possibility of a civilian jury trial. However, military investigators retain responsibility for the initial inquiries that determine whether the homicide was 'intentional'. This remains a very effective filter allowing police to claim that deaths occurred whilst the victim was 'resisting arrest'. Military prosecutors are also prone to accepting this version of events and dropping any charges (Cano 1999). In addition, police are adept at contaminating crime scenes and destroying evidence that might implicate them. In a number of high-profile cases in which large numbers of police officers were involved in multiple killings, the dearth of evidence against individual officers has resulted in charges being dropped or brought collectively against police, with the inevitable result that a fair or well-proven conviction is impossible (Amnesty International 1998).⁶

The ethos of military hierarchy also appears to override all other sets of values, and results in administrative punishments being often worse than the penal sanction for a given offence. Lower ranks of the military police have even turned to the newly formed police ombudsman's office to complain of excessive severity in minor infractions.⁷ This is a world of inverted values, where obedience and discipline are attributed greater importance than the right to life. Military police claim that they have a more effective system of internal oversight as they investigate and discipline proportionately more officers than do the civil police. However, this assertion should to be

⁵ The military police are better termed a 'militarised' police force. Although they are functionally linked to the army forces (and defined in the Constitution as an army 'reserve') they are governed on a day-to-day basis by civilian agents, the state Secretary for Public Security and the state governor. Their hierarchy, uniforms, training and operational ethos are military in character and they benefit from military 'privileges' such as the military courts.

⁶ In 2002 the military police involved in the killing of 19 landless peasants in Pará state, April 1996, were finally brought to trial. Of the 153 military police collectively charged with aggravated homicide, only two senior officers were convicted. The rest were acquitted due to lack of evidence as to individual responsibility.

⁷ Interview with Julita Lemgruber, ex-police ombudswoman of Rio de Janeiro, July 2001.

disaggregated in terms of the kinds of misconduct being investigated and punished.

Responsabilidade is therefore understood within the military police as a moral duty to the institution itself, not to the members of the public whom the police are supposed to be protecting from crime, or to a wider set of principles underpinning police work. Indeed, whereas the ethics and ethos of the military are well enunciated and drummed at length into new recruits, the police themselves are unsure of the ethical basis of their policing function, stranded as they are currently between the old, authoritarian practices of the past, and the new discourses of human rights, community participation and citizen security, into which they have only gingerly dipped their toes.⁸ In many cases of serious misconduct, even torture or fatal shootings, the officer in question will receive an internal sanction, for example sacking from the police, but will not be criminally prosecuted. As a result many violent policemen end up as private security guards, or even rejoin the force in another state.

One of the underlying causes of the military courts' excessive attention to petty disciplinary infractions and an inadequate response to more serious forms of misconduct in relation to policing activities is that the first category of misdemeanour is defined precisely and in detail in the *regimento interno*. By contrast there are virtually no written and codified procedures for all the myriad policing activities that an officer must carry out on duty, for instance stop and search, arrest or use of force. A recent ethnographic study of the military police demonstrates the entirely ad hoc and defensive character of military police practices (Muniz 1999). Without rules, that is, a baseline of established procedures in which police officers are trained and against which their performance is measured, *fiscalização* is meaningless and impossible. Assessment of officers' conduct becomes entirely subjective and the line between acceptable and unacceptable behaviour shifts with the vagaries of each new administration or police chief. For example, the state government of Rio de Janeiro (1995-98) pursued a shoot-to-kill policy that resulted in a sharp rise in military police fatal shootings of civilian criminal suspects (Cano, 1997), a policy reversed by the following administration.

Finally, the division of labour and professional rivalry between two separate police bodies complicates the establishment of a single disciplinary or oversight institution. Inter-force rivalries often result in each police force zealously policing the other. In some cases the civil police, responsible as they are for crime investigation, will actually carry out parallel investigations into military police misconduct, thus acting as another layer of control over the military police. This may turn up evidence of gross abuses but probably does not improve the overall quality of policing in the long run. The two police forces are governed by separate disciplinary rules, the military police by its *regimento interno* and the civil police by the *Estatuto do Funcionário Público*, and by separate penal codes, the military penal code and the civilian one. This means, as Zaverucha (1999) points out, that a misdemeanor committed by both a civil and a military policeman would result in entirely different internal disciplinary consequences and, more seriously, in terms of the democratic principles of equality before the law, in different punishments

⁸ For example in the whole of Rio de Janeiro there is only one community policing project, in Cantagalo, isolated institutionally from the mainstream of policing in the city.

handed down by the courts. A bifurcated police force results not only in inefficient and disorganized policing, but also in a fissiparous and ineffective oversight system.

De-militarization of the police, which would end this essential dissonance, periodically surfaces on the political agenda, but thus far with no success.⁹ A powerful military police lobby in the Senate, represented by a number of ex-governors, has strenuously resisted all attempts at re-civilianisation of policing. In 1992 Workers' Party (PT) federal deputy Hélio Bicudo submitted a bill that would have removed military jurisdiction for all crimes committed by military police. It met stern resistance and was only passed in a very modified form in response to the Eldorado de Carajás incident (Zaverucha 1999). The military courts survived the 1988 Constitution because the government of the day had no clear agenda with respect to the justice system and allowed the running to be made by interest groups. The courts thus continue to represent an enclave of exceptionalism that is incompatible with creating a culture of accountability.

B. Internal control: Corregedoria

In each state the civil and military police have their own internal affairs department, or *corregedoria*. This department undertakes all initial investigations of complaints against police, whether received by an *ouvidoria*, a *Disk-Denúncia* (telephone hot-line), or directly by the *corregedoria*. In the first instance a fact-finding inquiry (*sindicância*) is opened. This may result in either in administrative action and discipline, or in a full police investigation that will then be referred to the prosecution services for criminal charges.

Unsurprisingly, the *corregedorias* resemble police internal affairs departments the world over. They are slow, secretive, ineffective, and biased in favour of the police (Lewis 1999; Goldsmith 1991). Lemos-Nelson's study of the civil police *corregedorias* in Bahia reveals them to be 'a pre-emptive institution', a filter that protects officers from prosecution in the courts. (Lemos-Nelson 2001) Over half the complaints were levelled at 're-offending' officers, strongly suggesting that the *corregedoria* had illegally filed away cases of serious brutality or extortion under pressure from the police station chiefs and their political protectors. Data from Pará state show that in 1997 and 1998, civil police killed 27 civilians. However, an attempt by a local human rights groups to chart the internal investigations within the *corregedoria* and state appeals court (*Tribunal de Justiça*) revealed that none of the 1997 cases was the subject of an investigation, and seven of the 16 cases from 1998 had been characterised as deaths of suspects 'resisting arrest'.¹⁰ The court had received no information on any of these cases.

The issue of *transparência* is problematic in what is essentially an internal, trouble-shooting government department. Reliable data are very difficult to obtain from, and even within, the *corregedorias*. In Rio de Janeiro a joint internal affairs office (*Corregedoria Geral Unificada - CGU*), headed by a prosecutor, was set up in September 2000 precisely in order to oversee the

⁹ For example, the constitutional amendments put forward by São Paulo governor Mário Covas and by the national forum of police ombudspersons.

¹⁰ In this latter case the police are obliged to fill out a ready-made form (*auto de resistência a prisão*).

work of the two *corregedorias*. However, as the CGU is housed in the headquarters of the Secretariat for Public Security, it is physically removed from the civil and police investigators working in their own police departments. The CGU and the *ouvidoria* never received any information on investigations initiated before September 2000, and therefore are left completely ignorant of the patterns of abuses, the identity of serial offenders and the outcomes of some very serious investigations.¹¹ Lemos-Nelson reports that a notary in the Bahia civil police *corregedoria* was forced to set up her own informal 'log' on re-offending police in the absence of systematized institutionally held data (Lemos-Nelson, 2000: section 3.6.1.). It may be that this resistance to tracking past cases and keeping proper time series data derives from a bureaucratic mentality, in which staff do not wish to be associated with the 'problems' inherited from their predecessors. This problem has been resolved in Ceará by forming a single unit, a *corregedoria única*, headed by a retired judge, bringing all investigations under one roof and one authority.¹²

The case of Rio de Janeiro illustrates a common tendency in Brazilian state responses to problematic areas of public policy or services. When a state institution is failing, rather than reform it a new body is frequently set up duplicating the work of the first, which is then left to 'wither' rather than being dismantled. Thus, there remains in the Rio de Janeiro public security secretariat a *controladoria* (the old *Inspetoria Geral* which oversaw the police apparatus under military rule) that can also receive and investigate complaints in addition to the individual *corregedorias*. These are in turn monitored by the CGU, which is itself overseen by the *ouvidoria*.¹³ This 'reform by addition' (Evans 1995) and replication of efforts serves to fragment rather than consolidate information and transparency and to splinter and diffuse control, rather than strengthen it.

A number of smokescreen tactics are employed to evade allocating and enforcing *responsabilidade*. The first strategy is to normalise and naturalise aberrant behaviour by renaming it as legitimate police conduct or by downplaying its importance and severity. Serious offences are thus routinely re-classified as non-offences, and are filed away, or as lesser crimes. Intentional homicide is justified as killing in 'legitimate self-defence' (Cano 1997) or 'in the line of duty'.¹⁴ Torture becomes 'abuse of authority' or 'bodily harm' which carries a shorter jail sentence and consequently a much shorter statute of limitations (three years as opposed to 20 years) (Amnesty International 2001; United Nations 2001). In 'live' cases foot-dragging allows investigations to exceed the statute of limitations on the offence in question, so that it cannot be then prosecuted: some investigations of torture and homicide in Bahia have taken three to five years to conclude. One incoming head of police in Rio Grande do Sul discovered cases involving police station heads going back ten years (Governo do Estado do Rio Grande do Sul 2001).

¹¹ Interview with CGU staff, July 2001

¹² It has full autonomy within the secretariat of public security, its own premises and staff. The *corregedor*, José Helder de Mesquita, reported in 2001 that since 1997 2,212 disciplinary inquiries have been opened, resulting in punishment for 109 civil police and 420 military police. A similar system is in place in Pernambuco and is under consideration in São Paulo.

¹³ Interview with staff July 2001.

¹⁴ *estrito cumprimento do dever*

Disciplinary action is likely to be taken only if there is overwhelming evidence combined with media coverage. Senior officers are generally exempt from investigation, punishment or prosecution, despite the fact that they are over-represented in the universe of complaints. The Rio de Janeiro *ouvidoria* notes that, over a two-year period, officials of the military police and civil police station chiefs were the object of 10.3 per cent and 15.1 per cent of complaints, but only 6 per cent and 4.5 per cent respectively of force personnel. Of 119 internal inquiries into the civil police, only five resulted in punishment. No police station chief has been punished. In the first six months of 2001 the joint *corregedoria* in Rio de Janeiro received over 700 complaints on the hotline. In relation to the civil police, 47 per cent of these involved extortion,¹⁵ whilst *abuso de autoridade*, shorthand for beatings and torture, accounted for 12 per cent of complaints against civil police and 32 per cent against military police. Of all these cases, only two, relating to military police, were passed on to the prosecutor's office.¹⁶

Fiscalização is also a weak function of the internal affairs department as they fail to refer to those rules and standards of police practice that do exist. Investigators are apparently ignorant of new legislation, such as the 1997 anti-torture law, and cling to old habits shaped by now-superseded authoritarian laws. Similarly, both police and internal investigators ignore the provisions of the Penal Procedure Code, and follow their own custom and practice as to the assessment of evidence. For example, once evidence of criminal wrongdoing is discovered, investigators are obliged to open an *inquérito policial* that can then only be shelved by a prosecutor or judge. However, the Bahia civil police *corregedoria* has for years been illegally shelving its own *inquéritos* before they reach the courts, in a ritual that combines the superficial appearance of legitimacy with the internal culture of the police as a parallel legal universe (Lemos-Nelson, 2000).

The *corregedorias* suffer from several structural defects. Firstly the individual *corregedores* are not sufficiently insulated from the corporation they are investigating. There is no separate career path for them, making them very vulnerable to pressure from other officers and they can be sacked or transferred at will.¹⁷ They may return to work alongside officers they have been investigating. They are also frequently poorly resourced, and housed within police headquarters, making 'capture' by the corporation almost inevitable. Several states have only recently set one up and, until June 2000, São Paulo state's *corregedoria* covered only the capital. Staffing levels vary wildly. The São Paulo military *corregedoria* has 100 staff, that is, one per 128 police officers. It also functions 24 hours a day and covers the whole state, compared to others with a skeleton staff that can only cover the state capital. Whilst public pressure and scrutiny probably inclines the *corregedorias* to investigate cases with greater rigor than they might otherwise have done, nonetheless, these are internal bodies subject to corporate loyalties and pressure. By the very nature of the kind of abuses reported, they also tend to focus on the more extreme forms of police malpractice, that is, on summary executions, torture, and extortion, than on milder forms of incompetence

¹⁵ *extorsão* and *concussão*

¹⁶ 'Dados estatísticos da CGU' on file with the author.

¹⁷ A separate career path is one of the suggestions made by the *ouvidoria* in Sao Paulo (OPESP, 2000: 12)

which are just as damaging to the force's performance and legitimacy. They have no review function and the fact that they do not collaborate or maintain systematic data on persistent offenders (police and police stations) denies them the tools with which to analyse patterns of abuse and draw up prevention strategies. In sum, their's is an atomised and defensive approach to police oversight.

C. Controlling the controllers: Ouvidorias

The *ouvidorias da polícia* were set up in the latter part of the 1990s in order to monitor the *corregedorias* and, as such, constitute a form of semi-independent internal control. Although generally translated as 'ombudsman's office' they do not possess the independence and wide powers that such entities have elsewhere. In this sense, it is the *Ministério Público* that most resembles a true ombudsman. However, the *ouvidorias* have achieved the highest degree of transparency of all the police oversight mechanisms, even if in the final analysis they still lack the institutional clout to carry out *fiscalização* and enforce *responsabilidade*, tasks which remain the remit of other institutions in the criminal justice system.¹⁸

The first *ouvidoria* was set up in December 1995 under the centre-left PSDB governor of São Paulo state, Mário Covas, who passed the relevant decree on his first day in post, as part of his political commitment to tackling police violence in the state. More followed, initially in states governed by the left or centre-left.¹⁹ They are generally housed in the offices of the state secretariat for law and order, or equivalent, and are therefore part of the executive.²⁰ Their brief is to receive complaints about police misconduct, corruption or omission from the public,²¹ prepare an initial case summary, pass on the complaints to the *corregedorias* and track the progress of the investigation. They may also pass on cases to the *Ministério Público*. The pioneer office in São Paulo operated under a temporary decree whilst a consultative group carefully drafted the definitive law to ensure certain basic principles, such as a permanent staff (of 16) and a separate budget line.²² That law became the template for subsequent *ouvidorias*, such as that in Rio Grande do Sul, with certain modifications. For example, the Rio office sets out an obligation to publish a quarterly report, the Rio Grande do Sul office may make demands for information from any part of the executive branch of government, and São Paulo's may also require the judiciary and prosecution service to provide updates on cases.

¹⁸ The first in-depth study of the effectiveness of the *ouvidorias* is currently being carried out by the Centre for Studies of Public Security and Citizenship of the Candido Mendes University. I am grateful to the Centre's Director, Julita Lemgruber, herself a former Police Ombudswoman in Rio de Janeiro, for her insights.

¹⁹ Rio de Janeiro in March 1999 under Anthony Garotinho (PDT), Minas Gerais in 1997 (Eduardo Azeredo, PSDB), Pará in 1997 (Almir Gabriel, PSDB), Rio Grande do Sul in August 1999 (Olívio Dutra, PT), with others in Pernambuco, Espírito Santo, Rio Grande do Norte, Mato Grosso, Bahia and Ceará.

²⁰ Exceptions are those in Pará, subordinated to the state council on law and order (CONSEP), and Minas Gerais, linked to the governor's office.

²¹ They receive all manner of communications from the public in relation to the police. Priority is given, however, to serious allegations regarding the right to life, and police corruption

²² Those with seconded staff include Minas, Rio and Pará.

However, the true degree of independence that they enjoy is more related to their operational conditions. Some have been hostage to fortune: the Pará office took six months to find office and seconded staff, whilst the Minas Gerais one got little more than a desk and a telephone.²³ Rio Grande do Sul's and Minas Gerais' have an additional remit for overseeing the prison system, and Pernambuco's *ouvidoria* covers the whole state administration.²⁴ These additional tasks both dilute the focus of their work and increase their overall workload. The National Forum of Police Ombudspersons, set up in June 1999, has recommended to the country's state governors that all *ouvidorias* should have autonomy, and be free of hierarchical controls, with their own staff and premises. The *ouvidor* should have a fixed term of office (therefore less vulnerable than a political appointee), and have no links to the police, or hold any outside jobs or appointments. The first flush of appointments was of human rights activists.²⁵ However, in Bahia and Ceará the *ouvidores* are police officers thus depriving them of any true degree of independence.²⁶

In terms of promoting transparency, the *ouvidorias* have also been able to open the lid on police practices that were previously obscured. The Rio de Janeiro *ouvidoria* revealed that of 2,894 complaints received over 21-month period, 60 per cent were related to police extortion. The São Paulo office, which provides by far the most detailed report and statistical breakdown, was able to challenge the police argument that their job was life-threatening by publishing data showing that the majority of military police were killed off-duty, in their moonlighting work as private security guards.²⁷ They were also able to destroy the myth that the military police behaved worse and were punished less than the civil police as they showed that proportionately more complaints were related to the civil police who, for their part, initiated fewer internal investigations and disciplinary proceedings than the military police.²⁸ They also receive complaints from police officers about their conditions of service and treatment by superiors, and have been able to tackle publicly the problems of police job-related stress and suicide. As the service becomes better known, it will also be able to give a more accurate picture of the real

²³ It also clashed with the governor's chief-of-staff (*Casa civil*) and operated under too complex a law.

²⁴ Interview with *ouvidor* Fred Barbosa, 21 June 2000.

²⁵ Benedito Mariano (SP) began his human rights activism under the military. Julita Lemgruber (RJ) ran the prison service in Rio de Janeiro under the second Brizola government (1990-94); Rosa Marga Rothe is a Lutheran pastor, active for many years in Pará's main human rights groups, the SPDDH (Sociedade Paraense de Defesa dos Direitos Humanos).

²⁶ Information from Dr Mário Lúcio de Andrade Neves July 2001. In Pará the police initially proposed an ex-secretary of public security.

²⁷ Between 1990-98 845 military police were killed off-duty, over three times the number killed on duty (249). Source: www.ouvidoria-policia.sp.gov

²⁸ According to February 2000 data from the Ministry of Justice, Pará state had 2,393 civil police and 12,970 military police. Civil police, who make up 15% of the total, committed half of the 1997/98 police homicides and investigated none. Incidents involving the Civil Police made up 46.5 per cent of complaints to the Rio Grande do Sul *ouvidoria* (19 per cent of the combined police force). In Rio de Janeiro 49 per cent of complaints were against the civil police (26 per cent of total police). Source <[http://www www.mj.gov.br](http://www.mj.gov.br)>

level of victimization at the hands of the police than official police department data or newspaper reports.²⁹

The *ouvidorias* have also contributed significantly to breaking the culture of police impunity in Brazil. Members of the public are guaranteed anonymity, crucial in overcoming the population's real and justified fear of police reprisals. Complainants are now increasingly emboldened to report abuses openly, a shift which must reflect greater confidence in the state authorities. In 2000 most complaints to the Rio de Janeiro *ouvidoria* were made anonymously: from January to July 2001, some 150 complaints were made in person. Rio, in common with around half the states in Brazil, now has a witness protection program for use in such cases.³⁰

One of the chief criticisms made of the *ouvidorias* is their lack of powers and resources to undertake their own investigations or to influence the police investigation and prosecution. In relation to the dimensions of *fiscalização* and *responsabilidade* they are dependent on the co-operation and performance of the internal affairs units, which are capable of engaging in forms of passive resistance, manifest in a reluctance to release information,³¹ or in their ignoring the *ouvidoria* altogether. After the first nine months of operation, the Rio *ouvidoria* received 1,586 complaints, some involving serious and substantiated allegations of torture and extortion. However, it discovered that not a single police officer had been sacked as a consequence, although 101 military and 15 civil police had been sacked for misconduct in cases *not* reported to the *ouvidoria* (Soares 2000:415). The CGU's data on complaints received between September 2000 and June 2001 cited only their own hotline and the general hotline as sources: the *ouvidoria* is not even mentioned.³² By comparison the São Paulo office had a much better working relationship with the *corregedores*, as evidenced by the superior quality of data and larger numbers of cases resulting in a criminal prosecution.

The effectiveness of the *ouvidoria* also depends on the co-operation of the other parts of the justice system (courts and prosecution service). Rio de Janeiro civil police officers who had been arrested for abducting and decapitating a 16-year old boy were released by a judge, although held on unailable charges, returned to duty and were later rearrested *in flagrante* for extortion (Soares 2000: 415). The police, unsurprisingly, are suspicious of the *ouvidoria* and question the reliability of the complaints it receives, despite the careful triage process that eliminates at least half before they are transmitted to the *corregedoria*. In São Paulo the police made an indirect attempt to muzzle the *ouvidoria* when a state deputy and *ex-delegada* proposed a bill that would have removed its autonomy and the anonymity of complainants. The Pará state *ouvidora*, Rose Marga Rothe, was subjected to harassment when she tried to reopen a torture case. The *delegado* suspected of the

²⁹ Underreporting of crime is a problem in any criminal justice system compounded in Brazil by the paucity of victimization studies. Public perceptions of police malpractice are beginning to shift and behaviour previously regarded as 'normal' is now considered deviant. The *ouvidorias* have also noted that a complaint widely reported in the press will prompt others to come forward with similar stories.

³⁰ However, individuals with a criminal record are excluded from the program, thus depriving a good number of police torture victims of this protection.

³¹ Interview with Mário Lúcio de Andrade Neves, Rio de Janeiro 20 July 2001.

³² 'Dados estatísticos da CGU', on file with the author.

offence took out five lawsuits against her and attempted to have her sacked (Amnesty International 2001:18).

There are two main tools at the disposal of the *ouvidores* in the face of bureaucratic inertia, obstruction or hostility. The first is recourse to the media, a 'name and shame' strategy.³³ A rise in complaints is also noticeable when certain incidents receive widespread media coverage. The second is to refer cases directly to the state attorney general's office, a tactic that has given mixed results. It risks antagonising the police by leapfrogging internal procedures and it also relies on the will of the prosecution service to share this risk, which is by no means assured as we shall see. However, opinion is split as to the desirability of the *ouvidorias* having full investigatory powers, including power of subpoena,³⁴ in a move that would shift them closer to the other end of Goldsmith's continuum to what he terms 'civilian external investigatory'. They would be duplicating the work of the *Ministério Público*, which conducts its inquiries at one remove from the police with all the problems (such as lack of expertise and access to information) that that implies.

Strong links to civil society are also crucial for the *ouvidoria* to maintain its legitimacy and stance of independence from the administration. The São Paulo ombudsman is appointed from a triple list proposed by the state Human Rights Council, and is backed by a board of leading lawyers and human rights activists. The Pará office is governed directly by the state police advisory committee (CONSEP) and, as noted, the most successful ombudspersons to date have come from a background of human rights activism and hence have high credibility. Political support is also fundamental. The consequences of half-hearted backing for effective complaints handling in the face of powerful lobbies by the police are most eloquently analysed by Luis Eduardo Soares, the ex- under secretary of Public Security for Rio de Janeiro (Soares 2000). He and his entire reformist team left the administration in March 2000 when it became evident that the governor was unwilling to purge corrupt civil policemen from the force. In this case the *ouvidoria* was powerless to force either the *corregedoria* or the *Ministério Público* to act.

Perhaps the two greatest achievements of the *ouvidorias* have been, on the one hand, to create public expectations in relation to information about police conduct and, on the other, to contribute to a more pro-active and structural debate about policing and thus to go beyond mere complaints handling to engage in an incipient process of police review. In this, the São Paulo office has been a pioneer, putting forward suggestions to both the state and national assemblies not just to assist the work of the *corregedorias* but also to tackle underlying causes of police inefficiency and malpractice, for example proposing constitutional amendments that would unify and

³³ It is noticeable that Julita Lemgruber and Benedito Mariano's successors use the media a lot less. The new Rio *ouvidor* rejected what he dismissed as work 'só para aparecer em jornal'.

³⁴ Benedito Mariano, ex-*ouvidor* of Sao Paulo is an advocate of such a proposal. He now heads the newly created *Ouvidoria Geral do Municipio de São Paulo* to oversee public administration, expressly created with complete administrative, budgetary and staffing independence, and investigative powers. Interview 12 July 2001.

streamline the police forces into a single force.³⁵ As the police have traditionally been a closed institution and public consultation on policing is virtually unknown, the *ouvidoria* (from the verb 'to listen') is the first government institution to solicit the views of members of the public and performs an invaluable feedback function. The notion that the public should have a right to oversee, control and determine the actions and priorities of the police represents a significant cultural shift in Brazil of which the *ouvidorias* are both a reflection and a constitutive element.³⁶

D. External control: Ministério Público

One of the notable innovations of the 1988 Constitution was the unparalleled extension of the powers of the *Ministério Público*. Unlike other equivalent bodies in Latin America whose remit is limited to the traditional one of initiating and conducting public prosecutions, the Brazilian *Ministério Público* is also tasked with defending the legal order, ensuring that the authorities respect the rights guaranteed under the Constitution, and protecting the democratic regime, public patrimony, and 'diffuse and collective rights'.³⁷ The development of new institutional attributes for the *Ministério Público*, transforming it from a standard state prosecution service and an agent of the executive into an autonomous guardian of the law (*fiscal da lei*) and of the public good, has helped to erode public tolerance of exceptionalism and impunity for those in positions of political and economic power (Arantes 2000).³⁸

Specifically, the *Ministério Público* is charged with exercising external control over the police (article 129, para VII). Its legal attributes thus combine both reactive powers of oversight and pro-active powers of review. Thus, on paper at least, it should be an extremely powerful agency in monitoring and controlling the police. However, despite the optimism these *de jure* powers created in the human rights community, results have been very disappointing to date. By contrast to the *Ministério Público's* strong and pro-active performance in other areas of its remit, principally that of rooting out government corruption and embezzlement by public officials (Arantes, 2000), the organization has failed to exercise much consistent and discernible control over the police, particularly as regards curbing gross human rights abuses. A 1997 survey of prosecutors showed that they themselves rated their performance in this area as poor (Castilho and Sadek 1998).³⁹ Nonetheless,

³⁵ As a step in this direction civil and military police operational districts are now identical in São Paulo, enabling better analysis of crime data and thus of policing strategy. Interview with Ana Sofia Schmidt, 12 July 2001.

³⁶ There have also been a number of experiments with community policing in Brazil, as well as the establishment of police-community liaison councils (CONSEGs), mainly in São Paulo state.

³⁷ Articles 127 and 129 of the Federal Constitution

³⁸ The military regime removed the *Ministério Público* from the aegis of the judiciary and placed it under that of the executive from which it escaped definitively in 1988. The Brazilian authoritarian regime, in common with others, increased the powers of the *Ministério Público* in order to exert greater control over the national state apparatus and public administration. With the return to democracy the institution was ideally placed to serve the interests of citizens and protect their rights against the state.

³⁹ 33 per cent characterised it as 'OK', 39 per cent as 'bad' and 14 per cent as 'really bad'.

in some states the *Ministério Público* is now taking on a more proactive role in relation to the police. As experience is accumulated in specialist police oversight units, and as internal guidelines are refined and tested, the institution is growing more confident. The recent surge of interest in the practice of police torture following criticism by the United Nations has reportedly prompted a sharp rise in investigations and criminal charges (Amnesty International 2001). What, however, accounts for the institution's overall inertia on this front and for localised activism where it does exist?

Firstly, the parameters of the term 'external control' are hotly debated. The *Ministério Público* has two distinct and potentially conflicting remits in relation to the police. The first and more traditional concern is related to its role as the sole initiator of criminal prosecutions. The *Ministério Público* needs to control the quality of the police *inquérito* as it forms the core of any eventual prosecution.⁴⁰ The second concern is the institution's new, expanded responsibility as the watchdog of constitutional rights. This gives them jurisdiction to examine the treatment of detainees, as well as to examine all manner of aspects of police performance in relation to the letter of the law. For example, if a detainee has been tortured to make a confession, the *Ministério Público* may intervene either because this abuse invalidates the prosecution case or because it constitutes a gross human rights violations specifically outlawed under article 5 (paragraph XLIII) of the Constitution, regardless of whether the torture is related to a confession of guilt in a court case. Most police, and many prosecutors, hold a minimalist view of the *Ministério Público*'s remit, restricting it to the *atividade-fim* of the police, that is, a 'technical' review of the construction of evidence in the police *inquérito* (investigation) (Kfourri Filho 1999).⁴¹ An activist minority adheres to the maximalist 'ethical' position that in effect places no aspect of police activity out of bounds.

The constitutional provision on external control of the police was fully fleshed out in secondary legislation only in 2000, leading the police to assert that the *Ministério Público* had no legal basis for its actions in this area. That notwithstanding, individual state-level prosecution services have passed regulatory guidelines (*leis orgânicas complementares*)⁴² that vary as to the detail and reach of this function. Those of Rio de Janeiro gives the *Ministério Público* power to inspect jails and prisons as well as police stations.⁴³ São Paulo state has established the widest-ranging powers to inspect police documents, interview prisoners and check the destination of impounded illegal weapons, money, drugs, vehicles and other 'tradables' within the flourishing

⁴⁰ Although the *Ministério Público* may conduct its own inquiries and a great deal of the police inquiry may be duplicated at the 'judicial' stage, involving the judge and prosecutor, in reality it is very cumbersome for a full duplicate inquiry to be carried out. Therefore they rely greatly on the police *inquérito*.

⁴¹ Kfourri Filho is the ex-president of the national association of police station chiefs.

⁴² For example, Ceará's *Lei Complementar Estadual* No. 9 23 July 1998

⁴³ Article 43 (X) 'inspecionar os Distritos Policiais e demais dependências da polícia judiciária, requerendo ao juiz o que for pertinente ao interesse processual penal e à preservação dos direitos e garantias individuais, e representando ao Procurador Geral quantos às irregularidades que verificar' and (XI) 'inspecionar as cadeias e prisões, seja qual for sua vinculação administrativa, promovendo junto ao Juízo as medidas necessárias à preservação dos direitos e garantias individuais, da higiene e da decência no tratamento dos presos, com o rigoroso cumprimento das leis e das sentenças'

illicit police micro-economy.⁴⁴ Goiás, now a relatively activist state, last year published similarly detailed procedures on police oversight that include powers to monitor the *corregedorias*.⁴⁵

There is, however, no necessary correlation between such permissive legislation and the performance of the *Ministério Público* in controlling the police. Even in São Paulo, prosecutors refer and defer more to the national legislation than to their internal guidelines. The structure of the *Ministério Público*, with its specialist units and high degree of autonomy for prosecutors, has resulted in activist 'cells', relatively insulated from their colleagues and superiors and from other justice institutions. The federal system of government also results in striking differences in orientation from state to state. The existence of special criminal investigation units, such as the *Promotorias de Investigação Penal* and *Central de Inquérito*, set up in Rio de Janeiro in 1991, appear to have more impact than the laws themselves. Minas Gerais has a special human rights division that, although woefully understaffed, is said to have received 600 allegations of police violence, and to have prosecuted 2000 officers for human rights violations (United Nations, 2001:para 140). Bahia's special unit, with only five staff, has been relatively more active in clamping down on police misconduct than on political corruption, discouraged from the latter by the power of the local political elite, inverting the pattern of states such as São Paulo. In one year in Bahia 204 military police and 145 civil police including 20 police chiefs, were charged with misconduct (Sanchez Filho 2000). Goiás state's attorney general has taken a radical stance on eradicating torture in the police service after coordinating a nation-wide survey of the institution's performance in this respect. In April 2001, Goiás removed 21 civil and 47 military police from duty pending court cases.⁴⁶

The *Ministério Público*'s overall hesitancy in combating police misconduct is conditioned by inter-institutional conflict in several dimensions. In any criminal justice system a certain degree of territoriality and inter-agency rivalry is normal. This is exaggerated in the Brazilian case due to the hybrid features of the country's criminal procedure, characterised as a 'dual investigation' (*dupla instrução*) system in which two phases of police investigation and prosecution are strictly separated, and conducted according to the logic of two opposed legal traditions. The first phase is the civil or judiciary police investigation (*inquérito*) carried out within an 'inquisitorial' framework, associated with a 'civil law' tradition, that is, in secrecy, with no right of defence (*contraditório*) of the accused (Kant de Lima 1995). The second phase, initiated when the *Ministério Público* brings formal charges against the accused, and in which the judge may re-interrogate the accused and repeat procedures already completed by the police, obeys the logic of an accusatory, adversarial system, associated with the Anglo-Saxon common or case law tradition. This is conducted in public, with a right to a full defence and the judge acting as an arbiter between the two parties.

⁴⁴ *Ato 098/96* issued by the Special Body of the College of Prosecutors in order to regulate the provisions of the Constitution (article 129, para VII) and the *Lei Orgânica* of the state *Ministério Público* (*Lei Complementar* No. 734 of 26 Nov 1993, article 103, para. XII)

⁴⁵ *Resolução do Colégio Superior do Ministério Público do Estado de Goiás* No 6/2000

⁴⁶ *Correio Braziliense* 6 April 2001

Any interference by the *Ministério Público* in the way in which the police conduct the *inquérito* is therefore regarded by the police as a violation of the principle of this two-stage process. In their view, the *Ministério Público* contributes very little to the investigative process: they are mere bureaucrats who do not get their hands dirty. The prosecutors, on the other hand, view the police as corrupt and incompetent and blame the very low rate of completed and usable police *inquéritos* for the extremely high attrition rate in the criminal justice system, that is, the miniscule number of offenders successfully prosecuted.⁴⁷ In reaction to the contentious and closed character of the police *inquérito*, a number of attempts have been made to remove the police's exclusive and discretionary powers. During the 1987-88 Constituent Assembly the National Public Prosecution Association (*Confederação Nacional do Ministério Público* – CONAMP) in their Curitiba Charter proposed that the *Ministério Público* should supervise investigative proceedings, and be able to take them over if necessary. This was defeated by the lobby of the Association of Police Stations chiefs (Kerche 1999). The Forum of Police Ombudspersons has made renewed calls to remove the police monopoly over the initial phase of criminal investigation (OPESP 2000).

Another factor is the relatively high level of autonomy of both actors. The *Ministério Público* constitutes, in institutional terms, a 'fourth power' as it is functionally linked to neither the executive nor the judiciary, with individual prosecutors exercising a high level of autonomy and discretion in the dispatch of their duties. The *Ministério Público* may initiate criminal investigations in a case of police misconduct if there is sufficient *prima facie* evidence. Therefore, it can bypass altogether the internal police process and proceed without waiting for the *corregedoria* to finally pass on the *inquérito policial*. Naturally this generates great friction with the police. The civil police in Brazil are also not merely an investigative force, as in other countries, but have a quasi-judicial function. As noted, the police investigation mirrors that conducted by the courts, thus making the *delegado* — who must have a law degree -- a *de facto* investigating magistrate, and the police station a 'registry' office staffed by a legal 'clerk'. Such 'lawyerization' of the police (Cerqueira 1998) puts the police in competition with the judiciary and *Ministério Público* for control of the criminal investigation.⁴⁸ Since 1871, when the *inquérito policial* was created and exempted from judicial control, the Brazilian criminal justice system has suffered from fractionalisation in which the phases of arrest, investigation prosecution and trial proceed in hermetic spheres.

Unsurprisingly, there has been fierce resistance to the *Ministério Público*'s oversight function from those sectors of the civil police most embroiled in the interlinked practices of violence, extortion, corruption and criminal activity. Stories abound of prosecutors being illegally refused entry into police stations. In October 1998, prosecutors from the specialist unit were alerted by an escaped prisoner that a torture session was underway at a notorious police precinct, the Theft and Robbery department, in Belo Horizonte. The police attempted to prevent the prosecutors entering, harassed them whilst they were taking prisoners' testimony and recording evidence of

⁴⁷ *Jornal do Brasil* 'Polícia ruim, justiça lenta: Inquéritos malfeitos são devolvidas a delegacias por promotores' 25 May 1998

⁴⁸ He views this as a parallel problem to that of 'militarisation' of the military police

torture, forced them to through a gauntlet of catcalls when they left, and vandalised their official vehicles (Amnesty International 2002).

Where relations are not hostile, *Ministério Público* inactivity may be explained by a contrasting dynamic of cooption. Capture theory, which 'explains poor performance in regulation with reference to techniques by which the groups being regulated subverts the impartiality and zealotry of the regulatory body' would account for the overall inertia of the institution in this area (Prenzler 2000). Institutionally, both the prosecution service and the police share the task of investigating and prosecuting crime, and need to cooperate. Frequent contact produces shared values. Political pressures may mean that the priority of the state attorney general (the head of each state prosecution service, who is appointed by the state governor) is a sustained crime reduction and criminal conviction rate, rather than a possibly counter-productive clash with the police over their questionable methods.

In short, the *Ministério Público* has strong *de jure* powers of both *fiscalização* and *responsabilidade*, as it has full powers to investigate and prosecute police officers for misconduct. However, it has been constrained by institutional conflicts and limitations from fully exercising those powers. As a quasi-judicial institution, it is not obliged to reveal its reasons for pursuing, or not, inquiries into police abuses, although its new identity as a defender of the public good has made the institution sensitive to demands for greater *transparência* with regards to the police and other areas of social provision.

4. The socio-cultural context

The current matrix of police oversight mechanisms cannot be understood outside of the social, cultural and historical context of the justice system, which is embedded in an essentially dualist set of values, reflected in both police behaviour and public attitudes to police misconduct. Getúlio Vargas's comment 'for my enemies, the law, for my friends, anything' underlines the contingent aspect of the law in Brazil. Many police, in their repressive role, continue to have a 'preferential option for the poor'. In Brazil, crime fighting is not synonymous with law enforcement. Anthropological and ethnographic studies of the police (Muniz 1999; Mingardi 1992; Kant de Lima 1995) reveal the distinct universe of values that guide their day-to-day activities, a universe of social hierarchy, of citizens and 'non-people', 'criminals' and 'decent people, favours and paybacks, and of personalism not universalism, negotiation not rules, ad hoc decisions not procedures. The persistence of authoritarian values within the police is a major hurdle to greater accountability.

For example, the anti-Torture law has made no discernible impact on police conduct. Police continue to be protected by the *corregedorias* who bring lesser charges or shelve the cases.⁴⁹ When challenged, senior police offices resort to a number of ritualistic explanatory and justificatory strategies.

⁴⁹ Those cases that have been successfully prosecuted are still under appeal and therefore cannot be considered definitive (*transitado em julgado*). Perversely, the only full convictions have been of *private* individuals (generally for child abuse) not of state agents. This is contrary to the spirit of the international legislation, which is intended to hold States to account for their treatment of detainees.

The first of these 'vocabularies of motive' (Huggins 2000a) is to deny knowledge and/or control of the activities of subordinates, claiming they cannot be held responsible for the night shift, when they are not present, and so forth. This underscores not only the level of collusion with corrupt and abusive practices, but also the weakness of the chain of command and the existence of autonomous spaces within the civil police structure. Another move is to transfer blame to the victim, alleging that prisoners 'beat themselves up' to get attention and possible release.

Dominant, however, is the utilitarian rationale that sees violent methods as a lesser and necessary evil in the fight against a rising tide of crime, violence and drug trafficking (Morgan 2000). This so-called 'policing of results' operates outside the bounds of legality and exerts a strong pull on politicians who are terrified of appearing 'soft on crime', even though there is strong evidence that this form of extra-legal policing frequently ends up contributing to criminal activity rather than combating it (Huggins 2000a; Huggins 2000b; Soares 2000). Abuse and corruption thus become naturalised as normal and even necessary police practices, a worldview passed down in an oral tradition from generation to generation of police officers.⁵⁰ Very little has been done to tackle this police domain of informality and subjectivity. In the absence of operational detailed procedures that would put the principles of the law into effect ('sair do papel'), law enforcement officials continue to enjoy great latitude to operationalise their own interpretations of crime and punishment. Until the standards against which police performance and conduct are measured become much clearer and more objective, the current mechanisms of police accountability will continue to operate in a political vacuum and will retain a primarily reactive and partial character

Finally, federal government policy suffers fundamentally from a lack of accumulated capacity and interest in the operational details of law and order agencies. During the two authoritarian periods, in which policing was centralised, notions of national security and exceptionalism predominated, excluding all notion of accountability, whilst in democratic periods, policing has been decentralised and fragmented, and has often become compromised with the criminal interests of local political and economic elites. The federal government's ignorance and lack of interest in the performance of local criminal justice system is evidenced in the extremely poor quality of its databases in all relevant areas: homicide rates, victimization, crime clear-up rates, prison administration.⁵¹ Government policies tend to be generic and often a shopping list of disparate ideas, not underpinned by clear criteria of evaluation criteria.

⁵⁰ For a study of the 'vocabularies of motive' of officials who used torture under the military regime of 1964-1985 see Huggins (2000a).

⁵¹ For example, no national data are available on deaths in custody, or, until very recently, the prevalence of torture in police custody. Brazil's first report on torture to the United Nations, an obligation under the international Convention, was submitted ten years late, and only then in response to the setting up of a campaign by national and international human rights groups

5. Conclusions

Complaints handling procedures are not only the end stage of a complex set of practices, enshrined explicitly in law and in public policy and implicitly in shared values and institutional rituals, but are also part of a feedback loop which either disrupts or reinforces these practices.

Both the military courts and *corregedorias* have tended to legitimise residual authoritarian attitudes by their failure, or refusal, to punish serious human rights abuses. Their entirely internal control function makes them extremely vulnerable both to 'capture' by police and their dominant values, and to influence by local politicians, tending to undermine the efforts of even those *corregedorias* committed to the new, democratic principles of equality before the law, and the right to life. The military courts represent an unacceptable element of institutional 'authoritarian debris' and an enclave of exceptionalism and almost guaranteed impunity for three quarters of Brazil's police force. The external control mechanism, the *Ministério Público*, has delegated this responsibility to often marginalised and under-resourced units that exert minimal influence on the operations of the institution at large. Of the mechanisms examined, only the *ouvidorias* are wholly committed to the enforcement and construction of new conceptions of civil liberties, accountability and effective, transparent policing. Their effectiveness depends on political will, and on the level of resourcing and institutional autonomy they are accorded.

In order to understand the overall failure of the current system of police accountability, despite the individual successes highlighted, we need to understand the system as a chain in which inter-institutional relations are conflictive and uncoordinated. The *corregedorias* filter out cases of police misconduct before they reach more independent elements of the system. Oversight of the internal review process has been attempted in several ways but none has yet completely broken open this 'black box'. The most 'external' element of control in this system is not truly independent, for the *Ministério Público's* responsibility for criminal prosecution lead it into both conflict and connivance with the police, neither of which are conducive for impartial oversight. The *ouvidorias* have the independence, but not generally the powers, to enforce improvements in internal review processes. There is also very little non-governmental oversight of the police⁵² although in some states, notably São Paulo, 'police advisory councils' (*Conselhos de Segurança Pública* - CONSEGs) have been set up.⁵³

Accountability also needs to be conceived of in broader terms. Two of the mechanisms analysed have an essentially reactive, post facto, incident-oriented function (military courts and *corregedorias*). The *ouvidorias* also rely on complaints from members of the public but have begun to take on a more pro-active review character, using their accumulated experience to make

⁵² Those civil society entities such as the Community Councils (*Conselhos da Comunidade*) and Catholic church's Prison Ministry (*Pastoral Carcerária*) involved in prison visiting and inspection have also attempted to extend their remit to police lock-ups in which detainees are held (illegally) in long-term pre-and post-trial custody.

⁵³ Pará state's CONSEG was set up in 1996 and was the main force behind the setting up of an *ouvidoria*. For an analysis of São Paulo's CONSEGs see Luiz E. Pesce de Arruda's chapter in Mendes et al (2000)

proposals for structural changes in the policing apparatus. The *Ministério Público* enjoys the highest level of autonomy, resourcing and legal powers in relation to the police. However, it will not be able to fully exploit those powers for the purposes of police oversight and review until reform of the police is carried out to eliminate underlying structural problems such as institutional hyper-autonomy, dualism in the investigative process, and the current absence of operational regulation and procedures.

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