To Legislate or not to Legislate? That is the Question: How Legislative Inflation Boosts Prison Overcrowding and the Design of Policies that Counteract It

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Abstract

Prison and penitentiary overcrowding in Colombia has increased (following a growing oscillatory pattern) over the last decade in spite of plans to increase prison and penitentiary capacity and thanks to a sustained increase in the prison population. The increase in prison population has become a result of legislative inflation, a large control mechanism that creates and modifies a great variety of norms that strengthen sanctions to criminal conducts, as well as an increase in criminality. The overcrowding problem is worrisome; among other negative consequences, it hinders the system's capability to accomplish some of the purposes of prison sentences and preventive retention including re-education and social reinsertion of detainees. Here we present and discuss a systemic approximation to the jail and penitentiary overcrowding problem as a result of legislative inflation. We introduce a simulation model and explain possible feedback consequences of legislative inflation on the prison and penitentiary system of Colombia are explored. Finally we suggest the design of policies that may counteract jail and penitentiary overcrowding both from punitive and preventive perspectives. A systemic perspective allows us to compare and assess those policies. Legislative inflation is a perfect example that shows why policy makers need to challenge and improve their mental models in order to develop a dynamic understanding of feedback driven systems.

Key words: legislative inflation, system dynamics, jail overcrowding, public policy, policy design, justice administration

I. Penitentiary Overcrowding and Legislative Inflation

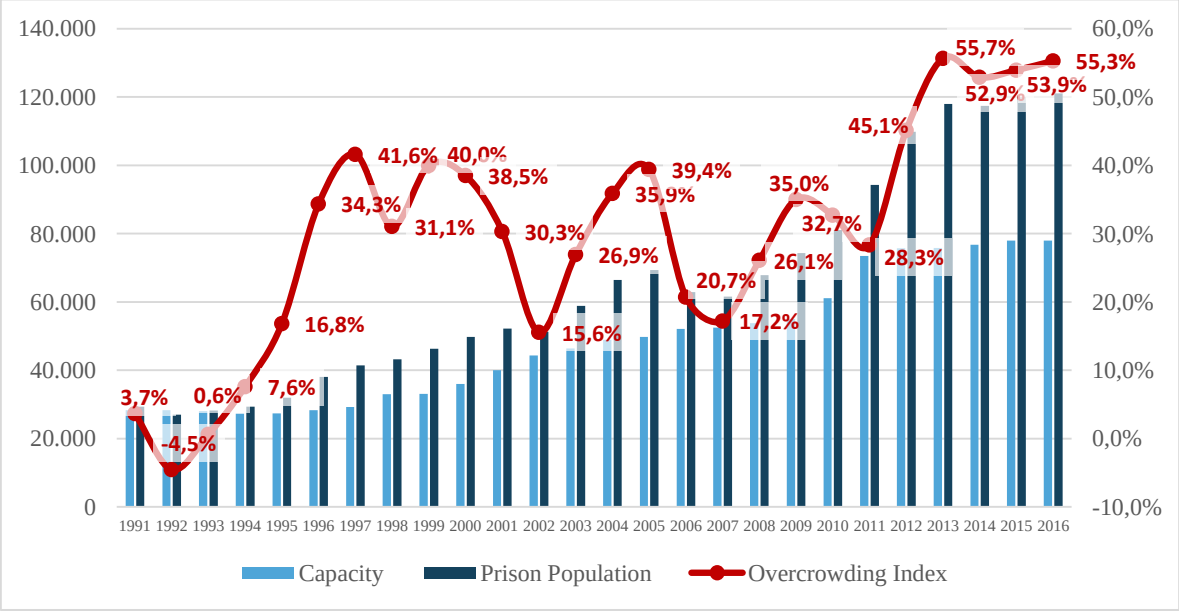
Jail and penitentiary overcrowding

Since mid-1990s the Colombian penitentiary and prison system has faced an increasing demand for a larger capacity that surpluses its actual capacity. Graph 1 shows this situation and its evolution from 1991 to 2016. The graph also shows overcrowding indices through each year. As shown, the system's capacity has not grown at the same pace as the interns have and hence, overcrowding indices have grown in oscillatory fashion from 14.5% in 2006 to 54.9% in 2016, almost 4 times larger in only 10 years. Overcrowding indices are calculated as the difference between prison population[1] and the capacity of the penitentiary and jail system[2], divided by the capacity (Iturralde, 2011).

Equation 1.

$$Overcrowding\ index = \frac{Prison\ population - Capacity\ of\ the\ Jail\ and\ Penitentiary\ System}{Capacity\ of\ the\ Jail\ and\ Penitentiary\ System}$$

Graph 1. Prison Population and Overcrowding Index 1991-2016



Source: Prepared by the authors on the basis of data from INPEC National Penitentiary and Prison Institute) (INPEC, 2016)

[1] Prison population refers to al detainees that are part of the Penitentiary and Prison System including convicted and charged individuals.
[2] Capacity refers to the total quota (available or not) that is enabled to accommodate convicts and charged individuals.

In 2004 the Government decided that it was necessary to build new infrastructure to expand the system's capacity with the purpose of controlling high overcrowding indices, which were above 20% by that year (Conpes 3277, 2004). This determination gave birth to the plan called *Prison Construction and Refurbishing Plan – PCRP* (Plan de Construcción y Refacción Carcelaria - PCRC) that aimed to attain an overcrowding index below 20% by 2006 with the increase of the system's capacity by a quota of 24331 by December of 2004 (Conpes 3277, 2004).

The PCRP had two strategies: 1. CEM: construction, endowment and maintenance, which aimed to increase capacity by a 21200 quota, and 2.EFE: enlargement, fitting, and endowment of existing prison establishments with the aim of increasing capacity by a 3131 quota (Conpes 3277, 2004). Nevertheless, the CEM was postponed by two years (Conpes 3575, 2009) and the EFE only generated 3010 new quotas that did not render the expected impacts on the overcrowding index given that the prison population had grown at a faster pace. In fact, the overcrowding index was 39.4% by 2005 (see Graph 1).

Legislative inflation

Criminal behavior can be counteracted through several ways, which include punitive and preventive measures. While punitive measures aim to preclude criminal careers by increasing the probability of capture and the length of the sentence, preventive measures look for sustainable solutions that anticipate criminal career building through social cohesion mechanisms and citizen culture building. (Dyner, Prado, & Arango, 2009).

In spite of the purposes of preventive measures, punitive interventions have become more popular by means of *legislative inflation,* a world spread phenomenon in which punitive measures have become the most common alternative to react towards social problematics (Ámbito Jurídico, 2012). *Legislative inflation*, however, trivializes norms and increases distrust in legislation because legislation becomes a reaction to a specific problematic that does not consider future implications for the penitentiary and prison system and hence produces much more complex problems such as jail and penitentiary overcrowding (Fassina, Page, & Lammel). *Legislative inflation* is also found in Colombia. Examples of these are the following: In parallel to PCRC, the Congress of Colombia issued Law No. 890 which increased the minimum and maximum terms for major crimes. Afterwards, in 2011 the *Law for Citizen Security* (Ley de Seguridad Ciudadana) was issued with the purpose of increasing the capability of Justice and Public Forces to fight crime more effectively, particularly in large urban centers (Semana, Santos firma Ley de Seguridad Ciudadana, herramienta contra la criminalidad, 2011) (Saumeth, 2011). The Law of Citizen Security not only modified the Criminal Code to increase the sanctions for specific criminal conducts but also limited the possibility of benefits such as house arrest. As expected, prison population increased.

Scope of the paper

Prison and penitentiary overcrowding in Colombia has increased over the last decade in spite of plans to increase prison and penitentiary capacity such as PCRP and thanks to a sustained increase in the prison population. This increase has become a result of the creation and modification of a great variety of norms that strengthen sanctions to criminal conducts as well as an increase in

criminality (Quintero Cuello, Lahuerta Percipiano, & Moreno, 2008). The overcrowding problem is worrisome; among negative consequences, it hinders the system's capability to accomplish some of its central purposes: re-education and social reinsertion of detainees (Serje Jimenez, 2010).

We present and discuss a systemic approximation to the prison and penitentiary overcrowding problem as a result of legislative inflation. We build a simulation model and possible feedback consequences of legislative inflation on the prison and penitentiary system. Finally, we propose the design of policies that counteract jail and penitentiary overcrowding both from punitive and preventive perspectives based on a feedback-loop understanding of the problem.

II. Actors and Decisions

Prison and penitentiary overcrowding behavior is the outcome of multiple decisions of actors involved on the Colombian prison system. We identified the following actors whose decisions are relevant to address the problem:

- Prisoners: It refers to all people detained in a prison or detention center. Prisoners are divided into two main groups: accused and convicted. The accused prisoners are those who are in custody as a precautionary measure, while a trial is conducted and a verdict about their guilt is established. On the other hand, the convicted prisoners are those people pronounced criminally responsible for a particular criminal offence in a final verdict (Cambridge dictionary, 2012).

  Prisoners are the ones who are directly affected by the prison and penitentiary overcrowding. They have to live under unacceptable living conditions, with high rates of insecurity, violence and disease. In addition, they don't have the opportunity to fully or partially resocialize during their stay in prison because there are no means to provide education and job opportunities for all the inmates (Semana, El oscuro panorama de las cárceles en Colombia, 2008). As a result, prisons become "crime schools" where due to the lack of activities to be undertaken, prisoners share their experiences and acquire new tools to enhance their criminal activities. This fact generates an increase on criminal recidivism and boosts the later reactions from the State against crime that end up further increasing the growth of prison population (Soto, 2013).

- Infrastructure Directorate of the Ministry of the Interior and Justice (DIN): This Directorate has as main functions the design of policies for authorizing the construction, maintenance and preservation of prisons infrastructure. It also coordinates with INPEC (National Penitentiary and Prison Institute) the management of prisons in order to achieve efficiency and economy in construction, manning and operation stages. (Ministry of the Interior, 2013). Thus the DIN is responsible for enforcing all policies related to the prison system infrastructure. For this reason its decisions are reflected on the number of new prison quotas that are constructed and / or fixed on each period of time.

- INPEC (National Penitentiary and Prison Institute): The government agency in charge of executing the jail and penitentiary policy. It is also responsible of the prison and penitentiary system administration and of the design and implementation of rehabilitation programs. It also contributes to law and regulation projects related with the Ministry of Justice and INPEC´s goals.

  The decisions of INPEC aim at developing programs and projects that seek to reduce prison and penitentiary overcrowding. Among these projects are some of them on which INPEC acts as a collaborator, such as infrastructure construction and upgrading of existing quotas policies. Other projects driven by INPEC are related to post-prison assistance programs (addressed to control criminality levels), and educational and employment programs of inmates that seek to achieve their reintegration into society (INPEC, National Penitentiary and Prison Institute , 2013).

- Congress of the Republic: It is the highest representative body of the legislature and has the power to amend the Constitution, create new laws and exercise political control over the government and its administration (Colombia Senate). Its decisions are intended to combat crime and ensure safety and cohabitation in the country towns and cities through laws and policies that define the maximum and minimum penalties. The Congress also defines behaviors as "new" crimes (that hence should be punished by freedom deprivation) (Saumeth, 2011) (Semana, Santos firma Ley de Seguridad Ciudadana, herramienta contra la criminalidad, 2011).

- Attorney General´s Office: It is an entity of the judicial branch responsible for investigating crimes and accusing alleged perpetrators to the competent courts. The Attorney General's Office must also ensure that alleged perpetrators go to court by taking the necessary security measures. (Attorney General's Office of Colombia). Its mission is "to conduct criminal investigations and develop and implement the state criminal policy, with the purpose of generating in society confidence and legal security to inquire for truth, justice and reparation". (Attorney General's Office of Colombia) For this reason, their decisions take place through diverse forms such as crime prevention programs, the criminal investigation and identification of suspects, their prosecution before the judges, the execution of judicial procedures that determine the time to carry out trials, etc. (Avella, 2007)

- Civil society: Society plays an important role within the criminal policy since it advocates for social control (Orellana Wiarco, 2010). It generates pressure on the government for the creation of new laws or strategies to reduce crime and prevent impunity. Their decisions impact the annual number of new laws or criminal code amendments that are based on the crime rate. When this rate is too high, the social pressure often leads to creating new laws and punitive reforms.

- Public Ministry: It is an overviewer body that interfere in criminal proceedings (it is not considered a part of it) if necessary, e.g. for defending the legal order, public property, human rights and fundamental guarantees. (Avella, 2007). Its decisions are related to the defense of prisoners' rights for having minimal, acceptable living conditions in prison.

III. Feedback and Accumulations

Nowadays the different entities and institutions that form the Colombian prison and penitentiary system take decisions based on a perspective limited by their scope. In most cases they only consider numerical data and the occurrence of contingent events that make them react and act against problems. (Journal of Prisons report #1, 2013). However, it is only possible to describe the observed prison and penitentiary overcrowding behavior through feedback structures due that this problem arises within a social system that changes, learns and transforms over time. The relationships that build feedback structures are the result of the decisions of the involved actors that take action from their different interests and perspectives.

On this section we present within a simulation model the most significant feedback structures that emerged from the conceptualization of the problem (See Figures 1-3; for clarity, each figure focuses on a particular set feedback loops). These feedback structures are created as the dynamic outcome of those decisions of the mentioned actors and end up driving the dynamics of the problem. Various accumulations linked to capacity building (new quotas, new infrastucture), the flow and permanence of prisoners through the system, the perception on overcrowding, etc. generate inertial dynamics that coupled with the feedback mechanisms explain the bejavior of this complex system. Notice the variety of balancing loops associated to "new laws" (i.e. legislative inflation) that account for the controlling intentions of society for "fixing" the problem through punitive action. These balancing loops contain numerous material delays (linked to the mentioned accumulations); there is also an information delay (overcrowding index perception)—The following section develops a dynamic hypothesis that explains the intertwined dynamics of accumulations and feedback loops in this system.

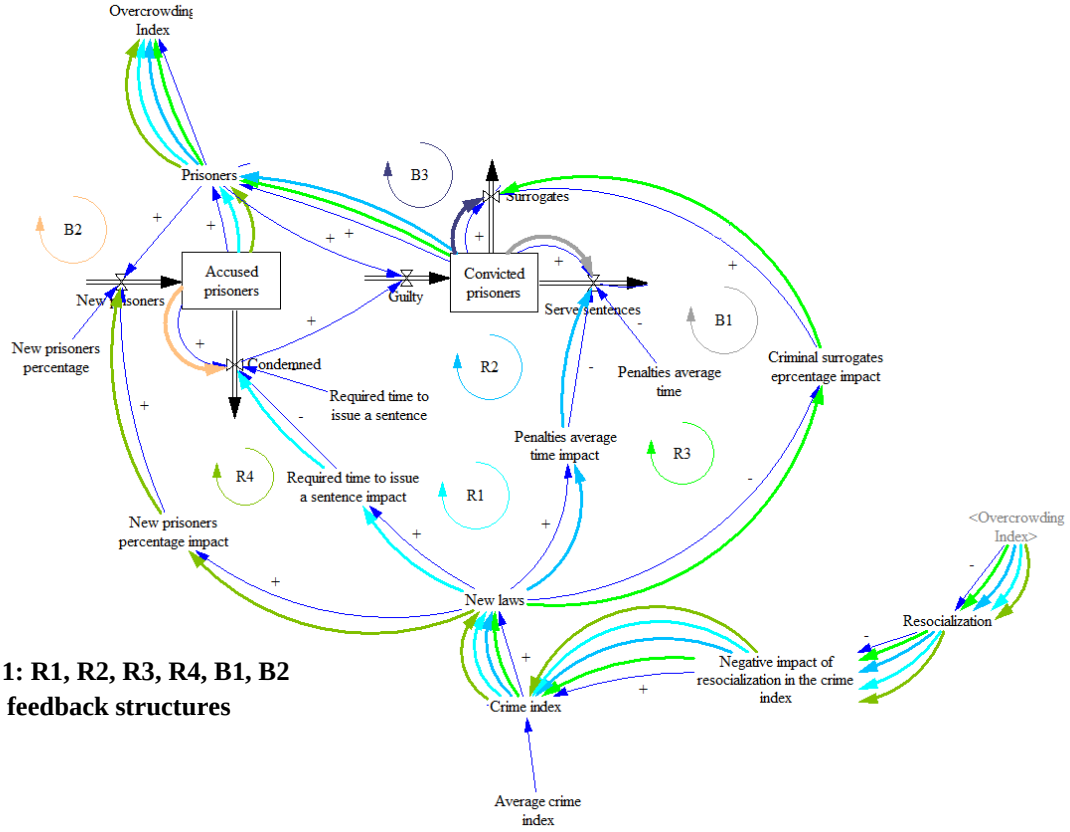


Figure 1: R1, R2, R3, R4, B1, B2 and B3 feedback structures

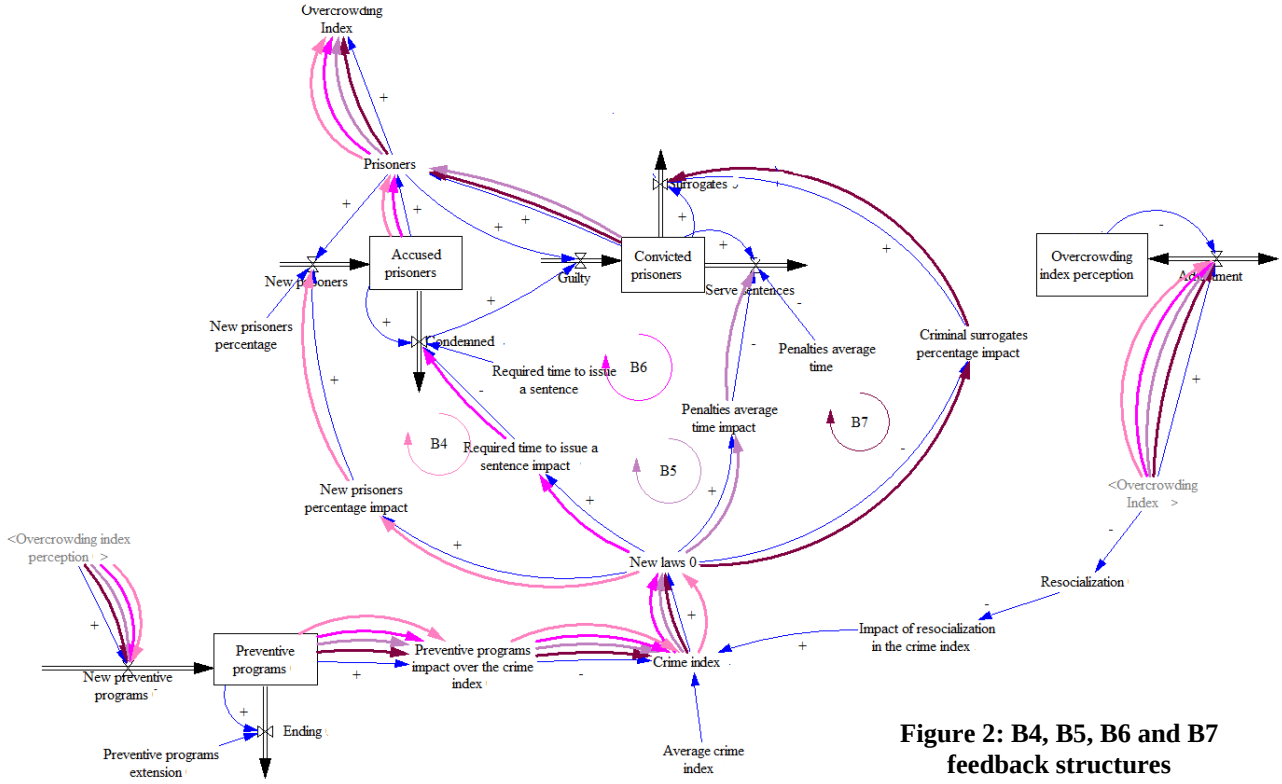


Figure 2: B4, B5, B6 and B7 feedback structures

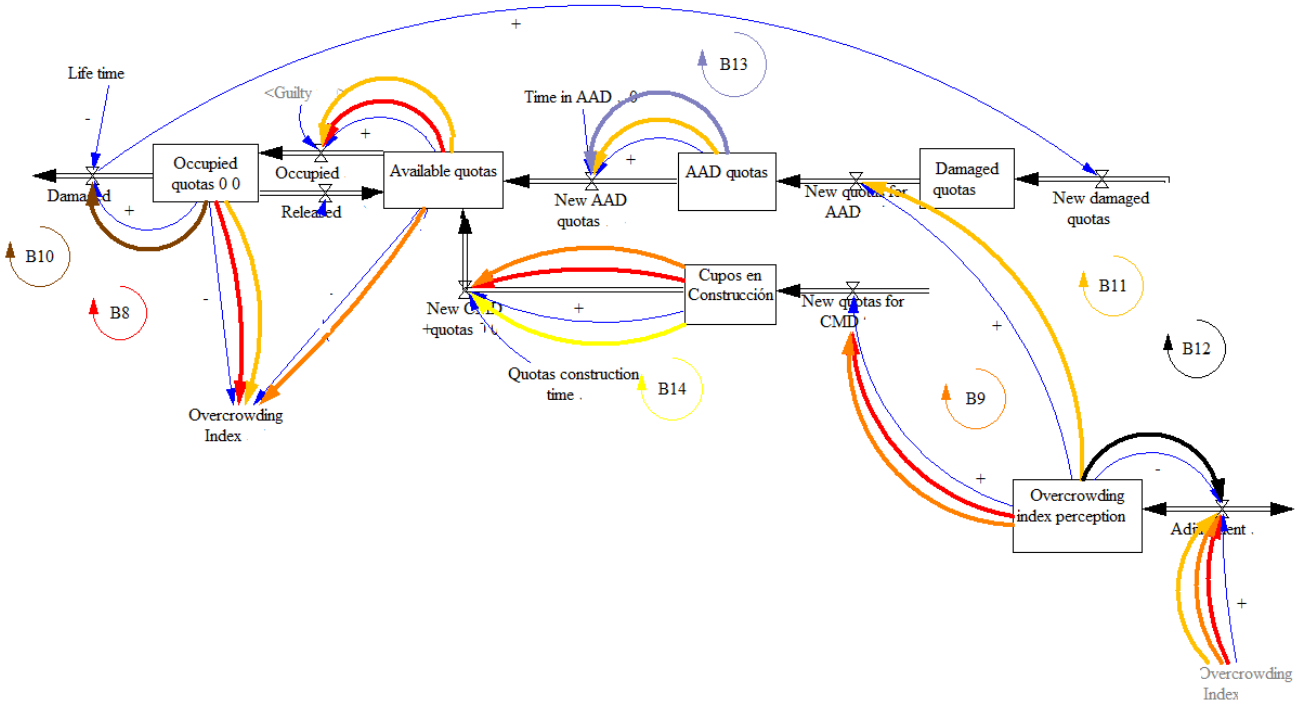


Figure 3: B8, B9, B10, B11, B12, B13 and B14 feedback structures

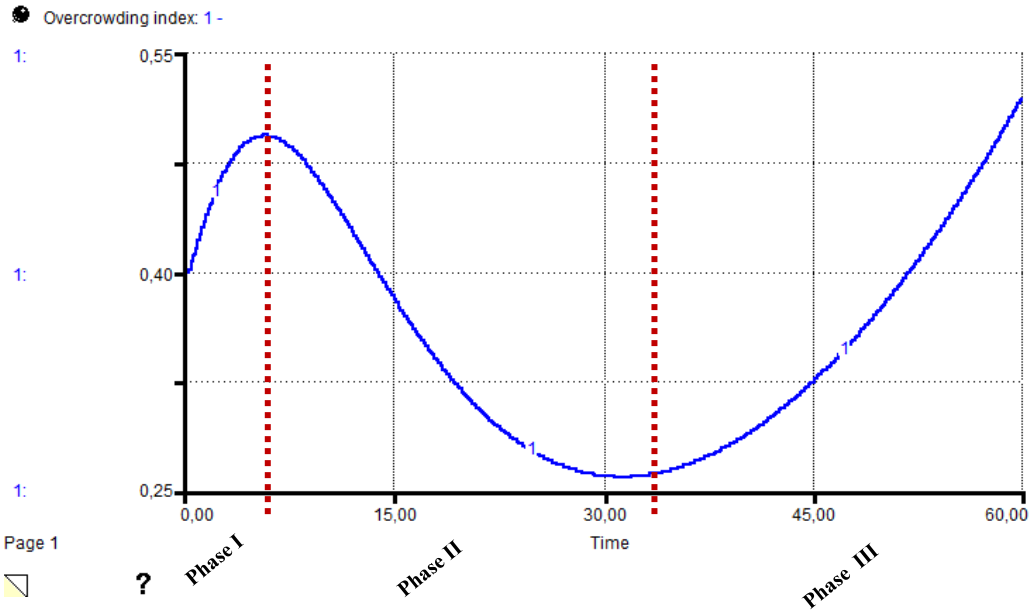
IV. Dynamic Hypothesis and Policy Design

We built a simulation model. We first propose a dynamic hypothesis as a "story" for explaining the dynamics of overcrowding as a function of the feedback loop structure. This story is backed up by literature on the subject, our understanding of the structure of the model and computer simulation. As we could suspect, the oscillatory pattern can be associated to control structures permeated by material and information delays (Figures 1-3). Based on this understanding we explore different policies.

Overcrowding Index behavior: Dynamic Hypothesis

To best explain the behavior of the Overcrowding Index throughout the simulation, the graph has been divided into three periods as shown in Graph 2; each period shows a different mode of behavior: Period 1: balanced growth, Period 2: balanced decline and Period 3: reinforced growth.

Graph 2: Overcrowding Index - simulation



The behavior of the Overcrowding Index (OI) can be explained in the following manner:

Phase I

OI initially increases as the prison population grows while the system's capacity remains constant given that the perception of the OI index is low and consequently the Government does not react to create new capacity. Moreover, the OI grows given the difficulties to resocialize that arise as a result of a high OI and hence the increase in criminal recidivism (Serje Jimenez, 2010) that ends producing more convicts and charged individuals. As a result, a reinforcing dynamics produce an increase in the prison population by means of increasing the length of sentences (R1, R2, R3 and R4) (Dyner, Prado, & Arango, 2009), increasing the time it takes to issue a sentence (R1), and hence ensure better investigation processes and less impunity (Santos & Vargas Lleras, 2011), and reducing the possibilities of convicts to pursue penal alternatives (R3). R4 in particular reinforces the increase of charged individuals' inflow with the creation of new laws and norms that compel authorities to dictate preventive detention for criminal conducts that were not considered before for this type of penalty (Iturralde, 2011).

At the end of Phase 1, control mechanisms gain strength the OI perception starts to increase (B12) up to a level where numerous balancing feedback loops start regulating OI growth with the creation of new quotas (B8 and B9) and the enlargement, fitting and endowing the existing quotas (B11).

Finally, the State builds higher capacity and hence contributes to the short-term control of the OI growth (B13 y B14).

Phase 2:

In Phase 2, the regulation of OI continues by means of quota increase which is accomplished through programs such as the PCRP, which generate approximately 24200 new quotas between 2006 and 2008 (Conpes 3575, 2009)—see loops B8, B9 and B11.

Given the increase of OI perception, the increase of the prison population is strongly controlled through prevention programs (Vanderschueren, 1994). When institutions such as the General Attorney Office recognize (OI perception) that the OI index is over critical levels (Conpes 3277, 2004), they design and implement prevention programs that reduce the criminality index and hence control de increase of prison population through: regulation of the average time it takes to dictate a sentence (B6), facilitating the access of convicts to penal alternatives (B7), controlling the increase in the length of sentences (B5) and controlling the outburst of laws and norms that compel authorities to dictate preventive detention for a larger range of criminal conducts (B4).

As a result in Phase 2, feedback mechanisms produce an increase in the system's capacity as well at the same time they control de prison population growth, producing a balanced decline of the OI.

Phase 3:

Nonetheless, once the OI index falls below critical levels, authorities stop their initiatives to generate new quotas in the system given that they do not recognize it as necessary (Conpes 3277, 2004). The control mechanisms that seek to increase system's capacity reduce their strength (B8, B9 and B11).

In addition to relent in capacity building, there is a balanced increase in prison population (B1, B2 and B3). This rise gives dominance again to reinforcing dynamics of prison population growth (given low resocialization levels) and increases the number of charged individuals that remained detained without a sentence (R1); these dynamics also reduce the number of convicts that complete their sentence (R2) or that apply to a penal alternative (R3), and increase the number of new detainees under the status of charged individuals (R4).

Policy design

On the basis of the foregoing dynamic hypothesis about the OI, we designed two types of policies, punitive and preventive. We used our understanding about how the feedback structures within the system produce the dynamics of OI in order to formulate policies that transform feedback effects into desirable outcomes, that is: OI reduction. Furthermore, we combined the two types of policies, and explore and discuss the different outcomes from a systemic perspective.

Punitive Policies

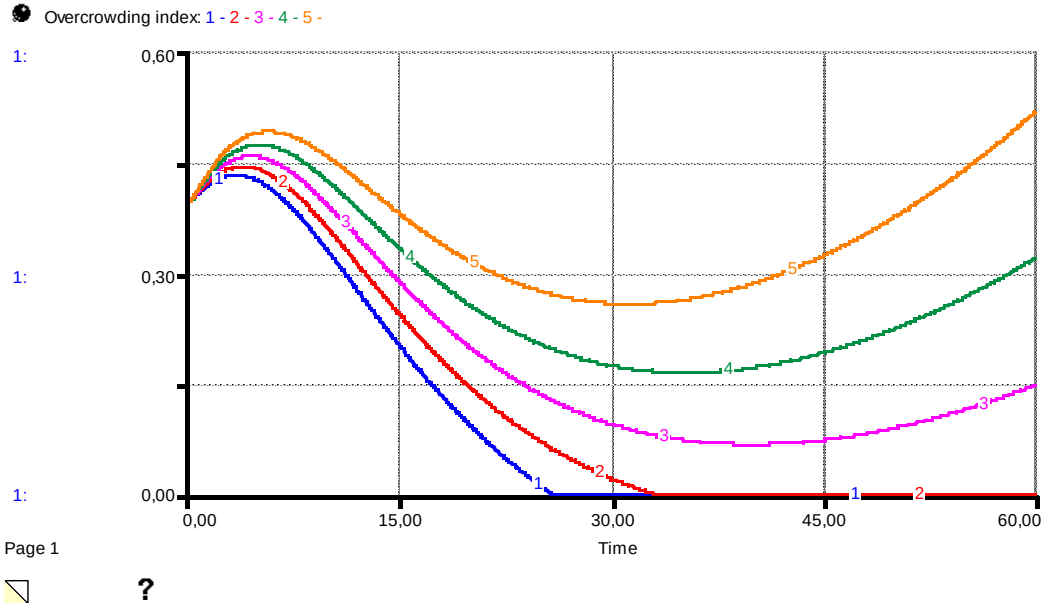
(1) Limits on Preventive Detention

Restricting the number of crimes per law that is issued in which preventive retention is applicable may weaken the reinforcing effect of OI growth (R4) in Phase 3. In this sense, even when faced with a high OI that triggers legislative inflation, the prison population will not increase as much as shown in the simulation in Graph 2. Graph 3 shows the OI behavior on scenarios with variations on the additional percentage of detainees that enter the penitentiary and prison system per each law that is issued. The percentage was varied between 0% and 0.25% (0.25% being the value used in the original simulation).

Table 1: Limits on Preventive Detention - Scenarios

Scenarios	1	2	3	4	5 [Original simulation]
Additional % per law that is issued	0%	0.0625%	0.125%	0.187%	0.25%

Graph 3: Limits on Preventive Detention – OI behavior under Scenarios



As shown on Graph 3, reducing the additional percentage of detainees that enter the penitentiary and prison system per each law that is issued can reduce significantly the OI. With the reduction of this percentage, feedback R4 loses strength and dominance, which modifies OI behavior. Notwithstanding, unless the percentage is 0.0625% or less, OI continues to grow exponentially.

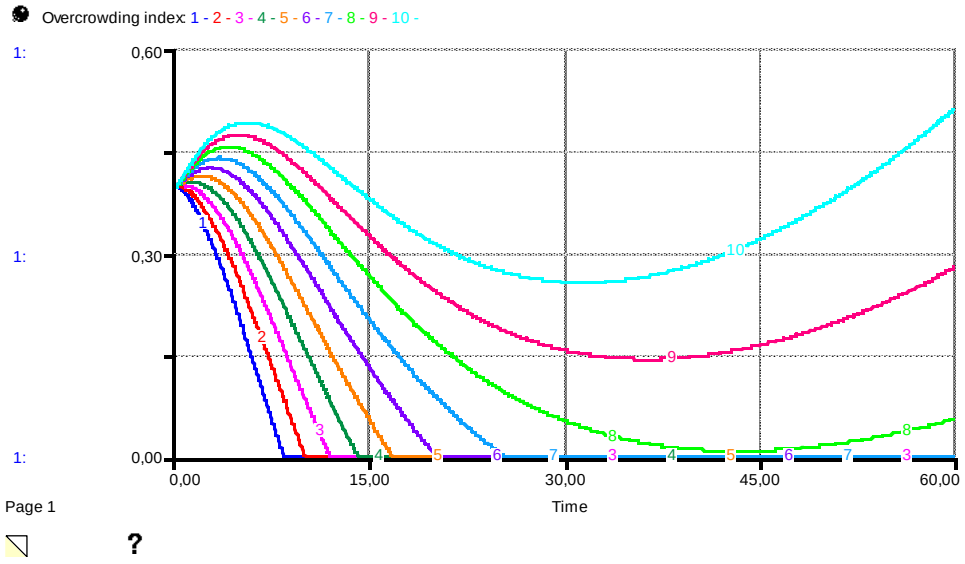
(2) Improve Access to Prison Benefits

Issuing bills that relax conditions required for convicts to obtain prison benefits such as sentence reduction for those who undertake work or studies while incarcerated, and probation[3] and early release can increase the outflow of prison population[4]. With this policy B1 is able to regulate more strongly the prison population by allowing a larger outflow of convicts that finish serving their sentence.

Graph 4 shows scenarios of OI behavior with variations on the average length of sentences. The average length was varied between 5 years to 15.8 years (15.8 years being the parameter used in the original simulation).

Table 2: Improve Access to Prison Benefits - Scenarios

Scenarios	1	2	3	4	5	6	7	8	9	10 [Original simulation]
Average length of sentences (years)	5	6.2	7.4	8.6	9.8	11	12.2	13.4	14.6	15.8



Graph 4: Improve Access to Prison Benefits – OI behavior under Scenarios

[3] It is a prison benefit given to convicted prisoners who have served half of the deprivation of liberty or ¾ of it, which consists on an early release of the prison.

[4] For purposes of showing this policy's effects in the simulation model, we assume that an increase in the number of convicts that have access to this type of prison benefits will traduce in a lower average length of sentences.

As shown on Graph 4, OI decreases as the average length of sentences decreases. The outflow control of convicted prisoners (B1) increases in strength regulating OI growth and even producing OI decline with the lowest values for the average length of sentences. Improving access to prison benefits in order to increase prison outflow not only controls OI but as well may aid the Government in resocialization process as it acts as an incentive for prisoners to engage in work or studies; these effects could be explored in further versions of the model presented in this paper.

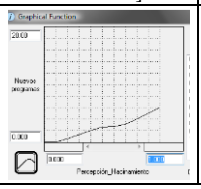
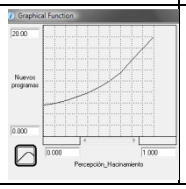
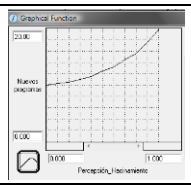
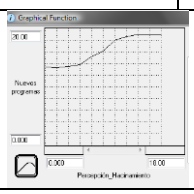
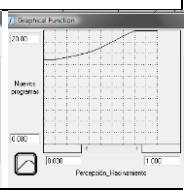
Preventive Policies

(3) Ongoing Preventive Interventions

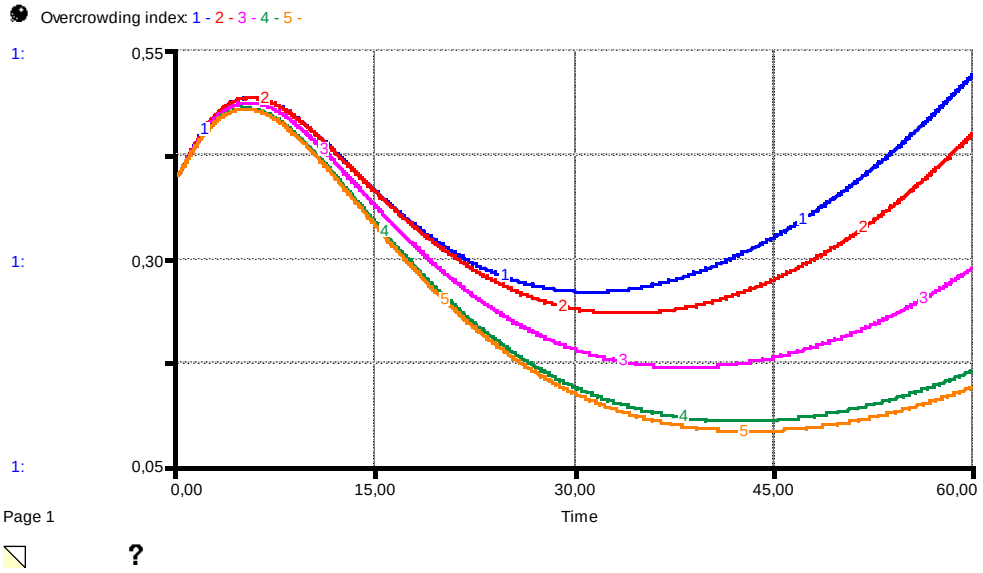
Preventive interventions should be maintained ongoing, that is, their implementation should not depend on the OI perception, however low it may be. They should be implemented both on local and national levels such that they reach the whole population. With prevention interventions, crime is reduced and hence the prison population inflow declines. Examples of these interventions are: lighting public areas, increasing the coverage and number of surveillance cameras, creation and recovery of public areas, prohibition of firearms possession, and establishing limits for alcohol consumption (Vanderschueren, 1994); as well as implementing permanent prevention programs aimed to vulnerable population, ex- convicts, among others that facilitate a safe and successful integration to society so that they have alternative possibilities to gain a living, other than crime (Vanderschueren, 1994). With this type of policies however, we do not suggest to cut feedback from OI perception to the implementation of prevention programs. Instead, we suggest that even though prevention might be intensified when OI perception is high, the impact of OI perception on prevention programs should not be too sensible to OI perception variations and that prevention programs should remain at a sufficiently high level even when OI remains at low values. Control mechanisms are hence strengthened (B4, B5 B6 and B7) and are able to regulate OI growth more effectively.

Graph 5 shows the OI behavior on scenarios with variations on the impact of OI perception on the creation of new preventive programs.

Table 3: Ongoing Preventive Interventions - Scenarios

Scenarios	1 [Original simulation]	2	3	4	5
Impact of OI perception on the creation of new preventive programs					

Graph 5: Ongoing Prevention Interventions – OI behavior under Scenarios

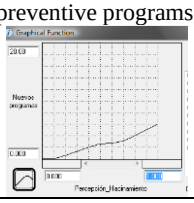
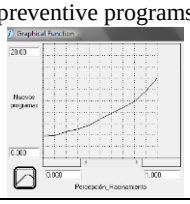
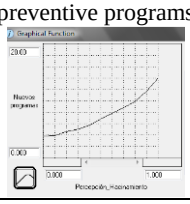


Graph 5 shows that as the impact of OI perception on the creation of new prevention programs is flattened (reduced sensibility) and overall increased, OI falls more sharply on Phase 2 and increases less in Phase 3, although it maintains an exponential mode of behavior. Control mechanisms produce a balanced OI decrease (B4, B5 B6 and B7) and counteract the exponential growth on Phase 3. Nevertheless, the scenarios also show that to obtain a low OI, high prevention levels are required; only scenarios 4 and 5 achieve this goal. Attaining such high prevention levels requires high monetary investments, which would eventually reduce the budget for prison infrastructure building (Conpes 3412, 2006); future developments on the simulation model presented here could explore the implications of such tradeoff.

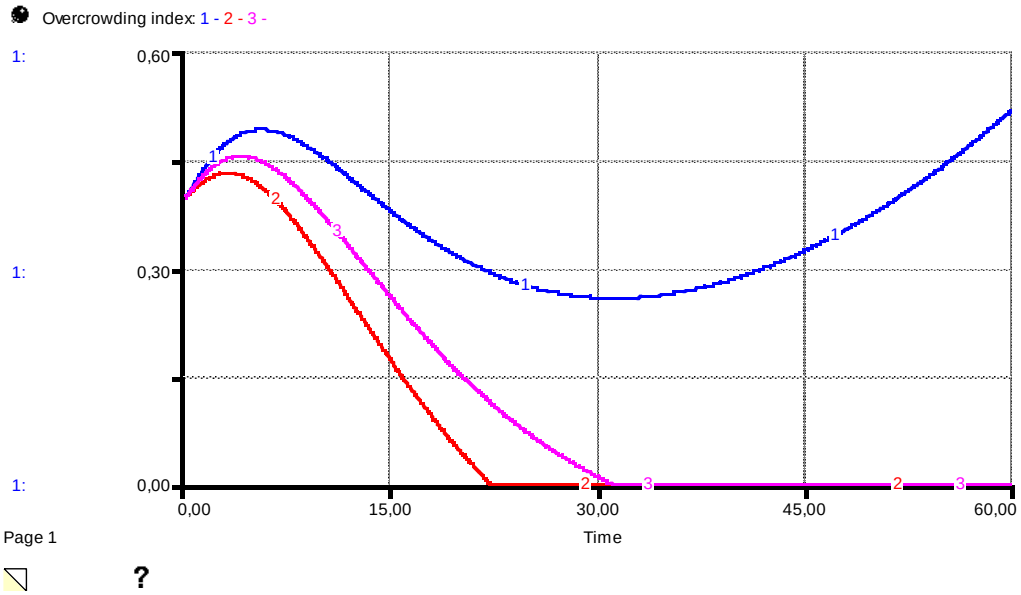
Punitive and Preventive Policies Combined

According to (Vanderschueren, 1994) in a society as ours, prison and penitentiary overcrowding, and crime should be counteracted on multiple fronts; one side, punitive measures are necessary to establish rules and impose sanctions that allow maintaining an organized society and defend individuals' rights. But relying only on punitive measures runs the risk of strengthening reinforcing legislative inflation feedbacks. Henceforth, punitive measures should be combined with preventive measures that reduce crime and hence minimize prison population inflow. We explored two additional scenarios which combine the before mentioned policies (Table 4).

Table 4: Punitive and Prevention Policies Combined – Scenarios

Scenarios	1 [Original simulation]	2	3
(1) Limits on Preventive Detention	0.25%	0.13%	0.25% [original value]
(2) Improve Access to Prison Benefits	15.4 years	13.4 years	13.4 years
(3) Ongoing preventive interventions	Impact of OI perception on the creation of new preventive programs 	Impact of OI perception on the creation of new preventive programs 	Impact of OI perception on the creation of new preventive programs 

Graph 6: Punitive and Prevention Policies Combined – OI behavior under Scenarios



Graph 6 shows OI behavior under the three scenarios described in Table 4. Both scenarios (2 and 3) show significant decreases on OI. Scenario 2 evidences a more prominent OI reduction given that it also includes variations on the *Limits on Preventive Detention* Policy, thereby including the effects of debilitating reinforcing dynamics (R4). The combination of increasing strength of feedbacks that control prison population increase (B1, B4, B5 B6 and B7) and strength reduction of feedbacks that reinforce OI growth (R4) produces a balanced OI decline. Cost analysis should be taken into account in order to decide which type of combinations is viable.

V. Outlook

We showed how system dynamics provides a different type of understanding (as compared to the usual cause and effect, short-term and static thinking) that helps to build a rationale for exploring and taking action. The problem of prison overcrowding is driven by large and delayed control mechanisms which with societies and governments usually act for tackling urgent problems. Legislative inflation is a perfect example of that type of static thinking that is not anchored on a systemic and dynamic view that only complicates things further, as Graph 1 shows. Policy makers willing to challenge their mental models can produce great transformations if their actions are backed by a dynamic understanding of feedback driven systems, i.e., the very systems that they face everyday.

VI. References

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