

74th Session of the CESCR Committee

Alternative report for the periodic review of Brazil before the United Nations Committee on Economic, Social and Cultural Rights

Reporting entities for this alternative report:



The National Agenda for Decarceration

The National Agenda for Decarceration emerged in 2013 and, in 2016, at the First National Meeting for Disarmament, it was consolidated as a national social movement that today brings together civil society organizations, family members and survivors of imprisonment. Its mission is to confront mass incarceration and the violence produced by the prison system. The articulations of the organization take place to denounce and combat the project of death managed by the State through its penal policies against the black, indigenous and poor population

Infovirus: prisons and pandemic

Infovirus: prisons and pandemic (Infovírus: prisões e pandemia) is a monitoring center that works with information, assessment and counterposition regarding the coronavirus pandemic in the Brazilian prison system. The project was created in April 2020 based on the initiative of independent researchers and the following Research Groups: Center for Studies on Inequality and Discrimination (CEDD/UnB - Centro de Estudos em Desigualdade e Discriminação), Asa Branca Criminology Group (UFPE, UNICAP – Grupo Asa Branca de Criminologia), Research Group on Criminology (UEFS, UNEB – Grupo de Pesquisa em Criminologia), Power, Control and Social Damage Research Group (UFSC – Grupo de Pesquisa Poder, Controle e Dano Social).

Institute of Religion Studies

The Institute of Religion Studies (ISER – Instituto de Estudos da Religião) is a civil society organization that promotes studies, research, and social intervention in the fields of civil rights, the justice system, and religion and public space. ISER was founded in 1970, and its mission is to strengthen a plural democracy, anchored in the appreciation of religious, racial,

ethnic, gender and territorial diversity, the defense of human rights, and the search for a fair, inclusive, and sustainable society.

Criminal Justice Network

The Criminal Justice Network (Rede Justiça Criminal) was created in 2010 and is composed of nine Brazilian civil society organizations. Its objective is to contribute with the qualification of public debate and influence political decision-making to reverse the logic of mass incarceration. Our effort is to fight structural racism in the field of public security and work towards a criminal justice system that does not violate human rights and guarantees dignity to all citizens. To this end, the network monitors the decision-making of the Legislative, Executive, and Judiciary Branches of government through advocacy and articulation with collectives, movements, and civil society organizations, and focuses on the implementation of public policies that promote rights in criminal justice and public safety.

1. This report analyzes the fulfillment, by the Brazilian State, of the international obligations originated from the International Covenant on Economic, Social and Cultural Rights, specifically with regard to guaranteeing the full realization of the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health” and other related rights.
2. The present document addresses the situation of people deprived of their freedom during the pandemic time. It should be noted that this group must be understood as one of those who were in a particularly vulnerable situation during the crisis, and it disproportionately gathers non-white people, including women, elderly people, LGBTQIAP+ people, and other social segments.
3. The information presented here about the impacts of the pandemic and the actions - or lack thereof - by state bodies to guarantee the rights of a fraction of their citizens should not be understood as exceptional cases. We emphasize the importance of understanding the pandemic crisis as a deepening of the dynamics of violation of rights that existed previously and continues today.

Absence/Distortions of official data on the impacts of the pandemic on the prison system

4. At the beginning of the pandemic, the National Penitentiary Department (Depen – Departamento Penitenciário Nacional), which is subordinated to the Ministry of Justice and Public Security, created a panel on its website to monitor the situation of Brazilian prisons in facing the Covid-19 pandemic. The Depen panel reported the numbers of suspected cases, detected cases and deaths caused by Covid-19 among the prison population in Brazil, informing the general number of contaminations by region and state. The panel also published a table containing the measures adopted by the states to control the spreading of the virus, such as reducing visits, cleaning of penitentiaries, ordinances and procedures adopted by the public authorities.

5. Despite the importance of publicizing supposedly updated data on deaths and infections, a series of problems were identified, such as inconsistencies, opacities, and fragilities in official information on the pandemic situation in Brazilian prisons. The data published by DEPEN did not specify the methodology used in data collection nor the periodicity of updates and data publication. The data presented by DEPEN were obsolete, and some states did not have any updates for months. It is important to mention that the websites of state penitentiary administrations did not maintain updated, periodic, and consolidated information about the pandemic situation in their prison units.
6. In addition to DEPEN, the National Council of Justice (CNJ – Conselho Nacional de Justiça) also issued weekly bulletins with information on the number of people arrested, adolescents in compliance with socio-educational measures and civil servants of the penal system contaminated with the Covid-19 virus and the resulting deaths of the disease. The CNJ bulletin also reported the number of tests applied to incarcerated people and system employees. Crossing the number of tests applied in each federative unit with the number of people arrested in the respective states made it possible to identify signs of underreporting of the information about detections and deaths caused by Covid-19 in prisons. In addition, the official information released by the official bodies - CNJ, Depen, Secretariat of Penitentiary Administration - often presented divergences in the information.
7. The production of reliable, transparent, and up-to-date data is essential for the elaboration of effective policies, in addition to being a duty of the State. However, the provision of these data fell far short of what the seriousness of the situation required. The production of inconsistent, outdated, and opaque data on COVID-19 in prisons is yet another deliberate form of the genocidal policy¹ operating in the prison system.

Inadequacies and/or lack of implementation of specific preventive measures aimed at people deprived of freedom

- Identification and protocol for risk profiles and suspected cases of Covid-19 and measures to prevent contagion within prison units
8. Despite measures to identify risk profiles and suspected cases of Covid-19 being enshrined in international norms, as well as in guidelines developed by national bodies, such processes did not occur properly in the Brazilian context. The unsanitary and overcrowded conditions of the prison system in Brazil led to obstacles to the effective implementation of these measures². The absence of tests for all prisoners and the lack of technical and medical staff in many units show non-compliance with such parameters.

¹ - Flauzina, Ana Luiza Pinheiro. As dimensões raciais do processo de ratificação da Convenção do Genocídio nos Estados Unidos. *Universitas/Jus* (Printed), v. 24, p. 1/1, 2013.

² Portella, Bruna et al. Instrumentos de combate e prevenção à covid-19 nas prisões: uma sistematização de normas de direitos humanos. Rio de Janeiro: Instituto de Estudos da Religião - ISER, 2021. p. 32.

9. In the state of Rio de Janeiro, for example, screening at the “gateway” of the prison system, an attempt to prevent the entry of infected people, took a while to be implemented, and existed only intermittently, as pointed out the State Mechanism for the Prevention and Combat of Torture of Rio de Janeiro³. The Mechanism indicates that the inconstancy of the measure was due to the absence of professionals, the decrease of the available test stocks and the absence of effective control of the data. The maintenance of the intense flow of entry into the prison system also represented an obstacle to the implementation of effective measures at the “gateways”⁴. This process occurred despite the international and national norms and recommendations that reinforced the exceptionality of pretrial detention- which should already be the keynote of regular judicial action.
10. Overcrowding was also a substantial obstacle to compliance with measures to prevent contagion within prison units. In fact, even before the pandemic, this was already one of the key factors for the exponential spread of infectious diseases in prison. This tendency is tragically illustrated by the disproportionate incidence of tuberculosis in the prison population - a treatable disease that often becomes fatal in prison⁵. The report by the State Mechanism for the Prevention and Combat of Torture of Rio de Janeiro, in 2019, already pointed to the dangers of an outbreak of infectious diseases in prisons in the state, reporting concerns about the occurrence of cases of meningitis within the system⁶.
- Desincarceration measures
11. Recommendation n.62/2020, edited by the National Council of Justice (CNJ) on March 17, 2020, right at the beginning of the pandemic, was the main proposal presented by the Judiciary Branch to fight Covid-19 inside the prison system. In addition to providing sanitary measures, such as water supply and access to healthcare, the measure called on magistrates to reassess the need for arrest in a series of cases, such as:
- 1) Pregnant women, nursing mothers or guardians of children up to 12 years old
 - 2) Elderly, Indigenous, or disabled people
 - 3) People in the risk group: those with comorbidities such as diabetes, tuberculosis, kidney diseases, HIV, and co-infections

³ Mechanism for the Prevention and Combat of Torture of Rio de Janeiro. Aglomeração Legal, Morte Indeterminada: Pandemia de COVID-19 e a Necropolítica Prisional no Estado do Rio de Janeiro. Rio de Janeiro: MEPCT/RJ, 2020. p. 27-28.

⁴ PORTELLA, Bruna et al. Instrumentos de combate e prevenção à covid-19 nas prisões: uma sistematização de normas de direitos humanos. Rio de Janeiro: Instituto de Estudos da Religião - ISER, 2021. p. 32.

⁵SANCHEZ, Alexandra Roma et al. A tuberculose nas prisões do Rio de Janeiro, Brasil: uma urgência de saúde pública. Cad. Saúde Pública, vol. 23, n. 3, 2007, p. 545-552.

⁶ Mechanism for the Prevention and Combat of Torture. 2019 Annual Report. Rio de Janeiro: MEPCT/RJ, 2019.

- 4) Overcrowded units, which represent 72.2% of Brazilian prisons
 - 5) Units without a health team – 31% of them
 - 6) Provisional arrests that have exceeded 90 days or related to crimes without violence or serious threat
12. Recommendation n.62/2020 also determined the preferential application of socio-educational measures in an open environment and transferring arrested people with suspected or confirmed Covid-19 to house arrest in the absence of adequate isolation in prison.
 13. Despite the justice of the measure, the facts were that a large part of the Brazilian Judiciary Branch refused to comply throughout the health crisis. The decarceration rate in the period was far below what it could have been. According to the Defense Institute for the Right to Defense (Instituto de Defesa pelo Direito de Defesa), three out of four people arrested in São Paulo who could have left prison during the pandemic were kept behind bars⁷.
 14. Based on Recommendation n.62/2020, many people asked for the revision of their prison sentences. The Criminal Justice Network searched the responses to these requests at different times of the pandemic and found the Judicial disregard for the lives of these people all over the country⁸. There were several excuses for not complying with Recommendation n. 62/2020, such as:
 - 1) Being in the risk group and having a serious illness would not qualify for release or applicants would be taking advantage of the Recommendation for a “general release;”
 - 2) The health and care conditions in prisons are excellent and would meet the needs of the prisoner;
 - 3) The risks of contracting the Covid-19 virus inside and outside prisons were the same;
 - 4) The prisoner was not concerned with the rules when he committed an offense and, therefore, would not behave according to sanitary preventive measures out of prison;
 - 5) Society would already be suffering from the pandemic and the economic crisis and, therefore, could not be made to suffer even more from the indiscriminate release of “criminals” who threaten its security.

⁷ Defense Institute for the Right to Defense. *Justiça e Negacionismo: como os magistrados fecharam os olhos para a pandemia nas prisões*, São Paulo: IDDD, 2021.

⁸ See <https://deixadosparamorrer.org/mural-da-vergonha/>. Access: 08/25/2023.

Importantly, within months after the issue of Recommendation n.62/2020, the Judiciary Branch itself decided to review its determinations and reissued the measure on September 15, 2020, restricting the chances of decarceration and authorizing custody hearings through video calls⁹. The following year, on March 15, 2023, the CNJ issued Recommendation n. 91/2021, which addressed confronting Covid-19 and its variants within the scope of the criminal and socio-educational justice systems, and which aimed to establish preventive measures additional to Recommendation n. 62/2020.

Amid a dramatic increase in the number of people infected inside and outside prisons, Recommendation n. 91/2021 drew attention, at first, for its omissions and inconsistencies¹⁰. The regulations, instead of promoting and prioritizing measures to decarcerate prisoners facing an overcrowded, unhealthy system, with poor ventilation, poor quality food, poor access to basic hygiene products and medical care and without minimum conditions of guaranteeing observance of sanitary measures and social distancing, maintained the restrictions provided by Resolution n.78/2020, which limited the scope of the original text of Resolution n. 62/2020, despite the urgency of maintaining special treatment for the population deprived of freedom in the face of the pandemic.

It is worth noting that several international organizations, such as the United Nations (UN) and the Organization of American States (OAS) highlighted, during the period, the need to reduce the number of prison populations as one of the main measures to combat Covid-19 in prison units. In addition, in the same week in which the CNJ announced that the number of deaths among prisoners and civil servants due to Covid-19 in prison units had a considerable increase of 190% in 2021 alone, the new Recommendation vaguely cited that magistrates should “ensure the elaboration and implementation of the contingency and vaccination plan by the Executive Branch”, ignoring the disastrous way in which the Federal Government was dealing with the pandemic, which caused a major cause of suspicion.

It was also alarming that the Recommendation n. 91/2020, unlike Recommendation n. 62/2020, maintained virtual custody hearings without making it clear that they were restricted only to the pandemic period, as approved in normative act n. 0009672- 61.2020.2.00.0000, which revoked Art. 19 of Resolution n. 329 of July 2020.

⁹ Recommendation n.62/2020 was edited on March 17, 2020, and updated by Recommendation n.78/2020 of September 15, 2020.

¹⁰ Because of the strong influence of civil society, the CNJ later amended Recommendation n.91/2021 and included the importance of priority vaccination for civil servants and incarcerated people. At first, the Recommendation did not mention anything about the matter. The exceptionality of virtual custody hearings was also included with priority being given to their in-person form. Previously, the text had also silenced about the matter. The final text, embodying these changes, was voted on 03/23/2021 by the CNJ.

Finally, it is worth noting that, by generally establishing, in Article 1, that “the provisions of Recommendation n. 62/2020 and its updates remain applicable where appropriate”, the Recommendation n. 91/2020 left space for unequal and subjective interpretations in its application, possibly undermining the scope and effectiveness of the measures provided in regulations to contain Covid19 in the prison and socio-educational systems.

- Care and compensation for the relatives of those who died

15. As reported by ISER publication: “Instruments to combat and prevent covid-19 in prisons: a systematization of human rights norms”¹¹, the absolute disrespect for the relatives of people who died in the prison system was the keynote of the management of the justice system in the face of the pain that devastated several families.
16. For instance, Joint Ordinance n. 1 of the National Council of Justice and Ministry of Health, published on March 30, 2020, which "authorized sending to cemeteries those people without civil registration of death, both in the case of burial and cremation, including the deaths of undetermined persons as a way of dealing with the increase in deaths due to the pandemic”¹².
17. Other related issues concern gaps in carrying out inspections within prison units and the absence of methods for identification a posteriori. This ordinance was strongly criticized and opposed by several civil society organizations and social movements, considering that its implementation would result in severe violations of rights. It ended up, then, being replaced by Joint Ordinance n. 2 of the National Council of Justice and Ministry of Health¹³, which corrected some of those problematic guidelines. However, this change did not end the various problems regarding the register and notification of cases of death in prisons in the country.
18. Another recurring situation was the lack of information to family members, who were subjected to the absence of news about their beloved ones, including, in most cases, when they were sick. Cases in which family members learned that their relative had been affected by the disease only after death were common. It should be noted that the shortage of healthcare and social assistance professionals in the prison system is an obstacle to the proper care of the population deprived of freedom and their families. It should be noted that no reparatory measures were developed for the relatives of fatal victims who were under the guardianship of the State.

- Communicability

¹¹ Portella, Bruna et al. Instrumentos de combate e prevenção à covid-19 nas prisões: uma sistematização de normas de direitos humanos. Rio de Janeiro: Instituto de Estudos da Religião - ISER, 2021. p. 32.

¹² NATIONAL COUNCIL OF JUSTICE. Joint Ordinance No. 1 of 03/30/2020. Available at: <<https://atos.cnj.jus.br/atos/detalhar/3264>>

¹³ NATIONAL COUNCIL OF JUSTICE. Joint Ordinance No. 2 of 04/28/2020. Available at: <<https://atos.cnj.jus.br/atos/detalhar/330>>.

19. As cases of Covid-19 increased in Brazil and in view of the first reports of contamination and deaths among the prison population resulting of the disease, prison units suspended visits as a way of preventing the spread of the virus inside prisons. In fact, the total suspension of visits to the prison population was the most widely adopted measure by penitentiary administrations to protect people deprived of freedom.
20. However, the suspension of visits has deprived prisoners of much more than seeing their relatives and beloved ones during the pandemic period because, given the precarious conditions and the State failures in guaranteeing supplies to people who are deprived of liberty, family visits are important to provide items such as hygiene materials, warm clothes, and food, in addition to playing a fundamental role in controlling torture and violence inflicted to prisoners. The suspension made possible numerous violations against prisoners, such as isolation, lack of access to basic food, lack of access to water and even cases of physical torture.
21. As a reaction, Infovirus reported the occurrence of at least thirty manifestations of family members claiming information and expressing concern regarding the precariousness of hygiene items and clothing, lack of sanitation, overcrowding, contamination and violence, common conditions to which the prison population is subjected, and which have been aggravated by the pandemic. In most cases, the official figures on deaths and contamination by COVID-19 inside prisons attested to stability and control. However, family reports denounced what the official data sought to hide: the occurrence of deaths, inhumane treatment and torture, rotten food, lack of medical assistance, among other violations of human rights.
22. Due to incommunicability, there were transfers of risk group prisoners away from their families without prior communication, episodes of rebellions in prison units and an increasing number of deaths among the prison population.
 - Vaccination
23. The vaccination process against Covid-19 in Brazil suffered from scientific negation by the Federal Government and its social bases, episodes of corruption in the acquisition of vaccines and attempts to dismantle the Unified Health System (SUS – Sistema Único de Saúde). The resulting delay in beginning public vaccination contributed to the substantial number of deaths in 2021¹⁴, which was only partially overcome by popular mobilizations in favor of the vaccines, by the institutional strength of the SUS and the resistance of healthcare professionals.
24. The vaccination of prisoners was affected by the national circumstances, aggravated by the political dimensions of the prison issue in Brazil. The precarious sanitary

¹⁴ In 2021 alone, 424,133 people died in Brazil victimized by Covid-19, According to the Press Vehicles Consortium (Consórcio de Veículos da Imprensa), which summarized the data about the pandemic in the country. See:

https://g1.globo.com/jornal-nacional/noticia/2021/12/31/balanco-indica-que-2021-foi-o-ano-mais-letal-da-pandemia-no-pais_ghtml; Access: 08/27/2023.

conditions of the prison system, built on serious rights violations related to health, food, access to potable water, sanitary conditions, and overcrowding, objectively indicated that the prisoners should be considered a priority group for vaccination.

25. This prioritization, scientifically supported¹⁵, was heavily criticized by public authorities and by the media¹⁶. Nevertheless, and after a considerable clash in the public debate¹⁷, the National Plan for the Operation of the Vaccine Against Covid in Brazil included the prisoner population among social groups with “high social vulnerability,” considering them as a priority group for vaccination.
26. In a mapping published in *Covid nas Prisões: Pandemia e Luta por Justiça no Brasil*, Fabio Cascardo¹⁸ points out that, except for the elderly and people with comorbidities, State and Municipal Vaccination Plans differ greatly in relation to the order of priority of the other social groups, which generated distortions at the national level. The Plan of the State of Ceará, for example, does not specify in which priority “phase” is the prisoner population; in Pará, the prisoners are the 4th group of the 4th phase, behind education workers, Armed Forces, and penitentiary servants.
27. Regarding the scope of the priority group, Cascardo points out that all documents (National Plan and State and Municipal Plans) analyzed in his survey refer only to the universe of the prison population, not including patients in psychiatric hospitals, therapeutic communities and rehabilitation clinics, which violates art. 3th, II, of Law 12.847/2013 (creates the National System for the Prevention and Combat of Torture), which considers all these groups as deprived of freedom¹⁹.
28. A major point of contradiction in these regulations appears when considering people deprived of freedom who belong to other risk groups, such as the elderly and people with comorbidities. Fábio Cascardo observes that these people, as a rule, were not vaccinated at the immunization stage compatible with these risk characteristics, which constitutes a discriminatory exclusion from the immunization schedule due to their legal status as provisional or convicted prisoners. In brief, if these people were not imprisoned, they would have been vaccinated earlier, in a time compatible with their priority group, which constitutes a serious breach of international human rights

¹⁵ Corrêa, Alessandra. Por que especialistas defendem que presos estejam entre grupos prioritários na vacinação contra a covid-19. São Paulo: BBC News, November 2020.

¹⁶ See: <https://noticias.uol.com.br/saude/ultimas-noticias/redacao/2020/12/09/governo-exclui-presos-das-prioridades-pa-ra-vacinacao-contra-a-covid-19.htm>. Access: 08/24/2023.

¹⁷ See: <https://www.brasildefato.com.br/2021/07/14/tirar-presos-da-prioridade-na-vacinacao-mostra-desrespeito-do-governo-a-vida-avaliam-juristas>. Access: 08/24/2023.

¹⁸ Cascardo, Fábio. Summary of “Vacinação de pessoas presas e os parâmetros de direitos humanos: violação ao princípio de não discriminação na atuação estatal contra covid-19 no Brasil”. In: Barrouin, Nina; et al. *Covid nas Prisões: Pandemia e Luta por Justiça no Brasil (2020-2021)*. Rio de Janeiro: ISER, 2021.

¹⁹ Cascardo, Fábio. Summary of “Vacinação de pessoas presas e os parâmetros de direitos humanos: violação ao princípio de não discriminação na atuação estatal contra covid-19 no Brasil”. In: Barrouin, Nina; et al. *Covid nas Prisões: Pandemia e Luta por Justiça no Brasil (2020-2021)*. Rio de Janeiro: ISER, 2021, p. 143.

standards, such as Rule 24.1 of the Mandela Rules and Resolution No. 1/2020 of the IACHR²⁰.

29. All these discussed dimensions caused an indisputable delay in the process of vaccinating people deprived of freedom. According to data from the Brazilian Yearbook of Public Security, in June 2021 only 8.8% of the prison population had been vaccinated with the 1st shot and 0.2% with the 2nd shot. The Brazilian Yearbook of Public Security indicates, in comparison, that, in the same period, other priority groups show much higher figures. Among civil police officers, for example, 80.3% had received at least the 1st shot, and 29.6% had already completed the vaccination cycle. In the military police group, 64.9% were partially immunized and 18.7% had received both shots²¹.
30. This delay in the vaccination process had severe consequences for the health and health security of the people deprived of freedom in Brazil, and it is a relevant fact to be reported. This severe picture, however, was relatively overcome with the decrease in the shortage of vaccines in the country. In a survey conducted in September 2022, the National Council of Justice pointed out that about 89.9% of the prison population and prison system servers had received two vaccine shots, which significantly decreased contagion and death rates²².
31. Based on data from Rio de Janeiro, the State Mechanism for the Prevention and Combat of Torture suggests that the advancement of vaccination in the state's prison system is directly related to the political efforts of the Intersectoral Commission for Monitoring Vaccination in the Prison System of the State of Rio de Janeiro and, especially, to the fact that it was necessary to “overcome institutional barriers that were insuperable until then, and show the presence of professionals and the institutional logic of the Unified Health System within prison units”²³.
32. The Mechanism emphasizes, therefore, that the relative success of vaccination was only possible due to the entry of public health policy within prison units, which needed to be consolidated in structural terms for the effective struggle against the “sanitary desert” that characterizes the system prison. This permanent process has not been observed, as the same Report points out, which reports difficulties in recording vaccination carried out in the prison system, uncertainty about the continuity of the vaccination process, given the huge flow of people entering the system, and the

²⁰ Cascardo, Fábio. Summary of “Vacinação de pessoas presas e os parâmetros de direitos humanos: violação ao princípio de não discriminação na atuação estatal contra covid-19 no Brasil”. In: Barrouin, Nina; et al. Covid nas Prisões: Pandemia e Luta por Justiça no Brasil (2020-2021). Rio de Janeiro: ISER, 2021, p. 150.

²¹ Barros, Betina. O Sistema prisional em 2020-2021: entre a Covid-19, o atraso da vacinação e a continuidade de problemas estruturais. In: Anuário Brasileiro de Segurança Pública. São Paulo: 2021.

²² See:

<https://www.cnj.jus.br/covid-19-cobertura-vacinal-atinge-97-do-sistema-socioeducativo-e-90-do-prisional/>.
Access 08/24/2023.

²³ State Mechanism for the Prevention and Combat of Torture of Rio de Janeiro. 2021 Annual Report. Rio de Janeiro: 2021, p. 15.

sequence of the immunization process, with the application of other shots prescribed by the Ministry of Health.

- Access to Justice;

33. During the pandemic, on the one hand, the Judiciary Branch accelerated the digitization of some services, including for public access, on the other hand, it also sponsored the dismantling of important instruments for the right of defense and justice. One of these instruments was the custody hearing.
34. Custody hearings are a right conquered with strong participation of Brazilian civil society. Since its implementation, and despite its recognized impact on the achievement of rights in Brazil, custody hearings have suffered attacks and attempts to make them void, including from those that should strive for their protection. With the onset of the pandemic in 2020, an intense debate began against the virtualization of such an instrument. Virtualization deprives the primary function of the custody hearing: preventing and combating torture resulting from police violence and other illegalities at the time of arrest.
35. It is known that custody hearings represent an important mechanism for controlling entry into the criminal justice system and, consequently, for combating mass incarceration. The precariousness of such an instrument represents a setback in terms of guaranteeing the rights of the prisoner, recognized by Article 310 of the Code of Criminal Procedure, by the Inter-American Convention on Human Rights and by the International Covenant on Civil and Political Rights. Such weakening was in line with the requirement to avoid the unbridled proliferation of the Covid-19 virus in places highly prone to dissemination due to the conditions of the prison units. In addition, the use of videoconferences perverts one of the primary functions of custody hearings, whose objective is to present the arrested person before the judge in the first 24 hours after the arrest, in order to verify signs of torture and ill-treatment. Therefore, any decision in this regard should avoid exceptions: custody hearing by videoconference is not custody hearing at all.
36. During the pandemic, custody hearings were discussed at the National Council of Justice (CNJ), the Federal Congress, and the Supreme Court of Justice (STF – Supremo Tribunal Federal). We present, in chronological order, the main normative acts, bills, and laws that regulated the matter:

CNJ - Resolution 213/2015 regulated custody hearings across the country, determining the presentation of every person arrested in *flagrante delicto* to the appropriate judicial authority. This resolution regulated the requirement of the American Convention on Human Rights.

Congress – “Anti-Crime Package” (Law 13.964/2019) prohibited the use of videoconferencing in custody hearings, legislating according to the CNJ resolution.

CNJ - Art. 19 of Resolution 329/2020 prohibited custody hearings by videoconference. This article was amended by Resolution 357/2020.

CNJ - Resolution 357/2020 addresses the holding of custody hearings by videoconference when it is not possible to hold them in person within 24 hours. It amended Art. 19 of Resolution 329/2020 cited above.

PL 1473/2021 – Law Project approved in the Senate and pending in the House of Representatives. It intended to authorize videoconferencing for the custody hearings for the duration of the pandemic.

STF (ADI 6841) - Minister Nunes Marques authorized, in June 2021, the courts to hold custody hearings by videoconference during the Covid-19 pandemic. The preliminary decision was taken in the Direct Action of Unconstitutionality (ADI 6841 – Ação Direta de Inconstitucionalidade), which judges the constitutionality of §1 of Art. 3-B of the Code of Criminal Procedure, introduced by Law n. 13.964/2019 (Anti-Crime Package) and which prohibits the use of videoconferencing in custody hearings.

Congress – (PL 8045/10) Code of Criminal Procedure – within the scope of the project that aims to prepare the new CPP, the custody hearings were discussed, and Representative Capitão Alberto Neto published a favorable opinion on the use of videoconferencing. The topic will be analyzed once more by a working group that intends to revise the report of the Special Commission.

After WHO declared the end of the pandemic crisis, the CNJ determined, in September 2022, the in-person return of all courts of justice in the country. However, it is known that the measure has not been followed and, despite the express determination in §1 of Art. 3-B of the Code of Criminal Procedure of Law n. 13,964/2019, few custody hearings have taken place on a regular basis.

Recent data compiled by the Observa Custódia Platform revealed that, currently, the expert examination reports do not arrive on time in 30% of custody hearings. In 38% of them, police officers themselves monitor the prisoner's medical care – which can inhibit reports of violence. And even more seriously: custody hearings continue to take place virtually in 31% of the units monitored by the survey.

Brazilian prison system and organs of the justice system context

37. It is known that Brazil has the third largest prison population in the world. According to recently released data²⁴, the country registered the mark of 832,295 people

²⁴ 16th Brazilian Yearbook of Public Security. The number is confirmed by Infopen, which is the basis of the data about the prison population under the responsibility of the Executive Branch: <https://app.powerbi.com/view?r=eyJrjoiMTQ2ZDc4NDAtODE5OS00ODZmLThlYTU0YzI4YTk0MTc2MzJkIiwidCI6ImViMDkwNDIwLTI0NGMtNDNmNy05MwYyLTRiOGRhNmJmZThlMSJ9&pageName=ReportSection045531d3591996c70bde>

incarcerated in 2022. From 2021 to 2022, there was a 0.9% growth in the incarceration rate. Of this total, 328,244 people are under closed regime, 6,842 in open regime and 124,718 in semi-open regime²⁵.

38. It should be noted that the vacancy deficit in the Brazilian prison system exceeds 230,000, and it is certain that the construction of new prison units, even if it really happened, would never be enough to keep up with the fast pace at which the incarceration rate grows in Brazil. Between 1990 and 2014, the prison population in the country grew by 575.2%; this tendency has continued over the years, with brief intervals of decline recorded during the Covid-19 pandemic period. The overcrowding of units and their inhumane and unhealthy conditions have been the agenda of the Federal Supreme Court, which has already attested to the “unconstitutional state of affairs” of the Brazilian prison system. In brief, a reversal of criminal policy is urgently needed, and the Brazilian State must promote the disincarceration of its population as an imperative measure for the observance of human rights in the country.
39. Another relevant aspect is the systematic, abusive, and illegal use of provisional detention in the country. According to data from the Brazilian Yearbook of Public Security, 25.3% of people deprived of freedom were provisionally arrested. Despite the decrease in the number of provisional arrests in the years 2020 (30.2%) and 2021 (28.5%), there are still 210,687 people currently in prison without having been convicted. In Brazil, imprisonment without conviction is the rule, and freedom is the exception, which contradicts the Pact of San José da Costa Rica, another international human rights treaty signed by Brazil, the Federal Constitution, and other norms of the internal legal system. Violation of the presumption of innocence in Brazil occurs at levels that are inadmissible for a democratic State based on the rule of law with international commitments regarding human rights.
40. The profile of the preferential public of the Brazilian prison system shows a racist and exclusionary picture. Imprisonment in Brazil has always been a tool of racial segregation and social control. Among the people in custody by the State, most are currently young people aged up to 29 years old (43.1% of the prison population), black (68.2%), with low education, and engaged in informal jobs²⁶. By way of comparison, between 2005 and 2022, there was a 215% growth in the incarceration of white people. In the same period, the growth rate in the incarceration of Black people reached 381.3%. In 2005, 58.4% of the total prison population was composed of Black people. In 2022, it was 68.2% (the highest rate in History)²⁷.
41. The scenario of mass incarceration in Brazil is further aggravated by the connivance and omission of the public sphere – namely, the Legislative and Judiciary Branches.

²⁵ Infopen 2022.

²⁶ Regarding the female prison population, there was no significant growth from 2021 to 2022, differently from previous years records which showed its vertiginous growth. It is still too early to conclude that such stability is a lasting tendency or merely a specific case resulting from the available historical data.

²⁷ 16th Brazilian Yearbook of Public Security.

The Legislative Branch presents itself as a fundamental actor in the increase of deprivation of freedom in Brazil by formulating and approving bills with a clear recrudescence character of punitivism and increase of the penal State. The Judiciary Branch, on the other hand, proves to be highly conservative and oblivious to the inequality that affects the country, reinforcing its selective and reactive role to any measures that challenge the use of the prison sentence as a central pillar of the justice system. A more recent example is the way in which the Judiciary Branch was refractory to disincarceration measures during the Covid-19 crisis.

42. This situation of exclusion, violations, and illness in prisons has become even more serious during the pandemic. In addition to the disastrous performance of the Federal Government in managing the pandemic, the Judiciary Branch ignored the dire situation of the prison system based on a racist and punitive policy of extermination, resulting in countless deaths that could have been avoided.
43. Brazilian judges made it difficult and even prevented the application of one of the only measures to contain the Covid-19 contagion in prisons, which is the Recommendation n. 62/2020 of the National Council of Justice. The Judiciary Branch also sponsored the dismantling of another fundamental instrument in the fight against torture: custody hearings. Its flexibility in the virtual modality meant that several people had their rights violated, either because of the impossibility of verifying signs of abuse, or because of the curtailment of the right of defense.
44. The Covid-19 pandemic has also highlighted the way Brazilian prison and justice systems are tools that deepen structural inequalities in the country. In the state of Ceará, the prison units with the highest rate of contagion by the disease were intended for women and the LGBTI+ population²⁸.

Recommendations

45. The Brazilian State should recognize the distortions in official data on the impacts of the Covid-19 on the prison system and make every possible effort to produce a review consistent with reality;
46. The Brazilian State should develop reparation policies regarding the impacts of the pandemic on the prison system, taking as fundamental the demands of the relatives of people who died under the State guardianship;
47. Strengthening public policies to combat pandemics, epidemics, and the spread of infectious and contagious diseases within the prison system must be a priority for the Brazilian State, therefore working for the effective implementation of the Unified Health System (SUS) in the prison system with greater allocation of resources, and hiring of technical personnel to make this process viable;

²⁸ Auri Moura Costa Female Penal Institute and Irmã Imelda Lima Pontes Prison Unit. The latter houses gay, transgender, bisexual, elderly, and disabled people who also fit the profile of family and emotional neglect. Source: <https://brasildedireitos.org.br/atualidades/covid-19-evidencia-carter-misgino-e-lgbtfbico-do-sistema-prisional>

48. The overcrowding of the prison system results in unhealthy conditions that prevent the implementation of the right to physical and mental health. In this regard, the Brazilian Judiciary Branch must act in accordance with the principle of exceptionality in prison, enshrined in the Brazilian Federal Constitution, and in international human rights standards, implementing all possible measures for decarceration.
49. The justice system must guarantee in-person custody hearings throughout the national territory, regressing the dynamics of virtualization of judicial acts that was introduced during the pandemic, and which produces serious violations of the rights of people criminalized by the State.