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Why Has a Progressive Court Failed to Protect the Prison Population against COVID-19? Mass Incarceration and Brazil's Supreme Court

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Abstract

Despite acknowledging the risks of the COVID-19 pandemic for the prison population, Brazil's Supreme Court declined to issue structural injunctions during the health crisis ordering lower courts to consider these risks when making incarceration-related decisions. These injunctions could have been crucial to mitigate mass incarceration and protect the prison population during the pandemic. Through an examination of the Supreme Court's rulings in structural cases and in a sample of over 4,000 habeas corpus decisions, this paper argues that granting these injunctions would have overwhelmed the court

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with an unmanageable influx of individual claims. Consequently, the Supreme Court acted strategically in anticipation of its limited institutional capacity to enforce compliance with structural injunctions among lower courts. This case study illustrates how practical considerations can hinder structural decisions in criminal law and highlights the limits of structural litigation and constitutional jurisdiction to address mass incarceration.

Introduction

A poorly controlled COVID-19 pandemic combined with overpopulated prisons represented an unprecedented threat to the health of the prison population in many countries during the recent global health crisis. Brazil was one of them. Until February 2023, COVID-19 was the confirmed cause of death for nearly 700,000 people, behind only the United States in the total number of reported deaths.[1] Brazil also has the third-largest prison population in the world and faces a severe problem of prison overcrowding.[2] In 2020, the prison system accommodated 668,135 people despite having the capacity for only 455,283, and 72% of the country's prison units held more prisoners than their designed capacity.[3]

The connection between overcrowding and poor health in the prison population has already been established.[4] Infectious diseases in particular tend to have a much higher prevalence among people in prison than the general population. Besides being an obstacle to social distancing measures, overcrowding is associated with inadequate sanitary conditions (e.g., lack of running water and ventilation), nutrition, and health care in prison. Despite the lack of reliable national statistics on COVID-19 infection and deaths in the Brazilian prison population and the possibility that many positive cases went underreported due to limited testing, there is evidence that the infection rate in prison was significantly higher than in the general population.[5]

The possible impact of COVID-19 in overpopulated prisons has been acknowledged since the beginning of the pandemic by scholars, activists, governments, and organizations around the world, and calls for the release or non-incarceration of low-risk offenders and those in vulnerable groups have been widely voiced.[6] During the pandemic, international organizations such as the Regional Office for Europe of the World Health Organization, the Inter-American Court of Human Rights, and the Inter-American Commission on Human Rights explicitly called for the prioritization of non-custodial measures, such as parole, home confinement, and early release.[7] Failing to take measures to protect the prison population during the COVID-19 crisis was possibly a breach of several international human rights norms and standards.[8]

In Brazil, the main initiative for releasing prisoners during the pandemic came from the National Council of Justice (CNJ for its Portuguese initials), an agency that integrates and oversees the judiciary. On March 17, 2020 (six days after the World Health Organization declared the novel coronavirus outbreak a global pandemic), the CNJ issued Recommendation 62 urging courts to release or avoid detaining people with a higher risk of serious disease in case of COVID-19 infection and who pose a lower risk for public security.

Despite the severe impact of COVID-19 in Brazil, the recognition of the increased risk among populations incarcerated in notoriously unsanitary conditions, and Brazil's domestic and international human rights obligations, Brazilian courts took few steps to apply the guidance issued by the CNJ. The Supreme Court had the opportunity, which it did not seize, to issue an order obliging trial and appeals courts to consider the heightened risk of COVID-19 when deciding about incarceration, along the lines of the CNJ's Recommendation 62.

This paper examines why Brazil's Supreme Court—which has generally held a progressive stance in high-profile cases related to prisoners' rights and which confronted the government's refusal to act against COVID-19—did not act decisively to safeguard the prison population during the pandemic. Drawing on a strategic account of judicial behavior, this paper argues that the Supreme Court's self-restraint can be better explained through its limited capacity to enforce a decision obliging lower courts to consider the risks posed by COVID-19 in decisions regarding incarceration.

COVID-19 in detention settings: The response by the National Council of Justice and the courts

In February 2020, the Brazilian Ministry of Health declared COVID-19 a public health emergency. In March, 2020, the CNJ issued Recommendation 62 asking judges to reconsider, in each case that came before them, the need for pretrial detention, especially for (1) pregnant or lactating women, mothers or carers of young children or people with disability, elderly people, indigenous people, and people with disability or health conditions that increase the risk of death or severe disease if infected; (2) people detained in institutions running above total capacity or without dedicated health care professionals; and (3) people provisionally detained for more than 90 days or accused of crimes that do not involve violence or the threat of violence against people. The recommendation also called for the early release of those in groups (1) and (2) serving prison sentences (i.e., those who had already been found guilty). On September 15, 2020, the CNJ amended the recommendation, excluding from its scope those convicted of belonging to a criminal organization or convicted of committing financial crimes, corruption, heinous crimes (as defined in Statute 8,072/90), or domestic violence against women.

Although the CNJ has no adjudicative power and cannot review judicial decisions, it is responsible for providing guidance to improve courts' efficiency. Its recommendations are not binding on judges but aim to provide a framework for adjudication and purportedly impose an argumentative burden on any judge who decides not to follow them.

Yet the data from the three most populated states in Brazil suggest that the CNJ's Recommendation 62 and the COVID-19 pandemic had a minimal impact on appellate courts' decisions related to incarceration. An analysis of 6,771 habeas corpus petitions decided by the State of São Paulo Court of Appeal found that 90% of such petitions were denied and that neither the pandemic nor the CNJ's guidance was usually relevant to the outcome of a case.[9] A study in the State of Rio de Janeiro Court of Appeal analyzed a sample of 137 petitions for home confinement and found that judges granted only one due to the COVID-19 threat.[10] Similar conclusions were found in the State of Minas Gerais Court of Appeal.[11]

The same pattern was found in high courts during the initial months of the pandemic. The Superior Court of Justice, which oversees all appellate courts, saw an increase in habeas corpus petitions in 2020. However, there was no increase in the proportion of writs of habeas corpus granted compared to the previous year.[12] The same conclusion applies to the Supreme Court, the highest court in

Brazil, where justices rarely mentioned the risks associated with the pandemic to grant a writ of habeas corpus.[13]

Further investigation is warranted into the Supreme Court's inaction, as it extends beyond its decision on habeas corpus petitions, but a point of clarification is pivotal before we proceed. Brazil has a hybrid model of judicial control of constitutionality.[14] The *diffuse review of constitutionality* can be exercised by any court when, in a concrete case, the constitutionality of a norm, policy, or decision is questioned. The Supreme Court is the final appellate court for the diffuse control of constitutionality, which gives the court jurisdiction to review decisions by criminal courts, including via habeas corpus petitions. In contrast, the *concentrated control of constitutionality* is exercised through actions filed directly before the Supreme Court. These *direct actions* historically have been used to control the constitutionality of norms in the abstract, although they also encompass challenges against executive and legislative omissions. In recent years, a specific type of direct action called "action against a violation of a fundamental right" (*arguição de descumprimento de preceito fundamental*, or ADPF) has been used for filing *structural cases*, which aim to protect the rights of large groups via judicial rulings ordering multiple public bodies to promote broad reforms in policy and institutional practices.[15]

In two direct actions—ADPF 347 and ADPF 684—the Supreme Court had the opportunity, which it did not seize, to rule that measures similar to those in Recommendation 62 were binding on the courts during the pandemic. This ruling would have given the Supreme Court the power to promptly review trial and appeals courts' decisions about incarceration that failed to consider the risks of COVID-19. Brazilian law provides that a judicial decision from any court that conflicts with a Supreme Court ruling in a direct action can be challenged through a constitutional complaint (*reclamação constitucional*) filed directly before the Supreme Court—that is, without going through a lengthy appeal process. In the absence of a binding Supreme Court order, lower courts were allowed to brush aside the CNJ's recommendation and to disregard the risks of COVID-19 in decisions about the detention of individuals.

But why did the Supreme Court fail to change its practices and force lower courts to change theirs concerning imprisonment when the fundamental rights of the prison population faced such a grave and imminent threat?

Explaining the Supreme Court's lack of decisive action

It could be argued that the Supreme Court's refusal to take more decisive action to reduce incarceration during the pandemic reflects the negative social attitude toward the prison population in Brazil, seen by many as responsible for their own condition and a threat to others and hence undeserving of rights protection.[16]

However, this explanation contradicts the fact that the Supreme Court held progressive stances in prominent judgments on the issue of the prison population's rights. In 2015, it declared an "unconstitutional state of affairs" in the prison system and ordered the investment of public funds to improve the conditions in prisons.[17] In 2018, the court ruled that judges shall consider the release of all women provisionally detained who are pregnant or the carers of young children or people with disability.[18] The court also set a binding precedent establishing that courts have the power to order states to improve the material conditions in prisons when there is a risk to the human rights of prisoners (*Tema 220*). In October 2023, it set another binding precedent stating that custodial sentences shall not be imposed on low-level drug dealers in cases with no aggravating circumstances (*Súmula Vinculante 139*). In October 2023, the court reiterated that there is an "unconsti-

tutional state of affairs" in the prison system and, among other things, ordered the federal and state governments to develop and execute a comprehensive plan to address this situation.[19] In these cases, the court aimed at protecting prisoners' rights and reducing prison overcrowding.

It is also important to remember that the CNJ was chaired by Dias Toffoli, the chief justice of the Supreme Court, at the time when Recommendation 62 was issued. Toffoli championed the measure as an imperative response to extraordinary circumstances. He stated that the judiciary could not remain inert in the face of the pandemic and emphasized the need for swift and uniform action to avert "irremediable damage."[20] More recently, in July 2023, Justice Rosa Weber, a Supreme Court justice acting as the chairwoman of the CNJ, launched a nationwide judicial task force directing lower courts to reconsider the detention of thousands of prisoners nationwide. As outlined by the CNJ, the overarching objective of this administrative measure was to ensure "strict adherence to legislation and binding precedents set forth by the Supreme Court and alleviate congestion within the state prison system."[21]

One could question the practical impact of these decisions and initiatives. Still, they show a clear legal policy position: mass incarceration and the current conditions in prison breach human rights, and the courts' practice and culture of incarceration that contribute to this result need to change. They certainly go in the opposite direction of reflecting or reinforcing the prevalent negative attitude regarding the prison population in society and in the lower courts.

Another hypothesis is that the Supreme Court acted cautiously to avoid confronting the federal government. The president at the time was Jair Bolsonaro, a tough-on-crime populist who openly advocated for more incarceration and state violence.[22] His followers widely supported his negative attitude toward the rights of criminals and prisoners.[23] Moreover, Bolsonaro and his supporters were openly hostile toward the Supreme Court, threatening disobedience, military intervention, and physical violence. In this context, a ruling leading to the mass release of prisoners could have escalated the tension between the president and the court and increased the risk of institutional instability.

However, this is not a compelling rationale for the court's behavior concerning the prison population during the pandemic. The Supreme Court openly took positions against President Bolsonaro and his supporters on multiple previous occasions.[24] For instance, it ruled in favor of compulsory COVID-19 vaccination, which Bolsonaro vehemently opposed.[25] The court also took away decision-making power from the president to allow state and city governments to impose restrictive social distancing measures.[26] Furthermore, the court defended the electronic voting system against repeated attacks from Bolsonaro on its reliability and opened criminal proceedings against pro-Bolsonaro militants. All these decisions elicited strong backlash from Bolsonaro and his supporters, but no substantiated evidence suggests that the court yielded to the threats.

Because these two hypotheses (the negative attitude toward the prison population and the fear of confrontation with Bolsonaro and his followers) cannot satisfactorily explain the Supreme Court's behavior on the issue of incarceration during the pandemic, this paper proposes an alternative explanation that can be backed up by stronger evidence: the Supreme Court did not make a binding decision ordering lower courts to consider the heightened risk of COVID-19 in prison settings because it was aware of the practical constraints related to its capacity to enforce such a decision. This argument will be developed by examining how the Supreme Court handled (1) the most overarching structural case on the issue of the prison population, which was filed before the COVID-19 pandemic, (2) the structural claims that aimed at reducing the

prison population during the pandemic, and (3) a representative sample drawn from a set of 4,247 individual criminal law decisions rendered by the Supreme Court during the pandemic.

ADPF 347 and the Supreme Court's preliminary decision in 2015

As explained above, an ADPF is a direct action filed before the Supreme Court that has been used to bring structural cases in the face of public authorities' failure to protect fundamental rights. The ADPF offers promising opportunities for structural litigation in Brazil, since an argument before the Supreme Court gives more visibility to issues while avoiding the time- and resource-consuming appeal process.

ADPF 347 was filed in May 2015 by a left-wing political party on the grounds that the violence and deprivation suffered by the prison population amounted to a blatant violation of human rights. They argued that this situation resulted from mass incarceration, for which all the branches of power were responsible—the legislative for the highly punitive legislation, the judiciary for excessive use of pretrial detentions and its resistance to disposing of legal alternatives to imprisonment, and the executive for insufficient funding for the prison system.

The Supreme Court issued a preliminary decision in September 2015. All the justices agreed that the "inhumane" status of the prison population caused by mass incarceration constituted an "unconstitutional state of affairs" for which the Brazilian state was responsible. The court was unanimous in guaranteeing the right to a hearing within 24 hours of pretrial detention (a measure beginning to be implemented at the time) and ordering the disbursement of federal funds for the prison system.

Despite the Supreme Court's willingness to interfere with the internal organization of the courts and reallocate public resources, it did not grant any preliminary injunction that could directly interfere with the lower courts' discretion. More specifically, the court refused to order lower courts to consider the inhumane conditions in prison and the alternatives to prison when sentencing or deciding about pretrial detention or regime progression.

The Supreme Court gave three reasons for not interfering with lower courts' decisions. First, it pointed to the need for further debates about the required measures.[27] Second, the existing legislation already required judges to consider the alternatives to incarceration available before imprisoning a person, making a Supreme Court's declaration redundant. Third, an order from the Supreme Court would allow the filing of constitutional complaints against any decision providing insufficient reasons for imprisoning an individual, rendering the Supreme Court's workload unmanageable.

The first and second arguments contrast with several *obiters* in the decision recognizing that the "culture of incarceration" in the courts contributes to mass incarceration in Brazil. They also contradict strong evidence that trial courts' overuse of pretrial detentions and prison sentences is a pivotal contributor to the problem of mass incarceration. More than one-third of prisoners in Brazil are provisionally detained (i.e., held in custody while awaiting trial).[28] A 2019 study by Maíra Rocha Machado et al. analyzed drug trafficking convictions and concluded that the refusal of courts to dispose of the alternatives to prison when sentencing is a "direct contribution" to mass incarceration.[29]

The third argument, regarding workload, seemed to be a key obstacle to granting the requests. Justice Luís Barroso expressed his hesitation to issue an order that would make space for a constitutional complaint against any insufficiently motivated detainment decision.[30] Justice Teori Zavascki referred to the risk of a "flood of constitutional complaints."[31] Justice Gilmar Mendes also considered the possibility of a significant increase in the number of constitutional complaints.[32] Justice Luiz Fux, who voted in favor of issuing wide

orders in the case, unsuccessfully tried to persuade his colleagues in his partially dissenting opinion that the risk of "an epidemic of constitutional complaint" was overblown. He went as far as to propose that the court consider making a declaration to bar the filing of constitutional complaints in this particular case.[33]

Yet the majority's concern was credible. According to Brazil's Civil Procedure Code, constitutional complaints can be filed directly before the Supreme Court against any judicial decision that contradicts a Supreme Court decision in a direct action, such as an ADPF. Therefore, had the majority ruled that courts were obligated to justify not choosing alternatives to imprisonment or not considering prison conditions when deciding on incarceration, the aggrieved party would have had the option to file a constitutional complaint.

Considering that Brazil's prison population exceeds 600,000 people, that any decision regarding incarceration is fact specific and fact intensive, and that the Supreme Court has no power to deny certiorari in cases of constitutional complaint, then granting the requests that interfere with lower courts' decisions could have led to an unmanageable increase in workload. The same concern also seemed relevant during the pandemic.

Structural cases at the Supreme Court during COVID-19

The Supreme Court did not make a decision on the merits of the case ADPF 347 until October 2023. However, following the emergence of the COVID-19 pandemic, a nongovernmental organization filed a petition within ADPF 347 requesting the Supreme Court to order lower courts to consider releasing prisoners at high risk of developing severe disease in case of infection and whose detention was related to crimes that did not involve violence or serious threat. In March 2020, a preliminary decision was made by Justice Marco Aurélio Mello "urging"—but not ordering—courts to consider these measures.

The full court, however, soon overturned this interim measure on procedural grounds and expressed concerns about the breadth and intrusiveness of the preliminary injunction. The Supreme Court recognized the threat to the prison population and mentioned approvingly the CNJ's Recommendation 62. However, the Supreme Court refused to issue an order that could be interpreted as an imposition on lower courts to consider the risks of COVID-19 in their decisions and review thousands of cases. According to the majority opinion, the CNJ's *recommendation* was a better approach than a Supreme Court *order*.

A few weeks after the full court's ruling, Justice Fux wrote an op-ed praising the "humanitarian motives" behind Recommendation 62. Nevertheless, he defended the Supreme Court's decision that refused to set a general rule directing lower courts' decisions. He argued that in each individual case courts should weigh the risks of COVID-19 to the prisoner's health against the risks of their release to public safety.[34] Ironically, lower courts often cited the full court's decision to brush aside the CNJ's recommendation and deny habeas corpus petitions based on the risks associated with COVID-19. Lower courts often argued that, as per the Supreme Court, they were *advised* but not *obliged* to consider the pandemic in their decisions.[35]

The Supreme Court missed another opportunity to issue a binding order on the same issue when ADPF 684 was filed in May 2020. The claimant argued that mere recommendations were insufficient to convince courts to consider the risks of the pandemic when deciding on imprisonment, requesting the court to order trial courts to release from preventive detention or transfer to house arrest those who had not committed crimes involving violence or severe threat and were at high risk of dying from COVID-19. The Supreme Court never ruled on ADPF 684, which is still on its docket.

The Supreme Court's omission in ADPF 347

and ADPF 684 contrasts with a preliminary order made in the Collective Habeas Corpus 188,820 on December 2020. The claimants here argued that Recommendation 62 was largely being ignored and requested the immediate release of prisoners who met conditions similar to those in this recommendation. Justice Edson Fachin ordered courts (1) to anticipate the progression to a less strict regime for those serving a sentence or (2) to grant conditional release or house arrest for those provisionally detained in institutions running above their designed capacity, belonging to a group with higher risks of severe disease in case of COVID-19 infection, and whose related crimes did not involve violence or serious threat.

Justice Fachin, however, conceded "escape routes" for lower courts: a prisoner did not have to be released if there were no confirmed cases of COVID-19 in the institution where they were located or if preventive measures had been adopted and adequate health care was available. Release from prison could also be denied if there was no substantial health risk for the prisoner but the risk for public security if they were set free was high. In other words, a case-by-case approach was not excluded.

A chamber of the Supreme Court confirmed this preliminary decision, which can be considered a structural case since it is applicable to whole categories of prisoners rather than specific individuals and is directed to all trial and appeals courts. Nevertheless, when deciding on a collective habeas corpus, the Supreme Court exercises a diffuse review of constitutionality, which differs from the concentrated control exercised in a direct action, such as an ADPF. The occasional noncompliance with the ruling would have to be challenged through the normal appeal process rather than through a constitutional complaint filed directly before the Supreme Court.

Echoing Justice Fux's op-ed, Justice Fachin stated that the release of a prisoner would depend on the analysis of the facts in each case and that lower courts were in the best position to make such an assessment. Subsequently, Justice Fachin dismissed requests to release individual prisoners who had directly petitioned the Supreme Court asserting fulfillment of all conditions. Justice Fachin contended that appeals against decisions contravening the precedent set by Collective Habeas Corpus 188,820 should follow the regular appeal process.[36]

The Supreme Court's grant of a collective habeas corpus, which involved issuing orders it had previously denied during the pandemic in ADPF 347 and had not addressed in ADPF 684, reverberates the notion that, despite its stated legal policy inclination, the court harbors apprehensions about becoming inundated with constitutional complaints—and being forced to review thousands of fact-specific individual decisions regarding incarceration during the COVID-19 pandemic.

COVID-19 and habeas corpus petitions by the Supreme Court

Despite avoiding decisions that could increase the number of constitutional complaints, the Supreme Court received thousands of individual habeas corpus petitions seeking release from prison based on the augmented risks due to COVID-19. This volume of petitions decided by the Supreme Court could challenge our hypothesis that it would be concerned about its capacity to judge a high number of constitutional complaints. Therefore, it is important to understand the volume of habeas corpus petitions filed at the Supreme Court and how they were handled.

Using the Supreme Court's website search tool, we developed automated routines using Python to collect and organize all Supreme Court decisions issued between January 1, 2020, and June 22, 2021, containing the words "covid," "pandemia" (pandemic), or "corona."[37] This time frame covers

the harshest period of the COVID-19 pandemic, which became less deadly as vaccination coverage increased over the first half of 2021.

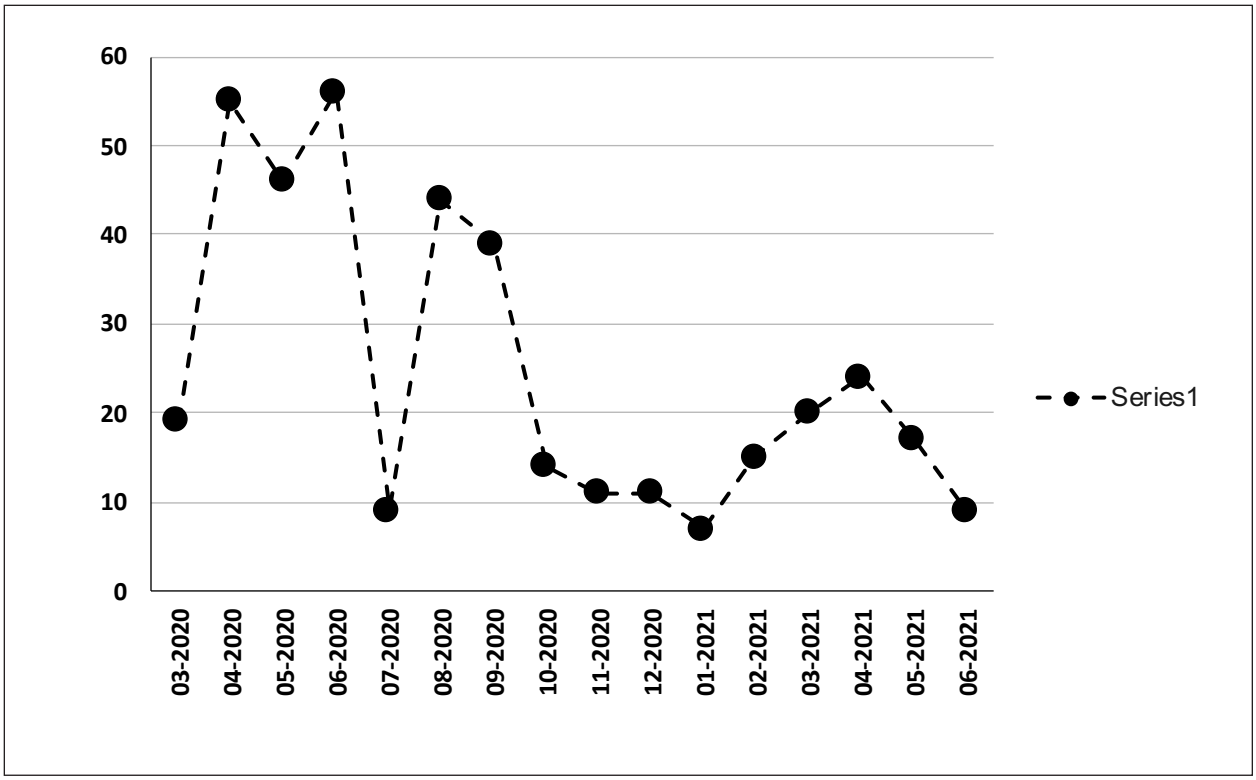
All results were aggregated, and duplicates were excluded, resulting in 5,412 decisions. With the support of machine learning algorithms, we organized these decisions into clusters based on text similarity. As a result, we found 4,247 decisions (78%) in criminal law cases. This is the material analyzed in this paper.

We then drew a representative sample of 396 decisions (95% confidence interval, ±4,8% margin of error) and developed a Google Forms questionnaire to extract data from the cases. To reduce human error, each decision was classified by random sets of three researchers, with the unanimous or majority response (i.e., when at least two out of three researchers indicated the same answer) prevailing.

In our sample, claimants requested the revocation of pretrial detention (n=249), transfer from prison to house arrest (n=180), application of alternative precautionary measures to custody (n=136), and progression to a less restrictive detention regime (n=41). Most of the 396 criminal law decisions were issued in response to a habeas corpus petition (83%, n=330), with a predominance of individual habeas corpus (n=327) compared to collective habeas corpus (n=3). Constitutional complaints represented 12% of the case sample (n=46) and other types of appeals represented 5% (n=19).

Most constitutional complaints sought the enforcement of binding precedents unrelated to the pandemic; COVID-19 was only marginally relevant to the claims. Without a binding precedent specifically addressing the grounds for reviewing

Figure 1. Monthly distribution of the sampled decisions



imprisonment due to the pandemic, a habeas corpus petition was the main instrument available to reach the Supreme Court. This section will analyze decisions rendered in response to such petitions.

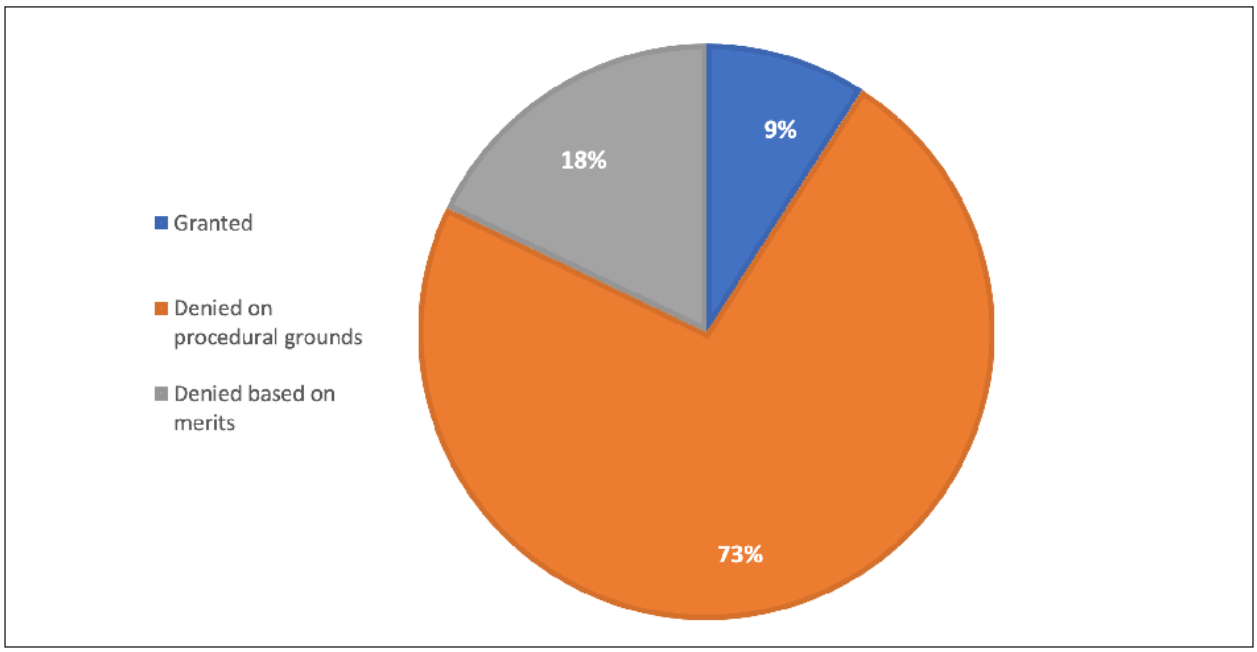
In a habeas corpus petition, the decision rendered by an individual Supreme Court justice tends to be definitive.[38] Although it is possible for the aggrieved party to appeal to a chamber of the court—which has two chambers, each with five justices—chambers rarely overturn single-justice habeas corpus decisions. Indeed, in our sample we found only one reversion out of 26 appeals filed against an individual decision.

In our sample, the Supreme Court denied 300 of the 330 habeas corpus petitions (91%). Seventy-three percent (n=241) of the habeas corpus petitions were dismissed on procedural grounds that prevented an analysis of the merits. Only 18% (n=59) of habeas corpus petitions were denied based exclusively on merits (in these cases, the court did not use any procedural argument to state that the habeas corpus should be dismissed) (Figure 2).

In 94% (n=227) of the cases in which the habeas corpus was dismissed on procedural grounds, the Supreme Court stated that it could not process a habeas corpus petition in a case where the jurisdiction of lower courts had not yet been exhausted. This reasoning, rooted in the court's own precedents, implies that the Supreme Court's jurisdiction is limited to cases that have culminated in a definitive judgment at the lower court level, except when there exists a "blatant illegality" in the detention. Therefore, as a general principle, a habeas corpus petition cannot serve as a means to bypass stages in the appeal process.

The term "blatant illegality" lacks a precise definition, often being described by the Supreme Court using synonyms like "teratological" and "manifestly illegal." This circumstance gives rise to apprehensions concerning the vagueness and inconsistency surrounding the circumstances under which the Supreme Court decides to direct the re-

Figure 2. Outcome of habeas corpus decisions related to the COVID-19 pandemic decided by the Supreme Court between January 1, 2020, and June 22, 2021



lease of a detainee when the possibility of an appeal to a different court exists.

Another common procedural argument used by the Supreme Court was that analyzing the habeas corpus petition would involve reexamining the factual evidence of the cases, for which the writ is unsuitable. Of the 300 writs denied by the court, 63 (21%) were based on this argument. In these cases, in order to grant the writ, the Supreme Court indicated that the claimants bore the burden of proving that their prison facilities did not provide adequate care, which most claimants could not do. However, there were a few cases in which this argument was not mentioned, and the Supreme Court found sufficient proof of the need for medical treatment unavailable within the claimant's prison facility.[39] Again, the court applied a procedural rule for dismissing most habeas corpus petitions while retaining the power to grant it in selected cases.

In sum, the Supreme Court managed to control the floodgates by dismissing most cases through procedural rules without analyzing the merits of the cases, while at the same time retaining discretion to grant requests in vaguely defined exceptional circumstances. The procedural obstacles to having a habeas corpus writ granted by the Supreme Court existed long before the COVID-19 pandemic. However, the Supreme Court maintained these obstacles despite the threat of COVID-19 to the prison population.

In a counterfactual scenario in which structural injunctions in direct actions were granted to compel lower courts to consider pandemic-related risks, individual cases would have been expedited directly to the Supreme Court via constitutional complaints. This would have bypassed the appeal process, which often spans months or years in lower courts, and would have been less susceptible to procedural dismissals. While the Supreme Court could have devised procedural grounds for rejecting constitutional complaints, dismissing habeas corpus petitions would likely be less detrimental to the court's standing and credibility than failing to uphold its own structural decision.

Discussion

The literature frequently delves into the topic of courts' institutional capacity when exploring the potential avenues for driving social change and protecting the rights of vulnerable groups through structural litigation.[40] The argument centering on courts' limited institutional capacity typically refers to the alleged lack of power of the judiciary to compel the government to act, as well as the limited resources and expertise of judges to perform tasks that are traditionally seen as falling under the responsibility of the executive and legislative branches. This paper, however, shows that institutional capacity can also be an issue when courts are performing roles that are unquestionably within their domain, such as reviewing decisions about the imprisonment of individuals.

Not everyone may agree that a court's apprehensions regarding its constrained institutional capacity, which encompass concerns about workload, constitute valid legal grounds in a judgment, particularly when the human rights of a vulnerable population are involved. Additionally, it is uncommon for a court to openly acknowledge such reasons for rejecting a request. However, that courts consider their capacity to enforce a decision should not be surprising if judges are seen as strategic agents who decide based on their legal policy preferences as well as on their personal (e.g., workload and reputation) and institutional (e.g., prestige and power of the courts) interests, the behavior of other actors, and the institutional context in which they act.[41]

Strategic courts will be attentive to the behavior of other actors, including the risk that those to whom their decisions are directed may not follow their orders. This risk is higher when courts try

to impose measures that conflict with established practices, such as the lower courts' overreliance on imprisonment to respond to crime. Noncompliance seriously threatens a court's legitimacy, as it can damage its institutional prestige and credibility.[42] The anticipation of this risk may constrain courts from acting on their legal policy preferences.

Courts have their means to induce compliance. In the case of the Supreme Court's orders addressed to lower courts, the Supreme Court has the power to overturn decisions. Moreover, the Supreme Court does not have to actively monitor compliance, as claimants can bring noncompliance cases. This is significantly less costly than controlling administrative agencies and governments. When courts control other branches, the principal-agent problem and information asymmetry are more accentuated, as are the risk of retaliation against the court and the concerns about its legitimacy in interfering with policy.

However, as this paper shows, there may also be challenges for a high court to enforce compliance against lower courts. Given the procedural rules and the prevailing judicial practice, the volume of expected constitutional complaints against decisions contravening a binding Supreme Court order on incarceration during the pandemic would be very high. Apart from the volume, Supreme Court justices see these decisions as involving difficult trade-offs between prisoners' rights and public safety. Striking the right balance would involve considering, for each claim, complex factual issues such as the conditions of the inmate, the situation in the prison where they are detained, and the risks of her release to the public.

Granting structural requests in direct actions such as ADPFs would have created a dilemma for the Supreme Court. On the one hand, if it abdicated from exercising its jurisdiction to enforce its structural decision, it would have risked being perceived as lacking authority over lower courts. On the other, the Supreme Court was—and is—probably unable to properly judge thousands of constitutional complaints seeking to review lower courts' decisions.

This task would have consumed much of the court's resources, energy, and time. Other things being equal, judges (like people in any other profession) likely prefer smaller rather than larger workloads and modulate the time spent on any issue to control their agenda and be able to focus on other priorities, including cases that may have a more significant impact on law and policy.[43] From a strategic perspective, it was rational for the Supreme Court to avoid reviewing an unmanageable volume of low-visibility decisions that were so fact specific, especially when the court was already making several decisions with broad implications for the responses of the Brazilian state to COVID-19.[44]

Therefore, endorsing Recommendation 62 and making orders to lower courts via a collective habeas corpus but not granting similar (but binding) orders when exercising concentrated control of constitutionality was not necessarily a contradiction (although it was disappointing from a human rights perspective). It may be seen as the strategic compromise found by a court that tried to advance its preferred legal policy, but up to the point that it did not risk damaging its authority if ignored by lower courts or opening the floodgates that it controlled through procedural rules to dismiss habeas corpus petitions.

Conclusion

Brazil's Supreme Court decisions during the COVID-19 pandemic on the issue of incarceration exemplify how practical concerns about institutional capacity may stand in the way of structural decisions that could protect the human rights of the prison population. In our view, this is the strongest explanation for why the Supreme Court failed to take decisive action to protect the prison population during the pandemic. Future research aimed at assessing how courts navigate the trade-off between

advancing their policy preference and the potential burden of escalated workload could further test the strength and generalizability of these findings.

It is noteworthy that in October 2023 the Supreme Court finally issued a long-awaited ruling on the merits of ADPF 347. This decision reaffirmed the "unconstitutional state of affairs" in the prison system and ordered the government to develop and implement a plan to address this situation. Additionally, it decreed that lower courts "provide a rationale for not opting for alternative penalties or precautionary measures to imprisonment when such alternatives are feasible, taking into consideration the dire state of the prison system." In contrast to the 2015 preliminary decision in this case, the court, during its deliberations, did not mention the risk of being flooded with constitutional complaints.

It is still too soon to analyze the implications of this decision, especially if there will be an unmanageable volume of constitutional complaints and, if so, how the court will handle them. Future research is essential to ascertain whether there has been a shift in the Supreme Court's position on the issue of constitutional complaints or if our hypothesis has limitations that were not discernable given the available information at the time of writing this paper.

In sum, in addition to analyzing a substantively important and paradigmatic case, this paper sheds light on the limits of structural litigation and constitutional jurisdiction in tackling mass incarceration in Brazil and beyond. Sympathetic judges within independent and powerful courts are a prerequisite for effecting a rights revolution.[45] But even a Supreme Court with a relatively progressive stance and extensive jurisdiction can be restricted by the practical constraints of overseeing myriad fact-specific decisions, encompassing intricate trade-offs rendered by trial and appellate judges. This underscores a lesson that practitioners engaged in strategic litigation at national and international levels should bear in mind in order to adjust their expectations and strategies.

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