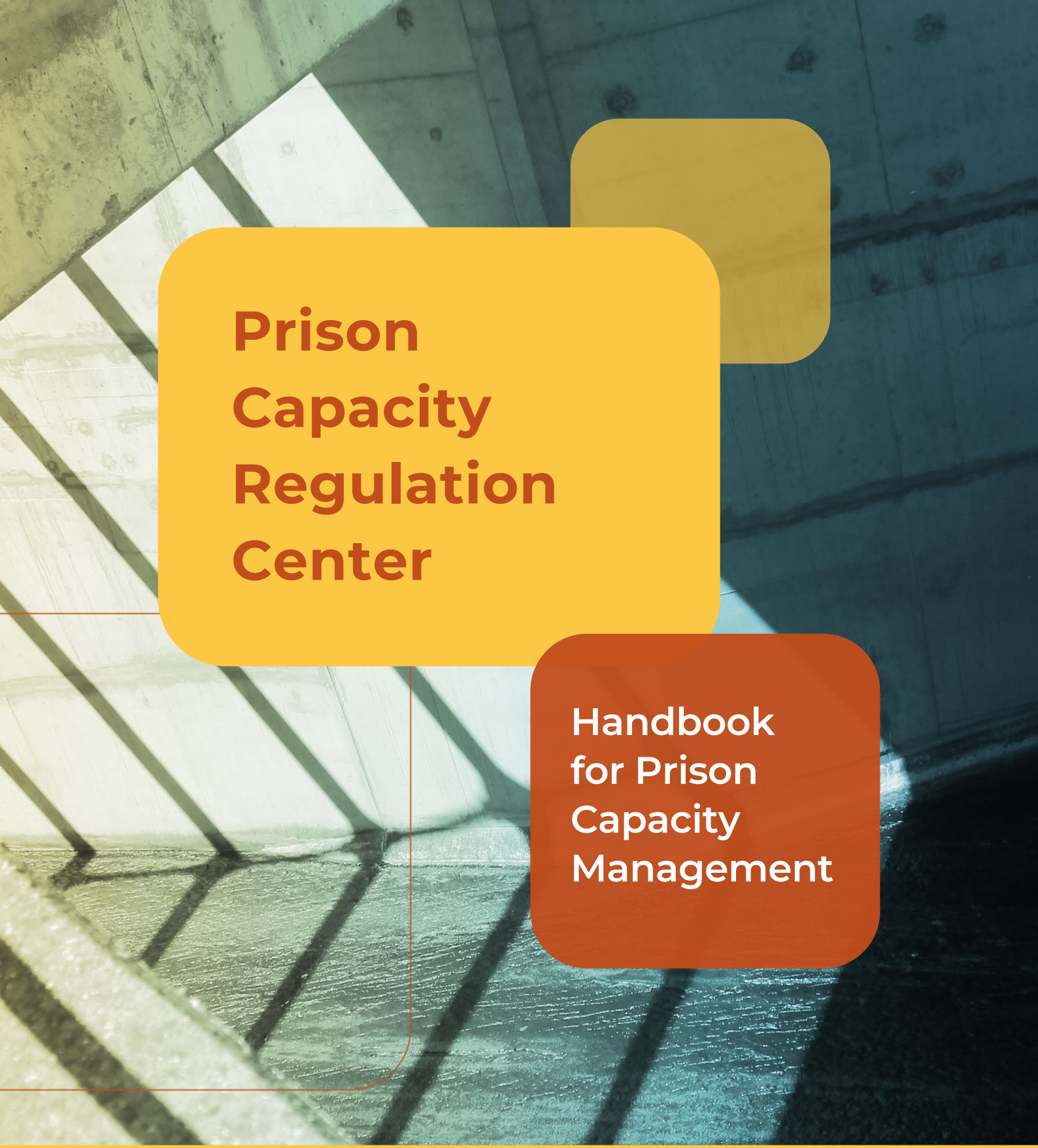

Prison Capacity Regulation Center

Handbook for Prison Capacity Management

SERIES FAZENDO JUSTIÇA | COLLECTION PRISON CAPACITY REGULATION CENTER

SENAPPEN
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COLLECTION PRISON CAPACITY REGULATION CENTER

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Handbook for Prison Capacity Management

BRASÍLIA, 2024

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Foreword

The National Council of Justice (CNJ), in partnership with the Ministry of Justice and Public Security (MJSP) and the Brazilian office of the United Nations Development Programme (UNDP Brazil), develops the Program *Fazendo Justiça* (Doing Justice) establishing a significant milestone in the search for innovative solutions in the field of criminal and juvenile justice.

The program works to qualify structures and services, promotes training, supports the drafting of regulations and public policies, and develops informative documents. These materials include guides, manuals, researches and models that combine technical and normative knowledge with the reality experienced in different places across the country. These products identify good practices and offer guidance to facilitate the immediate and effective implementation of interventions.

The program is aligned with the decision of the Supreme Court in the Claim of Non-Compliance with a Fundamental Precept Lawsuit (ADPF) Nº. 347, which in October 2023, recognized that Brazilian prisons are in an unconstitutional state of affairs and demanded national and local plans to overcome this situation. The program also carries out various actions in the juvenile justice field, following the principle of absolute priority guaranteed to adolescents and young people in the country's norms and laws.

At present, 29 initiatives are being carried out simultaneously, taking into account challenges considering the complete cycle of criminal and juvenile justice, as well as cross-cutting initiatives. Among them is the International Articulation and Protection of Human Rights, which facilitates the exchange of experiences between Brazil and other countries in public policies related to the criminal and juvenile justice cycle.

We recognize that each country faces unique contexts and challenges. We also believe in sharing knowledge and experiences as a tool for collective transformation. To this end, titles selected from the program's different collections have been translated into English and Spanish, such as this publication.

The strategy behind international articulation also includes support for events, courses, and training in collaboration with international partners, as well as the translation into Portuguese of standards and publications aligned with the topics worked on by the program. This promotes a necessary exchange of ideas and practices for a future in which dignity and respect for fundamental rights are common values for all of us.

Luís Roberto Barroso
President of the Supreme Court and the National Council of Justice

Presentation

The Brazilian Constitution is based on our aspirations as a society founded in the democratic state rule of law. At the same time, it fosters social development and respect for fundamental rights and human dignity. In this sense, it is an indelible duty of the institutions, especially in the Judiciary, to ensure that our actions point to these objectives, rejecting deviations to this purpose and acting to transform the present we crave.

In 2015, the Brazilian Supreme Court acknowledged that nearly 1 million Brazilians live in a state of affairs that operates on the margins of our Constitution, with harmful effects on the inclusive development degree to which we are committed through the 2030 United Nations Agenda 2030. As a result, the Program *Fazendo Justiça* () was created to face this scenario. The Program *Fazendo Justiça* is a partnership between the National Council of Justice (CNJ) and the United Nations Development Programme (UNDP) with the support of the Ministry of Justice and Public Security through the National Penitentiary Department.

Even during the Covid-19 pandemic, the program has been structuring deliveries based on collaboration and dialogue between different actors throughout the country. As a result, there are 28 actions developed simultaneously for different phases and needs of the criminal justice system cycle and juvenile justice cycle, which include facilitating services, strengthening the normative framework, and producing and disseminating knowledge. In the context of this last objective, this publication is an integral part of a robust catalog that combines advanced technical expertise in accountability and guarantee of rights with practical guidance for immediate application across the country.

This Handbook offers a valuable contribution to approaching the issue of mass imprisonment. This historical problem violates the individual's fundamental rights and feeds a cycle of violence in and out of prisons. Evidence shows that the measures adopted do not achieve the efficacy we have established, being necessary innovative solutions based on a long-term systematic approach to understanding a consistent and measurable impact.

From the international and national research perspectives regarding prison population reduction, this publication presents strategies to deal with the inmate's entries and exits, including tools for dimensioning possible accommodations, technological updates, and administrative roles. This procedure is part of a mosaic of possibilities to implement a Prison Capacity Regulation Centrer, adapted to the diversified local realities and centralized on the Judiciary Branch, which acts as an interinstitutional articulator. The objective is to support structuring and efficient intervention to revert the unconstitutional state of affairs represented by the Brazilian Prison System.

Luiz Fux
President of the Supreme Court and the National Council of Justice

INTRODUCTION

1 Introduction

This Handbook is a reference tool for implementing a Prison Capacity Regulation Center captained by the Judiciary System. For that matter, this document synthesizes a profound effort in the analysis of the experiences, both national and international, dedicated to transforming the Brazilian Prison System degrading conditions by regulating the person transit inside and outside the prison system through spacial and administrative guidelines. In addition, we sought to offer practical inputs that allow Brazilian magistrates to lead the way in facing the structural problem of overcrowded prisons.

Also, the Handbook represents a milestone in the National Council of Justice production. The CNJ Department for Monitoring and Inspection of Prison and Juvenile Systems (DMF) have been consistently acting to plan and spread the Judiciary policies to overcome historical problems concerning our prison system. Furthermore, from the Brazilian Supreme Court's decision in an Claim of Non-compliance with a Fundamental Precept Law Suit — ADPF Nº. 347/2015, it became urgent to rely on the role of the magistrates and Judiciary members to face the penal system "unconstitutional state of affairs".

Those actions focus on rationalizing the prison system entries, enhancing the deprivation of liberty sentences' conditions, and qualifying the recently released people's needs with informational system updates, management tools, and data management. In this sense, the DMF's mission is to plan and articulate actions nationwide, alongside the courts and other criminal justice actors, such as the Executive Branch, Public Prosecutor's Office, Public Defender's Office, legal assistance, and civil society, to the success of local initiatives.

With interinstitutional close coordination, this Handbook is a product of the **Program *Fazendo Justiça***, a renewed partnership cycle between the CNJ and the United Nations Development Programme (UNDP). With full support from the Ministry of Justice and Public Security, this Handbook focuses on reforming and optimizing the Brazilian Penal System cycle. The Program develops actions aligned with the Courts throughout the country. Furthermore, it focuses on sustainable initiatives promoted within the framework of this partnership since 2019 through the former Program *Justiça Presente*. From Judiciary protagonism, the Program *Fazendo Justiça* splits into four main areas: Hub 1 is oriented to penal proportionality; Hub 2 focuses on the juvenile justice system; Hub 3 is centered on intramural citizenship; finally, Hub 4 is dedicated to information technology and biometry for civil identification. Thus, the program supports creating and enhancing products, structures, services, event promotions, training and qualification, knowledge products, and regulatory acts.

A multitude of projects is being developed simultaneously, focusing on solid results and long-term sustainability. The Program *Fazendo Justiça* works alongside the **Sustainable Development Goals** from United Nations, primarily objective 16, which deals with "Peace, Justice, and Strong Institutions".

Furthermore, it is essential to point out that this Handbook is under the **National Strategy of the Judiciary for 2021-2026**, instituted by the CNJ Resolution Nº. 325/2020. This resolution results from democratic and participative collaboration within the Collaborative Governance Network. The resolution establishes the institutional and interinstitutional Judiciary System guidelines for the next sixty years. It is crucial to make it clear that the National Strategy starts by recognizing the Judiciary macro challenges, among which is the necessity for the "improvement of Criminal Justice management". In the CNJ Resolution Nº. 325/2020, it is mandatory the adoption of "injunctive reliefs against criminality, fostering criminal system improvements through a better sentence, alternatives to imprisonment, and investment in restorative justice. Also, it is fundamental to improve the prison system and establish mechanisms for minimizing the feeling of social impunity and insecurity".

Furthermore, this strategy seeks to "reduce the number of criminal cases, reduce the imprisonment rates and foster care actions to people held in custody or already released, aiming reoffending reduction; and create a Criminal Justice perspective bonded with social justice". The normative also impels the Judiciary to make efforts alongside other bodies of the criminal justice system to deal with irregularities and improve administrative routines.

Prison overcrowding is a phenomenon of multifactorial causes, from inadequate investments, legislative obstacles, and excessive use of the deprivation of liberty sentences to the slowness of criminal procedures and enforcement. Addressing these problems requires an articulated intervention between different authorities and institutions. Moreover, after the exhaustion of old and inefficient models, the confrontation of prison overcrowding requires innovative initiatives that comprehend the deprivation of liberty sentences and alternative measures systemically, defining practical standards to face this structural problem in a planned and continuous way.

In order to fulfill this purpose, the **Prison Capacity Regulation Center** presents an effective cost-benefit solution to achieve these objectives. Therefore, we divided this Handbook into four chapters. The first chapter explains the reasons and possible benefits of implementing the Center. The second describes the Prison Capacity Regulation Center's key aspects and definition. The third chapter has dozens of tools at the Judiciary System's disposal, serving as practical guidelines for penal regulation. Also, it allows the production of adapted models that fit the local necessities. Finally, in the fourth chapter, we discuss some possibilities in Judiciary governance as well as the roles of the Executive Branch and their shared attributions.

Lastly, we thank Professor Rodrigo Duque Estrada Roig, a remarkable advocate for the *numerus clausus* principle introduction into the Brazilian Prison System, and his vital contributions to reviewing this Handbook. His thoughts allowed us to expand the scope of the references analyzed and, as a result, to deepen the study of possibilities for prison capacity regulations in prisons through close coordination and application of institutional tools.

WHY IMPLEMENT A PRISON CAPACITY REGULATION CENTER?

2 Why implement a Prison Capacity Regulation Center?

Since 2017, after overtaking Russia, Brazil has reached **the third position in the absolute number of people arrested worldwide**[1], with the highest rate per 100,000 inhabitants (357) in South America[2], going against many world policies regarding imprisonment. Various countries are in a downward imprisonment process, such as China, with a decrease of 0.5% in the prison population, United States, with a reduction of 4%. Russia with 9%, and Mexico with 20% (between 2015 and 2018). On the contrary, the Brazilian incarcerated population grew by 14%[3].

Between 2000 and 2017, the Brazilian number of people deprived of their liberty had a three-times upsurge, jumping from 232,000 to 726,000, representing a total increase of 212.93%. The increase is high, above the 40% growth compared with America's population, and 24% worldwide, in the same period (2000-2018)[4]. In the 10-year interval between 2009 and 2019, the prison population went from over 473,000 to over 755,000[5], an increase of 59.61%. If this increase stays constant, in 2029, the Brazilian prison population will reach 1.2 million people, in 2039, 1.9 million, and in 2049, 3 million people will be in prison. **At this rate, the estimative shows that, in 2075, one in ten Brazilians will be in jail**[6].

In parallel with the Brazilian prison population growth, the prison capacity in the Brazilian penitentiary system grew at the same rate, suggesting that the creation of new accommodations cannot solve the phenomenon of prison overcrowding. Between 2009 and 2019, prison capacity rose from approximately 278,000 to 442,000, representing an increase of 58.99%, insufficient to contain the persistent accommodation deficit[7]. In 2009, this deficit corresponded to 194,000 and, in 2019, 312,000[8], representing an average unit value of R$ 49,350.00 for the construction of a prison space[9].

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[1] ICPR, Institute for Crime & Justice Policy Research. **Highest to Lowest – Prison Population Total**. World Prison Brief. Available at: https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_%20taxonomy_tid=All

[2] Ibid.

[3] WPB, World Prison Brief. **World Prison Population List**. 13th edition. WPB: 2021.

[4] Ibid.

[5] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[6] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Modelo de gestão da política prisional:** caderno I: fundamentos conceituais e principiológicos. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/556.

[7] If it considered the number of people under house arrest and peding arrest warrants, the shortage of accommodation in the penal system would be even greater.

[8] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[9] BRAZIL. TCU, Tribunal de Contas da União (Federal Court of Accounts). **Relatório de Auditoria Nº 01804720181.** 2019.

This scenario expresses a national overcrowding rate of 151.9%[10], an equivalent to saying that, for every three individuals in deprivation of liberty, one occupies a facility without suitable accommodation. However, the national index showed significant regional disparities. According to the 2019 National Council of the Public Ministry (CNMP) data, the Midwest has the highest occupancy rate, at 196.45%, while the South has the lowest rate, at 131.30%. In addition, there are states with up to 200% of their maximum capacity, such as Pernambuco (239.16%), Mato Grosso do Sul (230.41%), Amazonas (216.01%), Distrito Federal (212.09%), Ceará (211.58%), and Roraima (200.61%)[11]. There are also penal facilities with an occupancy rate of 1,300% (Novo Gama Public Jail, GO) and 2,681.71% (male wing of the Dr. João Chaves Penal Complex in Natal, RN). According to 2021 CNJ data, the country has 1,267 over-occupied prisons, representing 63.97% of active prison facilities in Brazil[12].

It is worth mentioning that, in 2017, Brazil had 1,507 active prison units, 50% of which were of these establishments originally intended for provisional detainees[13]. Data of National Secretariat of Penal Policies (Senappen) report that, in the 2000s, provisional detainees corresponded to 34.7% of the prison population, reaching the level of 33.18% in 2010 and corresponding to 30.43% in 2019[14]. However, *G1 Monitor da Violência* shows a downward trend with slight deviations — 38.6% in 2015, 37.1% in 2017, 34.4% in 2018, 35.9% in 2019, 31.2% in 2020, and 31.7% in 2021[15]. If the downward trend of individuals charged with provisional detention in Brazil consolidates, most Brazilian penal facilities with inadequate infrastructure will require reforms that can be determined by the Judiciary System, implying new financial costs[16]. For instance, CNJ data show that 10.5% of Brazilian prison facilities are in inadequate conditions (271) and 28.2% are in terrible conditions (727)[17].

According to the most recent data from Senappen, in December 2019, there were more than 755,000 people deprived of their liberty in Brazil, primarily young (44.79%)[18] and black people (66.69%)[19]

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[10] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU-4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[11] BRAZIL. CNMP, Conselho Nacional do Ministério Público (National Council of the Public Ministry). **Sistema Prisional em Números**. Available at: https://www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros.

[12] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Painel de dados sobre as inspeções penais em estabelecimentos prisionais.** Available at: https://paineisanalytics.cnj.jus.br/

[13] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – junho de 2017. Brasília: Senappen, 2019. Available at: https://www.gov.br/senappen/pt-br/servicos/sisdepen/relatorios/relatorios-sinteticos/infopen-jun-2017.pdf

[14] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU-4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[15] G1. **Raio X do sistema prisional em 2021**. Available at: https://especiais.g1.globo.com/monitor-da-violencia/2021/raio-x-do-sistema-prisional/

[16] The Judiciary System shall lawfully impose to the Public Administration tho promotion of measures or building reforms in prison establishments. This rule shall guarantee the principle of human dignity and the individual's physical and moral integrity, in terms of the art. 5, XLIX, of the Federal Constitution; also, it shall not be opposable to the argument of possible reserve nor the principle of separation of powers (BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **Extraordinary Appeal N° 592,581/RS**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=2637302)

[17] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Painel de dados sobre as inspeções penais em estabelecimentos prisionais**. Available at: https://paineisanalytics.cnj.jus.br/

[18] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU-4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[19] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Aprisionamento feminino** – Sistema de Informações do Departamento Penitenciário Nacional (SISDEPEN). Brasília: Senappen. Available at: https://www.gov.br/senappen/pt-br/servicos/sisdepen

with poor education[20]. It is also worth noting that, according to these data, approximately 30% of these incarcerated people are serving pre-trial detention[21].

The problem also affects women. The growth of **female imprisonment** jumped from 5,600 in 2000 to more than 37,000 women in 2019, corresponding to an **increase of 564%**. Even in the face of the First Childhood Legal Framework (Law Nº. 13,257/2016), the publication of the art. 318-A of the Code of Criminal Procedure (2018) and the Collective *Habeas Corpus* Nº. 143,641/SP[22], which determined the substitution of pre-trial detention to house arrest for pregnant women or with children until 12 years old or people with disabilities, were registered in 2019, 1,336 children, 255 lactating e 276 pregnant/parturients in the prison system[23]. Thus, that year, the deficit related to women's accommodations surpassed 4,000[24].

The problems caused by an overcrowded prison system are severe and have been documented in the country for at least 45 years. As early as 1976, the Parliamentary Inquiry Commission (CPI) created a report by the **Chamber of Deputies** to understand the prison situation in the country. From the CPI report, a testimony of a penal facility director stated, "As for the prison overcrowding issue, the explanation would be the reduced number of penal facilities and jails in ruins"[25]. However, 17 years later, in a subsequent report, the new 1993 CPI stated on the same topic: "Not only individuals with provisional detention sentences but also those already convicted by the Justice, are put together in subhuman conditions, prevailing their coexistence system, based on an absolute undervalue of life"[26].

In 1990, **Human Rights Watch's** world report on human rights violations, also known as the "World Report", indicated "concerned about the appalling prison conditions in Brazil". It identified that "in many prisons, the individuals are held into tiny, dark, filthy, damp, and smelly cells, destined for half, third or even fewer occupants than those confined there"[27]. It also points to increased prison violence, including torture, corruption, and other abuses.

Almost ten years later, **Amnesty International** published the report *"Brasil: Aqui ninguém dorme sossegado — violação dos direitos humanos contra detentos"* (Brazil: Nobody sleeps peacefully here — human rights violations against detainees) showing that the situation remained unchanged. It in-

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[20] Ibid.

[21] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU-4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[22] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). ***Habeas Corpus* N° 143,641/SP.** 2018. Available at: https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/HC143641final3pdfVoto.pdf

[23] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU-4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[24] Ibid.

[25] RUDNICKI, Dani; SOUZA, Mônica Franco de. **Em busca de uma política pública para os presídios brasileiros:** as CPIs dos sistemas penitenciários de 1976 e 1993. 2009. Available at: https://core.ac.uk/display/19883940

[26] Ibid.

[27] HUMAN RIGHTS WATCH. **World Report – Brazil**. 1990. Available at: https://www.hrw.org/reports/1990/WR90/AMER.BOU-02.htm#P99_29079

dicated Brazilian prisons as: "violent places, where life is at risk. The individuals live in constant fear of aggression by other inmates". It also highlights that most deaths of people deprived of liberty were not documented or investigated. In addition, it highlights torture practices as well as overcrowded facilities. Describing a prison in Espírito Santo, it noted: "Many individuals sleep on the cement floor, on filthy foam mattresses or a blanket. Where floor space is not even enough to allow everyone to lie down, people resort to various ingenious methods, such as the relay system and the use of hammocks, while some tie themselves to the cell bars so they can sleep"[28].

Regarding another prison facility in São Paulo, it was observed that "up to 10 men were confined 24 hours a day in cells for a single occupant", causing ventilation problems and lack of natural light, generating a "fetid and humid atmosphere"[29].

These issues are related to severe structural problems, with prison overcrowding as a catalyst for degrading conditions and violence. However, the responsibilities for this phenomenon are diffuse and worsen due to the lack of articulated initiatives to face it. In this chapter, five justifications for a population management policy will be addressed: (i) requirement of the legal framework, (ii) rationalization of public spending, (iii) ineffectiveness of specific measures, (iv) contribution to public security, and (v) successful experiences of other public policies.

2.1. The reasons why the legal framework requires long-lasting measures

The first justification for managing the prison capacity is based on a legal imperative that determines urgent and energetic actions to face overcrowding, backed by a vast legal framework supported by international and national sources.

The **Federal Constitution** states that "no one will be subjected to torture or inhuman or degrading treatment" (art. 5, III), "there will be no cruel punishments" (art. 5, XLVII), and "people deprived of liberty are guaranteed the respect for physical and moral integrity" (art. 5, XLIX). Consequently, all these legal rights are subject to serious violation in the overcrowding context, putting the overcrowding problem at the center of constitutional protection of fundamental human rights.

From an infra-constitutional point of view, the Criminal Execution Law (LEP) institutes the excess or deviation of enforcement, as shown in art. 185: "There will be excess or deviation of enforcement whenever any act is practiced beyond the limits fixed in the sentence, in legal or regulatory norms". Likewise, overcrowding constitutes a deviation of enforcement, thus, violating the individual's rights.

This legal interpretation is reinforced by art. 85, *caput*, of the same law, which determines that the "penal establishment must have a capacity compatible with its structure and purpose". instituting the principle of the *numerus clausus* or the Legal Occupancy Rate within the criminal legislation[30].

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[28] AMNESTY INTERNATIONAL. **Brazil: "No one here sleeps safely"**: Human rights violations against detainees, 1999, p. 43. Available at: https://www.amnesty.org/download/Documents/140000/amr190091999pt.pdf

[29] Ibid., p. 44.

[30] GIAMBERARDINO, André Ribeiro. **Comentários à Lei de Execução Penal**. Belo Horizonte: Editora CEI, 2020.

In addition to normative references, the current legal status of the penitentiary system is defined by the Brazilian Supreme Court (STF) as an "**unconstitutional state of affairs**" in a decision granting non-custodial measures in **ADPF 347**[31]. This decision comes from a precedent established by the Constitutional Court of Colombia in a 2013 General Law Judgment T-388. Based on the Colombian decision, the STF reiterates that the recognition of this matter as an "unconstitutional state of affairs" implies the identification of three main assumptions: (i) a situation of generalized violation of fundamental rights; (ii) inertia or repeated and persistent inability of the authorities to change the situation; (iii) the overcoming requires the action not only of one institutional body but a plurality of public institutions[32]. The Supreme Court stated the presence of these presuppositions, being their responsibility to "impose urgent and necessary actions on the Public Powers to remove massive violations of fundamental rights, as well as supervising the effective implementation of such actions"[33].

JURISPRUDENCE

SENTENCE T-388/2013: CONSTITUTIONAL COURT OF COLOMBIA

The ADPF 347 is referenced in the sentence T-388/2013 from the Constitutional Court of Colombia, which recognized the Unconstitutional State of Affairs encountered in the country's penitentiary system based on the understanding that the case presented was one of: (i) massive and generalized violation of the constitutional rights of persons deprived of liberty; (i) state obligations derived from such rights; (iii) the institutionalization of clearly unconstitutional practices in the prison system routine; (iv) the notable lack of urgent and necessary legislative, administrative and financial measures; (v) the necessity of an intervention by various entities, and complex and coordinated actions to solve structural problems.

In the vote of Rapporteur Justice, penitentiary overcrowding was identified: "With the prison deficit exceeding 206,000 vacancies, it is evident that **the overcrowding problem could be the origin of all ills**". Based on the Legislative reports, the Supreme Court recognizes that: "Overcrowded cells cause insalubrity, diseases, riots, rebellions, deaths, and human degradation". This scenario would only lead to the conclusion that there is a generalized violation of fundamental rights in relation to dignity, physical health, and psychological integrity, shedding light on the understanding that prison overcrowding and the precariousness of the units, in addition to defying the legal order, "constitute degrading, outrageous and undignified treatment of the persons in custody". It clearly states: "**The deprivation of liberty sentences in our prisons become cruel and inhuman punishments**. People deprived of liberty become 'garbage worthy of the worst possible treatment', being denied all minimum rights to their safe existence"[34].

[31] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[32] COLOMBIA. Corte Constitucional de Colombia (Constitutional Court of Colombia). **Sentencia T-388**. 2013. Available at: https://www.corteconstitucional.gov.co/relatoria/2013/t-388-13.htm

[33] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF.** 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[34] Ibid.

The STF's precautionary decision also discussed the responsibilities for the current violations stage, with a broad spectrum of deficiency in state actions, attributing them to the three branches of government — Legislative, Executive, and Judiciary — and not only those of the Union but also the states and the Federal District.

It indicated that there are problems both in the formulation and implementation of public penal policies, as well as in the interpretation and application of criminal law, marked by the absence of institutional coordination, highlighting the systematic inertia and incapacity of public authorities to overcome it. In addition to being a landmark of *erga omnes* normative content, this judgment established that several national and international norms are being violated by prison overcrowding. For instance, violation of the rights advocated in the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and the American Convention on Human Rights.

Therefore, this decision considers that there is a breach of a fundamental precept based on the critical situation of prisons in Brazil. Furthermore, due to massive and persistent violation of fundamental rights resulting from structural failures and lack of public policies and whose modification depends on extensive measures of normative, administrative, and budgetary matters. As a result, two main actions were determined: the holding of custody detention control hearings at the national level and non-contingency of the National Penitentiary Fund (FUNPEN).

The ADPF 347 was a landmark in **the jurisprudential evolution of the Supreme Court regarding penitentiary matters**. After 2015, essential decisions were made to reduce and control overcrowding, guaranteeing decent conditions of deprivation of liberty and compliance with the law. Among the reference decisions, a the Binding Precedent Nº. 56, the Extraordinary Appeal Nº. 580,252/MS, Collective *Habeas Corpus* Nº. 143,641/SP, Collective *Habeas Corpus* Nº. 143,988/ES, and Collective *Habeas Corpus* Nº. 188,820/DF.

In 2016, the STF approved the **Binding Precedent Nº. 56**, stipulating a new jurisprudential paradigm, acclaimed by the Inter-American Court of Human Rights[35], which prohibits the occupation in a more severe regime. It says, "The lack of adequate penal establishment does not authorize the maintenance of the convict in a more severe prison regime, observing, in this hypothesis, the standards established in Extraordinary Appeal Nº. 641.320/RS"[36].

[35] "113. This Court finds in the Brazilian Supreme Court decision a clear statement where in a situation of lack of prison accommo¬dations i.e., in a prison overcrowding situation, the Penal Enforcement Judge shall determine the person early release, electronic monitoring or house arrest. [...] The Interamerican Court shall consider the Binding Precedent 56 to be fully applicable as a mandatory precedent to the beneficiaries under provisional measures, in the face of the facts exposed in the present and prior courts resolutions" (I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil**. Resolução da Corte IDH. Assunto do Instituto Penal Plácido de Sá Carvalho. 2018. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf).

[36] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). E**xtraordinary Appeal N° 641,320/RS**. 2016. at: https://jurisprudencia.stf.jus.br/pages/search/sjur352985/false

JURISPRUDENCE

BINDING PRECEDENT Nº. 56 STF: REPRESENTATIVE PRECEDENT

A person must serve his/her sentence in closed regime if there is no accommodation in an establishment suitable for his/her regime. The violation of the principle of individualization of the sentence (art. 5, XLVI) and legality (art. 5, XXXIX). The lack of adequate penal facilities does not authorize the maintenance of the convict in a stricter prison regime. 3. Penal enforcement judges may evaluate facilities planned for semi-open and open regimes to qualify them as suitable for such regimes. Establishments that do not qualify as an "agricultural colony, industrial" (semi-open regime) or "shelters or suitable building" (open regime) are acceptable (art. 33, § 1, b and c). However, there must be no shared accommodation for people in semi-open and open regimes with individuals in closed regime. 4. If there is a shortage of accommodations, the following must be determined: (i) the early release of the convict in the regime with a shortage of accommodations; (ii) electronically monitored release of the convict who leaves early or is placed on house arrest due to lack of accommodation; (iii) the serving of right restrictive penalties and/or educational sentences to the convict who progresses to the open regime. Until the proposed alternative measures are structured, house arrest may be granted to the sentenced person[37].

In 2017, the Constitutional Court signed a thesis in the **Extraordinary Appeal Nº. 580,252/MS** judgment with general repercussions on the State's liability for moral damages resulting from prison overcrowding. The thesis considers that it is the State's duty to ensure minimum humanitarian standards and "it is its responsibility, under the terms of art. 37, § 6, of the Constitution, the obligation to compensate for damages, including moral damages, demonstrably caused to the detainees as a result of the lack or insufficiency of legal imprisonment conditions"[38]. The illegality of detention conditions imposes legal reparation since the convicted persons are sent to prison as a punishment — because of their situation and not for punishment resulting from poor detention conditions[39]. In other words, the conviction serves the purpose of retribution, but the administration of the sentence does not focus on punishment; on the contrary, it aims at the resocialization of the individual. The LEP points out that the objective of the sentence is to "provide conditions for the harmonious social integration of the convict and interned" (art. 1). The afflictive content of the sentence or the pre-trial deprivation of liberty would

[37] Ibid.

[38] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **Extraordinary Appeal N° 580,252/MS**. 2017. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=2600961

[39] STEINBERG, Jonny. **Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa**. 2005. Available at: https://www.csvr.org.za/docs/correctional/prisoncovercrowding.pdf

increase to an extent that it would become illicit or unlawful and could even imply civil liability of the State[40] .

JURISPRUDENCE

BROWN VS. PLATA, SUPREME COURT, USA

The case of Brown vs. Plata, judged by the US Supreme Court in 2013, was a central precedent for criminal treatment in the country. Regarding prison conditions in the state of California, the Court evaluated the case of health care conditions and overcrowding in line with the 8th amendment to the US Constitution, which defines that " cruel and unusual punishments will be inflicted"[41]. It then decided that **overcrowding is the primary cause** of constitutional violations, although it is not the only cause[42]. It also determined a maximum occupancy level above which it will be prohibited for new admissions. The decision resulted in legislative reform and changes in penal policies at the state and municipal levels[43].

The following year, in 2018, the Supreme Court judged the **Collective HC Nº 143.641**[44], which ordered house arrest instead of pre-trial detention for pregnant women or mothers of children up to 12 years of age or people with disabilities, suggesting the application of non-custodial measures. The decision was based on recognizing the critical situation of Brazilian prisons provided in ADPF Nº. 347, along with the harmful impacts they have on newborn children and their mothers, as well as on care and family life. Again, overcrowding was a decisive factor in the Justices' *ratio decidendi*[45]. Therefore, in 2020, the 2nd Panel of the STF judged the **Collective HC Nº 165,704**[46], extending the measures of the HC Nº143,641 to all individuals who are solely responsible for people in the same situation.

In 2018, the Rapporteur Justice of the **Collective HC Nº 143,988/ES**, which dealt with the inhumane conditions of juvenile justice units, granted the order to determine that the deprivation of liberty units did not exceed their projected capacity. Thus, it chose an end to overcrowding in juvenile justice units and presented criteria and standards to be observed by magistrates in overcrowded facilities. The "adoption of the *numerus clausus* principle as a management strategy, with the possibility of implementing new accommodations in the moment of the individual´s admission"[47]. The decision was endorsed by the 2nd Panel of the STF in 2020.

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[40] I/A COURT H.R, Inter-American Court of Human Rights. **Montero Aranguren y otros (Retén de Catia) Vs. Venezuela – Sentencia**. 2006. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_150_esp.pdf

[41] Ibid.

[42] Ibid

[43] Ibid

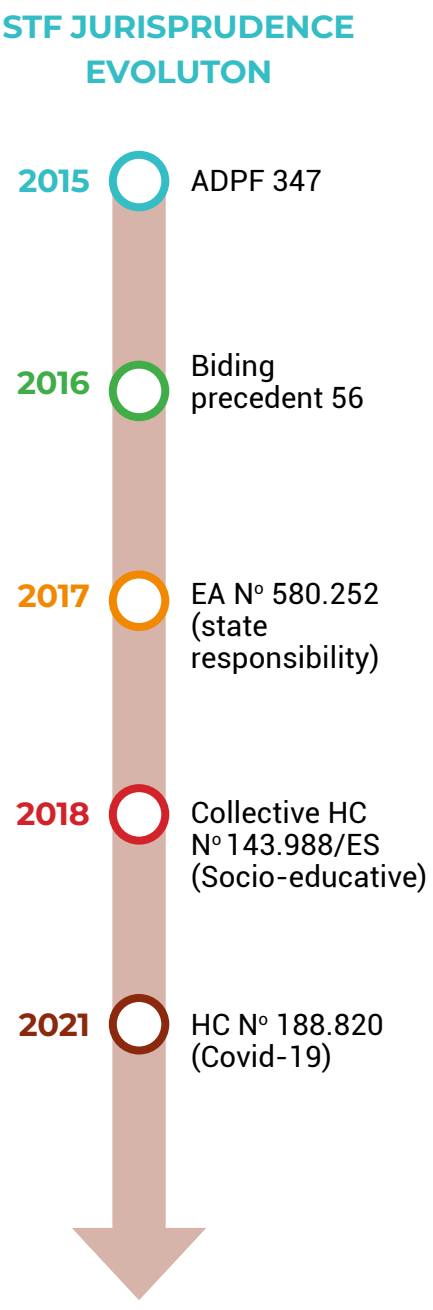
[44] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). ***Habeas Corpus* N° 143,641/SP**. 2018. Available at: https://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/HC143641final3pdfVoto.pdf

[45] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[46] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). ***Habeas Corpus* N° 165.704/DF**. 2018. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=5596542

[47] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). ***Habeas Corpus* N° 143,988/ES**. 2020. Available at: https://www.defensoria.es.def.br/site/wp-content/uploads/2020/01/Superlota%C3%A7%C3%A3o-e-119-por-cento-DPES-Decis%C3%A3o-do-STF.pdf

In the context of the Covid-19 pandemic, the Supreme Court reinforced the decision-making path adopted in this evolutionary line. In 2021, the STF ruled an injunction **Collective HC Nº 188,820** that "it is accepted — after analyzing the peculiarities of the individual cases by the respective criminal enforcement courts, and provided that the subjective requirements are present — the adoption of measures to avoid infection and the spread of Covid-19 in prisons, including the early progression of the sentence". The decision was endorsed by the 2nd Panel of STF and granted "collective *habeas corpus* in favor of all people imprisoned in places beyond their capacity, who are members of groups at risk for Covid-19 and have not committed crimes with violence or serious threat"[48].



In addition to the evolution of jurisprudence of the Superior Courts, the **National Council of Justice (CNJ)**, as a regulatory body for the administrative action of the Judiciary, has approved normative acts with guidelines that strengthen judicial structures and measures aimed at easing penitentiary relief. The **CNJ Resolution Nº. 214/2015**[49] delimited, among the competencies of the Court Monitoring and Supervision Groups (GMFs), to: "inspect and assess the conditions of enforcement of the sentence, security measures, and pre-trial detention and to supervise [...] with the adoption of the necessary measures to comply with the applicable legal provisions and to ensure that the number of people arrested does not exceed the occupancy capacity of the establishments". With the advent of Covid-19 pandemic, CNJ stated the **Recommendation Nº. 62/2020**[50], containing guidelines to the Judiciary to avoid contamination in prison and juvenile justice system, creating guidelines for the reassessment of pre-trial detention and early release measures based on prison overcrowding rate.

In the international sphere, overcrowding is an issue that has been extensively analyzed and referenced

[48] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). ***Habeas Corpus* N° 188,820/DF**. 2020. Available at: https://defensoria.mg.def.br/wp-content/uploads/2020/12/HC188820MC.pdf

[49] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 214**. Provides for the organization and functioning of Monitoring and Supervision Groups (GMF) in the Courts of Justice of the States, the Federal District of Territories and the Federal Regional Courts. Brasília, CNJ, 2015. Available at: https://atos.cnj.jus.br/atos/detalhar/2237

[50] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Recommendation Nº 62/2020**. It recommends that Courts and magistrates adopt preventive measures against the spread of infection by the new coronavirus – Covid-19 within the criminal and juvenile justice systems. Brasília: CNJ, 2020. Available at: https://atos.cnj.jus.br/atos/detalhar/3246

by legal standards of the United Nations, the Inter-American system, and comparable experiences. More than a mathematical question, overcrowding implies serious problems that generate cruel, inhuman, and degrading conditions. First, it entails **an insufficient infrastructure** to accommodate a disproportionate population to its capacity[51], which results in **material conditions of unhealthy and unsafe detention**. Another inherent effect of overcrowding is the **shortage of staff** to deal with many inmates. Finally, this phenomenon generates one of the most severe problems related to overcrowding: **self-government** among people deprived of liberty and the limited or non-existent control exercised by State agents[52].

JURISPRUDENCE

INTER-AMERICAN COURT OF HUMAN RIGHTS

In different decisions, the Inter-American Court of Human Rights (IACHR) recognizes that overcrowded cells cause filth, pervasive smells, and insects[53] and create undeserving environments for night rest without allowing everyone to sleep in their own space. In addition, it points out that overcrowding tends to be also related to the lack of adequate fire prevention mechanisms, worsened by the possible existence of high numbers of non-fireresistant mattresses, for instance[54]. Attributing legal significance to the matter, the Court established that "**overcrowding constitutes a violation of personal integrity**," a right safeguarded by the American Convention on Human Rights[55]. It also demonstrates that overcrowding is one of the **main factors contributing to violence inside prisons**, which favors aggression, humiliation, and severe deterioration of individuals' subjectivity and self-esteem, generating a high risk of reproducing violence with more severe crimes than those that led to the arrest[56].

In addition, there are **insufficient services** provided in the unit. Overcrowding obstructs the regular functioning of food services, health care[57], security, visits, training, and work, among others[58]. When

[51] The United Nations Office for Project Services (UNOPS), an UN agency focusing on infrastructure projects, explains that "a prison facility designed to hold precisely 400 persons may encounter difficulties regarding their septic tanks, because, due to overcrowding, the numbers of persons will probably exceed 600 constantly" (UNOPS, United Nations Office for Project Services. **Orientaciones técnicas para la planificación de establecimientos penitenciarios.** Copenhagen: UNOPS, 2016. Available at: https://www.ungm.org/Public/Notice/126497)

[52] In this scenario, the control of the internal order, in general, remains in the hands of more violent groups, organized for survival or self-defense, with frequent imposition of power by force on other inmates, also commonly promoting inappropriate rules of conduct for the later coexistence in freedom (I/A COURT H.R, Inter-American Court of Human Rights. **Montero Aranguren y otros (Retén de Catia) Vs. Venezuela – Sentencia**. 2006. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_150_esp.pdf)

[53] Ibid.

[54] I/A COURT H.R, Inter-American Court of Human Rights. **Loayza Tamayo Vs. Perú – Sentencia**. 1997. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_33_esp.pdf

[55] Ibid.

[56] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil.** Resolução da Corte IDH. Assunto do Instituto Penal Plácido de Sá Carvalho. 2018, par. 88. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf

[57] Ibid.

[58] I/A COURT H.R, Inter-American Court of Human Rights. **Vélez Loor Vs. Panamá – Sentencia**. 2010. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_218_esp2.pdf

a facility faces an overcrowding situation, "health is worse, hygiene is worse, food is worse, personal safety for both inmates and staff is worse, and so on"[59]. Health issues can be aggravated by overcrowding, mainly when associated with inadequate ventilation, personal hygiene, nutrition, access to drinking water, and medical services. Notably, under these conditions, the vulnerability of the population deprived of liberty is increased to HIV infection, tuberculosis, and other infectious diseases, expanding this population's morbidity and mortality rates[60]. Risks aggravated in the context of the Covid-19 pandemic.

In 2015, the United Nations (UN) revised the Standard Minimum Rules for the Treatment of Pri-soners, renaming them to the **Nelson Mandela Rules**. These rules set universally known standards for prison management and treatment. They recommend that the Member States "endeavor to reduce overcrowding" and "resort non-custodial measures as alternatives to pre-trial detention, to promote increased access to justice and legal defense mechanisms, to reinforce alternatives to imprisonment, and to support rehabilitation and social integration programs"[61].

The Inter-American Commission on Human Rights (IACHR) has also established standards against overcrowding in its **Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas**. Principle XVII states that "the occupation of an institution over its maximum capacity will be prohibited by law" and "will be considered cruel, inhumane or degrading treatment or punishment". It adds that "mechanisms must be establish to immediately remedy any overcrowding situation"[62]. It also emphasizes the roles of judges as responsible actors for addressing the issue, stipulating that they "must adopt adequate measures in the absence of effective legal regulation"[63].

With the Brazilian State as a defendant side, four Provisional Measures dealing with deprivation of liberty units are being heard by the Inter-American Court. In 2017, in the shadow of the massacres in three Brazilian states, in an unprecedented decision, the Court unified the proceedings and requested general information about the Brazilian prison system, which became known as the **prison super-case**.

The Court stated that the facts regarding prison violence and overcrowding under its jurisdiction transcend different states and regions. It also indicates that it is a "phenomenon of greater extent than the four cases brought before this Court and which could be an indication of the possible generalization of a nationwide structural problem of the prison system"[64].

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[59] CARRANZA, Elías. Situación penitenciaria en América Latina y el Caribe ¿Qué hacer? In: **Anuario de Derechos Humanos**, Nº 8, p. 31-66, 2012. Available at: https://anuariocdh.uchile.cl/index.php/ADH/article/view/20551

[60] UNAIDS, Joint United Nations Programme on HIV/AIDS. **HIV/Aids em Ambientes Prisionais: Prevenção, Atenção, Tratamento e Apoio**. New York: 2009. Available at: https://www.unodc.org/documents/lpo-brazil/Topics_drugs/Publicacoes/UNODC_Livro20HIV20Ambiente20Prisional.pdf

[61] UNODC, United Nations Office on Drugs and Crime. **The Nelson Mandela Rules:** The United Nations Standard Minimum Rules for the Treatment of Prisoners. 2015. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

[62] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas**. Washington: IACHR, 2008. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[63] Ibid.

[64] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisionales Respecto de Brasil**. Resolución de la Corte IDH. Asuntos de la Unidad de Internación Socioeducativa, del Complejo Penitenciario de Curado, del Complejo Penitenciario de Pedrinhas, y del Instituto Penal Plácido de Sá Carvalho. 2017. Available at: https://www.corteidh.or.cr/docs/medidas/asuntos_unidad_se_01.pdf

This entire legal framework results in a single consequence: it is necessary to adopt effective measures to control overcrowding and mitigate violations of the rights of people deprived of their liberty. Returning to the framework of the decision in ADPF Nº. 347, the vote of Justice Marco Aurélio problematizes the inertia of public authorities in seeking **"any attempt to change the situation**, once the insufficiency of protection conferred by the current rules has been identified" and leverages the critical role of the judiciary:

> *[...] the role that the Court should play in favor of overcoming the unconstitutionality of the prison system: removing the public authorities from a state of lethargy, provoking the formulation of new public policies, increasing the political and social deliberation on the matter, and monitoring the successful implementation of the measures chosen, thus ensuring the practical effectiveness of the solutions proposed. Furthermore, flexible orders under monitoring prevent judicial supremacy and, at the same time, promote the institutional integration cogitated by Justice Gilmar Mendes, formulated within the framework of* ***cooperative constitutionalism***[65].

The vote of Justice Luiz Fux follows a similar argumentative path, emphasizing the understanding that **"it is responsability of the Judiciary to interfere in a state of inertia and passivity in which fundamental rights are not being fulfilled**". He also considers examples of Comparative Law from constitutional courts in India, South Africa, and Colombia, which have ruled on the implementation of public policies, playing a fundamental role in their monitoring and coordination.

Thus, a robust juridical framework imposes the adoption of consistent, durable, and efficient measures based on coordinated efforts of the branches to develop penal policies to face prison overpopulation.

The efficient management exercised by the Public Power through the regulation of prison capacity represents a preventive action against situations of collapse in prison facilities, which tend to occur when adequate measures for previous control of the proportional relation between individuals and accommodations are not adopted.

2.2. The reasons why it rationalizes public spending

The second justification relates to a financial-budgetary aspect of the prison system, pre-trial detention, and penal enforcement. Deprivation of liberty in State custody imposes on the State[66] the obligation to provide for the basic needs of individuals in deprivation of liberty, such as food, security,

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[65] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[66] The Interamerican Court of Human Rights already considered in a respective sentence "the States cannot claim economic difficul¬ties to justify a detention condition in no accordance with minimum international standards, not in line with human dignity" (I/A COURT H.R, Inter-American Court of Human Rights. **Pacheco Teruel y otros Vs. Honduras – Sentencia**. 2012. Available at: https://corteidh.or.cr/docs/casos/articulos/seriec_241_esp.pdf).

clothing, health, and education, among others. The maintenance of these rights implies a cost to the State that goes from the construction of the penal establishment, the acquisition of equipment, the hiring of professionals, the supply of inputs, and the maintenance of infrastructure to the availability of health services, work, study, and family life.

In 2018, after several rebellions and deaths occurred in prison facilities in previous years, the Federal Court of Accounts (TCU), together with state and municipal courts of accounts, presented a report on the prison system in eighteen federal units[67]. This report concludes that: "**although it is not possible to establish a causal relationship between prison overcrowding and the occurrence of riots, overcrowding in prison facilities impairs the State's performance in ensuring the order and safety of incarcerated individuals, as well as favoring the presence of criminal factions within these establishments**"[68]. In addition, the report notes that 78% of the cases of rebellion occurred in overcrowded prisons: 18 of the 23 prison facilities analyzed had faced some riot or conflict between October 2016 and May 2017[69].

The TCU also found that the **distribution of resources by federal units does not prioritize the deficit of accommodations in the prison system and causes inequality in the allocation of funds**. In addition, the National Public Security Policy (Pnasp)[70], inserted in the Pluriannual Plan (2012-2015) to alleviate the precarious situation of Brazilian prisons, did not achieve the expected results[71]. The report states that although the mandatory transfers of resources from the National Penitentiary Fund (Funpen) have the potential to promote changes in the medium and long term, the transfers need to improve the planning and control instruments, the deadlines for certain acts, the computerized tools, and the use of the workforce, among others[72].

"Difficulties in the relations between governmental actors are identified once the solution for the problem of prison capacity will not come from the isolated action of the Executive Branch", also, "the deficit will not be solved with the creation of new accommodations"[73]. There should be engagement to **redefine the "manner of entry, permanence, regime progression and exit of the individual in the prison system", in addition to proposing cooperative action between all actors involved[74]**.

Thus, it is essential to ensure the maximum effectiveness of prison policy in the face of lacking resources. Different methodologies define the so-called "prison cost," which is fundamental for planning expenditures and evaluating the services offered. The diversity of methods generates comparisons

[67] Acre, Amazonas, Bahia, Distrito Federal, Maranhão, Minas Gerais, Mato Grosso, Mato Grosso do Sul, Pará, Paraíba, Paraná, Piauí, Rio Grande do Norte, Rio Grande do Sul, Rondônia, Roraima, Sergipe, and Tocantins.

[68] BRAZIL. TCU, Tribunal de Contas da União (Federal Court of Accounts). **Relatório de Auditoria Anual das Contas**. Brasília: TCU, 2017. Available at: https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A81881E73726BD201742309CFA8326B

[69] Ibid.

[70] Pnasp aimed to support, at least, 20% of the prison capacity to Federal prison facilities and build 42,5 thousand new accommodations throughout prison system.

[71] The TCU report shows that, even the Pnasp goal to create those accommodations until 2015, there hasn't been deliveries along the implementation period of the Pluriannual Plan (2012-2015). In 2016 and 2017, they delivered only 400 and 1.090 accommodations, respectively, making 1.490 accommodations, expressively below the estimated number.

[72] BRAZIL. TCU, Tribunal de Contas da União (Federal Court of Accounts). **Relatório de Auditoria Anual das Contas.** Brasília: TCU, 2017, par. 204. Available at: https://portal.tcu.gov.br/lumis/portal/file/fileDownload.jsp?fileId=8A81881E73726BD201742309CFA8326B

[73] Ibid., par. 475.

[74] Ibid., par. 475..

based on different standards and hinders Brazil's accurate imprisonment cost evaluation. In 2012, there was the first initiative at the national level to standardize the form of analysis of prison costs through Resolution Nº. 6/2012 of the **National Council of Criminal and Penitentiary Policy (CNPCP)**[75]. However, challenges to this accounting in a standardized manner persist. For example, in a TCU audit of 2018, they identified that only three states declared to follow the procedures of Resolution CNPCP Nº. 6/2012[76].

More recently, in 2021, the CNJ prepared the report "**Calculating prison costs: national panorama and necessary advancements**" (pending publication), in which it systematizes the guidelines to calculate the cost of a person deprived of liberty in the Brazilian system based on a survey of expenditures with the units of the federation to investigate the methodologies used in the calculations and the costs involved in the prison policy. The text analyzes that, despite seeming to be a simple task, the estimate of prison costs is guided by several difficulties, such as expenses for the prison population. Moreover, even when there is a specific management body, there is a fragmentation between different secretariats, as commonly occurs concerning health and education services, for example. This fragmentation leads to disregarding these costs, which leads to underestimating the cost of maintaining a person in custody. Furthermore, the CNJ highlights that comparing different systems is challenging as states adopt other methods for calculating fees, and there are discrepancies between penal establishments in the same state. In adition to this, there is the offer of services with different qualities, prison policies marked by overcrowding, precarious structures, and violations of constitutional and legal provisions[77]. The report records that only six states had minimally organized data according to the standards of CNPCP Resolution Nº. 6/2012.

The report indicates ways to calculate prison costs and rationalize the resources spent on prison policy in Brazil. Thus, considering the context of violations of the rights of the imprisoned population, the CNJ proposes a **quality/effectiveness index** that facilitates the assessment of costs and the comparison of the quality of prison policy. This proposal considers nine dimensions, each with its indicators: material assistance; health; education; legal advice; work; security and accessibility; contact with the outside world and coexistence; prison staff; and occupation.

An estimate was made to illustrate the costs of the Brazilian prison system for this Handbook by dividing the value fixed in the budgets for current and capital expenditures for the prison system by the number of people imprisoned in each federative unit[78]. Regarding the budget laws, the transparency

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[75] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 6**. Standardizes the methods to be used to assess the value of the person in deprivation of liberty's monthly cost in each unit of the federation. Brasília: CNPCP, 2012. Available at: https://www.gov.br/senappen/pt-br/composicao/cnpcp/resolucoes/2012/resolucao-no-6-de-29-de-junho-de-2012.pdf/view

[76] BRAZIL. TCU, Tribunal de Contas da União (Federal Court of Accounts). **Relatório de Auditoria Anual das Contas.** Brasília: TCU, 2018.

[77] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Calculando custos prisionais:** panorama nacional e avanços necessários. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/626

[78] To estimate prison costs, this Manual adots the following: the amount fixed in the budget (current and capital expenditure) destined for the prison system was divided by the number of persons deprived of liberty in each state (VASCONCELOS, Beto Ferreira Martins; CARDOZO, José Eduardo Martins; PEREIRA, Marivaldo de Castro; et. al. Questão Federativa, Sistema Penitenciário e Intervenção Federal. In: **Revista Culturas Jurídicas**, v. 5, Nº 10, 2018. Available at: https://periodicos.uff.br/culturasjuridicas/article/view/44996).

portals and the state secretariats of planning and finance were consulted. As for the information related to the prison system, data from the National Secretariat of Penal Policies' Information System (SISDEPEN) were used. Categorizing current and capital expenses allows us to identify the number of resources set in the budgets for constructing and maintaining prison occupations in correctional facilities. Therefore, the groups "personnel and charges" and "other current expenses" were considered for current expenses. This group of costs identified as "investment" was also considered regarding capital expenses.

Thus, one state from each region of the country was selected, namely: **Espírito Santo, Maranhão, Mato Grosso, Pará, and Paraná**, in the financial year 2017. This time frame was chosen because some time has passed since the recognition of the "unconstitutional state of affairs" by the Supreme Court, the easiness of accessing data and budget laws.

CONSULTED LEGISLATION

- Pará: Annual Budget Law (LOA) 2017[79]
- Mato Grosso Annual Budget Law (LOA) 2017[80]
- Espírito Santo: Annual Budget Law (LOA) 2017[81]
- Maranhão: Annual Budget Law (LOA) 2017[82]
- Paraná: Annual Budget Law (LOA) 2017[83]

The first analysis shows a cost representation regarding prison policies in the face of the general budget, considering each state:

[79] BRAZIL. Governo do Estado do Pará (Government of the State of Pará). **Orçamento Geral do Estado.** v. 2. 2017. Available at: https://seplad.pa.gov.br/sites/default/files/PDF/loa/loa2017/oge_2017_vol_ii_com_paginacao.pdf

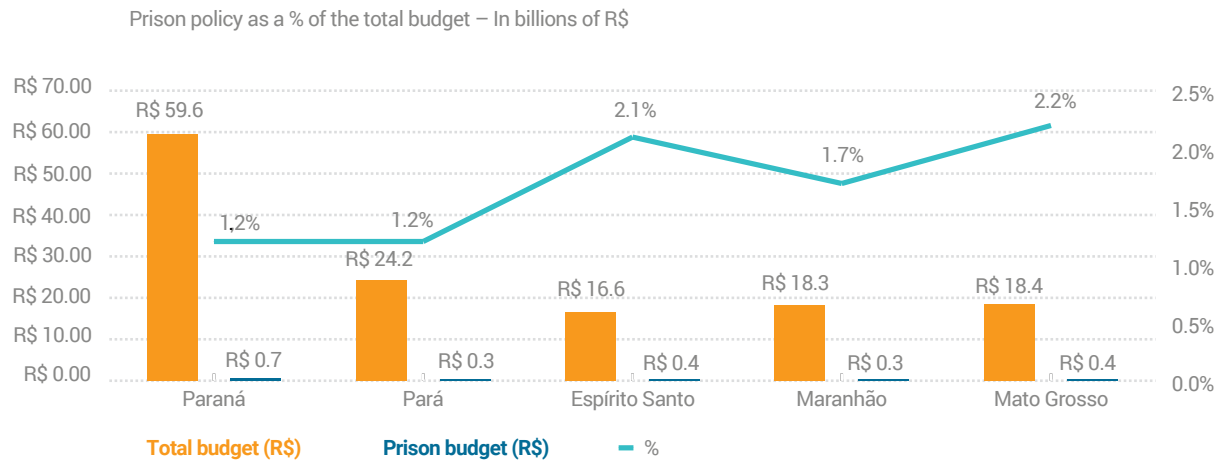
[80] BRAZIL. Governo do Estado do Mato Grosso (Government of the State of Mato Grosso). **Lei Orçamentária Anual (LOA)**. 2017. Available at: https://www5.sefaz.mt.gov.br/-/11466208-loa-2017

[81] BRAZIL. Governo do Estado do Espírito Santo (Government of the State of Espírito Santo). **Orçamento Geral do Estado.** 2017. Available at: https://seplad.pa.gov.br/sites/default/files/PDF/loa/loa2017/oge_2017_vol_ii_com_paginacao.pdf

[82] BRAZIL. Governo do Estado do Maranhão (Government of the State of Maranhão). **Lei Orçamentária Anual (LOA).** Available at: Available at: https://seplan.ma.gov.br/loa

[83] BRAZIL. Governo do Estado do Paraná (Government of the State of Paraná). **Lei Orçamentária Anual (LOA)**. Available at: http://www.transparencia.pr.gov.br/pte/assunto/2/63;jsessionid=msH4fvAoKi1tv7xvPFTuY3LaraHdTERGO_DeHXWl.ssecs75004?origem=4

Graphic 1: Participation of penitentiary policy in the budgets of entities — 2017



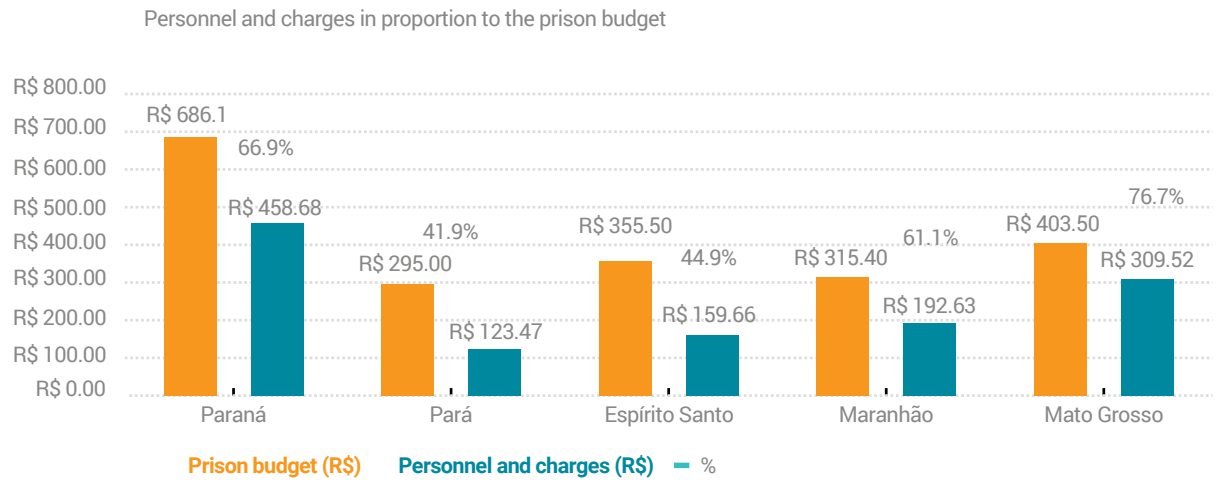
Source: State budgets and Infopen. Prepared by the authors.

From the analysis of Graphic 1, it can be seen that Mato Grosso, with about 12,000 people imprisoned for 8,000 accommodations in 40 penal facilities in 2017, was the state that proportionally allocated the most resources from the general budget to this policy (2.2%). Meanwhile, Paraná, with 50,000 individuals for 18,000 places in 31 penal facilities, and Pará, with around 16,000 individuals for 10,000 accommodations in 46 penal facilities, allocated only 1.2%[84]. Therefore, there is no correlation between the number of people in prison and the need to create new accommodations as a criterion for allocating a proportionally greater budget to improve prison policies. It is also noteworthy that none of the states issued a percentage higher than 2.2% of the budget to prison policies, indicating the difficulty in prioritizing the policy by state administrations.

In addition, it is essential to note that from the total amount allocated by the federal entities to prison policy, a significant part is consumed by payroll expenses, as seen in Graphic 2. Thus, the cost of creating a more substantial number of accommodations to solve overcrowding should consider not only capital expenditures, such as the construction and renovation of physical spaces and the acquisition of equipment but also current expenditures, such as those resulting from hiring personnel. In this regard, the budget allocated to the employees must provide decent salaries and professional qualification mechanisms such as continuous training.

[84] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – junho de 2017. Brasília: Senappen, 2019. Available at: https://www.gov.br/senappen/pt-br/servicos/sisdepen/relatorios/relatorios-sinteticos/infopen-jun-2017.pdf

Graphic 2: Participation of personnel expenses and charges in the prison budget — 2017



Source: Expenditure Statement Table of Budgets (QDD), and Infopen. Prepared by the authors.

Concerning the relation between values destined for the penitentiary policy and the number of individuals deprived of liberty of each federative unit, the average annual cost per person among states is R$ 23,627.48. This value corresponds to an average monthly cost of R$ 1,968.95 per individual. However, the reasons for the differences in costs between the states need attention from a qualitative analysis standpoint regarding penal services and the cost of living in these states, among other aspects, issues beyond this Handbook's scope.

The estimation of the average cost of opening and maintaining prison accommodations in 2017 displays high values in the five states analyzed: R$ 13,700 in Paraná; R$ 17,900 in Pará; R$ 17,700 in Espirito Santo; R$ 36,000 in Maranhão; and R$ 32,800 in Mato Grosso. This Handbook calculates the average cost of opening and maintaining accommodations by analyzing the budget allocations of all the portfolios of state administration[85] and selecting the actions oriented to the construction and operation of prison facilities, as determined by the budget laws of each of the five states used as samples. Finally, the expenditures identified were added, and the aggregate value was divided by the number of prison accommodations for each state, as shown in the Penitentiary Information, systematized by Senappen.

In parallel to the investments made by the states in prison facilities, it is observed that the number of people incarcerated represents an upward curve over the years. This phenomenon results in the low effectiveness of the resources allocated to reduce overcrowding. Notably, the average overcrowding rate in 2017 in the five states analyzed was 167.5%. Individually observed, the states, once again, show significant disparities. In Paraná, overcrowding in 2017 reached more than two people imprisoned beyond the limit of available places (215.2%). In the state of Pará, the occupancy rate was 187.5%. In Espírito Santo (147%), Maranhão (144.2%), and Mato Grosso (143.7%), the occupancy rates were very close.

[85] The budgetary resources of all actions aimed at the prison system from the various secretariats were added to the state administration, not restricted to the entire budget of the secretariat in charge of prison management.

Given the high costs of maintaining and creating new accommodations, the answer to this chronic deficit is costly for state coffers. To measure this budgetary impact, Table 1 presents an estimate of additional investment to eliminate the prison capacity shortage in the states under analysis, grounded on the available data over 2017[86].

In 2017, Paraná had the most significant deficit in prison occupancy, a total of 31,306. As a result, **to eliminate this deficit, an additional contribution of almost R$ 430 million would be required**, an allocation that could significantly compromise the state budget for the implementation of other public policies. On the other hand, the state of Maranhão, in the fiscal year 2017, had the lowest deficit among the states under analysis, imposing a lower burden to remedy the issue.

Table 1: Additional cost to eliminate the accommodation deficit and resource savings – 2017

Additional cost to eliminate the accommodation deficit and resource savings – 2017			
State	**Average annual cost (R$)**	**Vacancy deficit**	**Additional cost (R$)**
Paraná	R$ 13,713.79	31,306	R$ 429,324,046.84
Pará	R$ 17,887.24	7,890	R$ 141,130,340.06
Espírito Santo	R$ 17,723.01	6,414	R$ 113,675,362.61
Maranhão	R$ 35,981.82	2,685	R$ 96,611,199.53
Mato Grosso	R$ 32,823.35	3,737	R$ 122,660,869.83

Source: State budgets and Infopen. Prepared by the authors.

Preliminarily, it should be observed that the **Prison Capacity Regulation Center would bring a substantial economy of resources to the public coffers** in states since it would eliminate the deficit of the prison capacity without the need to commit additional costs for the creation and maintenance of new accommodations. In this perspective, with the implementation of a policy of this nature, it is estimated that the state of Paraná would save approximately R$ 430 million, equivalent to six times the investment in child and juvenile assistance or five times in culture, in the fiscal year 2017[87]. Concerning the state of Pará, the economy of resources would be R$ 141 million, seven times more than the resources allocated for child and juvenile assistance or five times for culture[88]. In Espírito Santo, on the

[86] The calculation of the additional cost was obtained from the intersection of two sources: the number of accommodations and the corresponding deficit in each state (according to data systematized by Senappen) and the cost of opening and maintaining prison capacity in each state (calculated according to the methodology explained above). The unit cost of opening and maintaining accommodations per state was defined, dividing each state's worth by the number of existing accommodations. Then, to estimate how much each state would have to invest in remedying the excess contingent in its prison facilities, the unit cost of opening and maintaining accommodations was multiplied by the prison capacity deficit.

[87] BRAZIL. Governo do Estado do Paraná (Government of the State of Paraná). **Relatório Resumido da Execução Orçamentária** – Janeiro a dezembro de 2017. Available at: http://www.portaldatransparencia.pr.gov.br/arquivos/File/responsabilidadefiscal/publicacoes/2017/6Bimestre/RREO/2AnexoRREOFuncaSubfuncao.pdf

[88] BRAZIL. Governo do Estado do Pará (Government of the State of Pará). **Relatório Resumido da Execução Orçamentária** – Janeiro a dezembro 2017. Available at: http://www.sefa.pa.gov.br/arquivos/contabilidade/bimestrais/2017/novembro-dezembro/02-a-Dem-Exec-Desp-Func-Subfunc.pdf

other hand, the economy would be R$ 113 million, corresponding to approximately 11 times the value of investments in health and 12 times in education[89].

From these analyses, opening new accommodations to fill the deficit would present many setbacks, requiring the states to sustain an exceptionally high expenditure of public resources over time. Therefore, other solutions need to be analyzed.

SCIENTIFIC EVIDENCE

PRISON COSTS REDUCTION IN OTHER COUNTRIES

The United Nations Office on Drugs and Crime (UNODC) surveyed strategies to reduce prison overcrowding. The survey points to examples from different countries that show significant savings from the exceptional use of prison[90].

In several countries, community-wide non-custodial measures are a more economical alternative than imprisonment. For example, in Sweden, the average daily cost per person imprisoned in a closed regime in 2003 was EU 200, compared with the cost of those subjected to penal alternatives, which was EU 17. In Finland, the price of a person serving alternative to imprisonment sentences in 2004 was 2,800 euros per year, compared to the cost of a person in deprivation of liberty, amounting to an annual EU 44,600. In Estonia, the charge of supervising a person is about ten times less than maintaining someone deprived of liberty. In Romania, the financial cost is about 11 times lower.

A comprehensive meta-analysis study involving various types of alternatives to prison in Australia, Canada, Europe, New Zealand, and the United States, conducted between 1996 and 2007, compared their success rates and costs of these measures with those of prison and found that the alternatives to prison were less costly than prison and produced better results in terms of reducing criminal reoffending rates. The survey estimated savings of between £ 3,437 and £ 88,469 for taxpayers and between £ 16,260 to £ 202,775 savings for taxpayers plus cost savings for victims of crime.

Finally, it should also be noted that in RE Nº. 580,252, with general repercussion, the STF recognized the State's duty to indemnify the conditions to which individuals in overcrowded units were subjected. Considering the probable multiplication of lawsuits throughout the country and estimat-

[89] BRAZIL. Governo do Estado do Espírito Santo (Government of the State of Espírito Santo). **Relatório Resumido da Execução Orçamentária** – Janeiro a dezembro de 2017. 2018. Available at: https://www.pmav.es.gov.br/uploads/documento/20180209155107-anexo-ii-demonstrativo-de-execucao-de-desp-por-funcao-.pdf.

[90] UNODC, United Nations Office on Drugs and Crime. **Handbook on strategies to reduce overcrowding in prisons**. New York: UNODC, 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

ing that 50% of the prison population would obtain compensation like that of the Supreme Court precedent (about 2 thousand reais), **more than R$ 755 million would be needed to pay the balance**. Thus, regulating prison capacity is essential to preserve the government's financial health.

2.3 Why specific measures, such as interdictions and carceral task force, do not solve the problem

In the face of the Judiciary's responsibility to exercise control over the legality of penal enforcement, the national magistracy has developed one strategy for dealing with overcrowding: the realization of prison inspections and the interdiction of units that, despite being quick to answer the problem, do not constitute a systemic and lasting resolution.

The Carceral Task Force is an effort concentrated in the Justice System to review the procedural situation of people imprisoned in a particular prison facility in a short period. Sometimes it is cumulated with inspections, contributing to identifying failures in the administration of justice and irregularities in the units[91]. It also generates a high volume of requests regarding benefits and releases simultaneously, which may have **diminishing** effects on overcrowding. Although it brings immediate or short-term results for individuals and procedural speed, it is a temporary solution.

An inseparable element of Brazilian criminal justice, the carceral task force obtained **the status of law in 2009** with the enactment of Law Nº. 12,106, which established the CNJ Department for Monitoring and Inspection of Prison and Juvenile Systems (DMF), within the scope of the CNJ and assigned the function of "planning, organizing and coordinating, in the scope of each court, task forces to reassess pre-trial and definitive detention, security measures and juveniles detention" (art. 1, § 1, II). In September of the same year, the CNJ edited Resolution Nº. 89/2009, institutionalizing task forces "as a mechanism for periodic review of pre-trial and definitive prisons [...]". The following month, the Council, through Resolution Nº. 96/2009, stipulated that each Court should establish the Monitoring and Supervision Groups of the Prison and Juvenile Systems (GMF) also with attribution to "plan and coordinate carceral task forces" (art. 5, IV).

Since then, dozens of carceral task forces have been carried out under the coordination of the CNJ, and local bodies have promoted countless others. Between 2008 and 2014, the CNJ's Carceral Task Force Program analyzed more than 491,000 cases, which corresponded to a higher number than the entire Brazilian prison population in 2008 (451,459)[92], having contributed to the granting of approximately 85,000 benefits and 42,000[93].

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[91] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). Mutirão carcerário: raio-x do sistema penitenciário brasileiro. Brasília: CNJ, 2012. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/280

[92] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Sistema de Informações do Departamento Penitenciário Nacional (SISDEPEN)**. Departamento Penitenciário Nacional. Available at: https://www.gov.br/senappen/pt-br/servicos/sisdepen

[93] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **CNJ engaja Poder Judiciário no enfrentamento à crise prisional**. Brasília: CNJ, 2020. Available at: https://www.cnj.jus.br/cnj-engaja-poder-judiciario-no-enfrentamento-a-crise-prisional/

Considering only the states that, in 2019, had a capacity of over 200%, it is observed that: in Pernambuco, there were three task forces from national initiatives between 2011 and 2015[94], and in Mato Grosso do Sul, there was a task force in 2011[95], in Amazonas, there were three task forces between 2010 and 2016[96], in the Federal District there was a task force in 2010[97], and Roraima two task forces were carried out between 2010 and 2017[98]. In Pernambuco, which had the highest overcrowding rate in the country in 2019 (239.16%), even after the end of the task force in 2011[99], the percentage of overoccupancy of male accommodations was 245.38%; the other task forces were limited to a specific region or prison facility and were not analyzed. In Roraima, even after the task force ended in October 2017[100], the over-occupation rate in March 2018 was 190.38%[101].

The official report of the CNJ task force in Bahia, 2014 recognizes the Program's limitations and indicates that the carceral task forces have an important role in the country, giving visibility to the critical prison situation. According to it, "radiographs that reveal a world of horrors, atrocities and absolute denial of the fundamental rights of the incarcerated person" and pointing out the "abyssal discord between criminal laws, criminal procedures, criminal enforcement and the reality of places of deprivation of liberties"[102]. Nevertheless, the CNJ assesses that "it remains a real perception that the task force is insufficient as an instrument to reduce the prison population, or as a mitigator of the prison system crisis". It also suggests that the task forces "be rethought as an instrument for planning and organization of the criminal enforcement system," as they bring together "the indispensable means and conditions for analyzing the system from its various angles and vertices." The report indicates the "possibility of providing a close coordination, to allow the elaboration of a strategic plan, ensure legitimacy to the process and obtain maximum effectiveness of programs and actions".

On the other hand, it should be mentioned that the Criminal Execution Law gives to the supervisory judge, in art. 66, in control action, the attribution to interdict, in whole or part, in a correctional facility operating under inadequate conditions or incurring an infringement abiding. However, despite being a relevant instrument for the cessation of rights violations, the interdiction mechanism has been used

[94] There were two collective carceral task forces by the CNJ, in 2011 and 2014, and 1 joint effort by the Defender Without Borders Program.
[95] There was 1 collective carceral task force from CNJ.
[96] There were 2 collective carceral task forces by the CNJ, in 2010 and 2013, and 1 joint effort by the Defender Without Borders Program.
[97] There was 1 collective carceral task force from CNJ.
[98] There were 1 collective carceral task forces by the CNJ, in 2010 and 2013, and 1 joint effort by the Defender Without Borders Program.
[99] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Relatório mutirão carcerário eletrônico:** Pernambuco. Brasília: CNJ, 2011. Available at: https://www.cnj.jus.br/wp-content/uploads/2011/02/relatorio_final_pernambuco.pdf
[100] BRAZIL. DPE/RR, Defensoria Pública do Estado de Roraima (Public Defender's Office of the State of Roraima). **Em Roraima, programa Defensoria Sem Fronteiras chega a sua última etapa.** 2017. Available at: https://luna.defensoria.ro.def.br/2017/10/em-roraima-programa-defensoria-sem-fronteiras-chega-a-sua-ultima-etapa/
[101] BRAZIL. CNMP, Conselho Nacional do Ministério Público (National Council of the Public Ministry). **Sistema Prisional em Números.** Available at: https://www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros
[102] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Relatório mutirão carcerário eletrônico:** Bahia. Brasília: CNJ, 2014. Available at: https://www.cnj.jus.br/wp-content/uploads/2011/02/b54eff50dbca6d7d023952fc488736cd.pdf

very parsimoniously[103], especially in cases of overcrowding. It is because the problem transcends the issue of a specific prison facility due to the systemic and complex nature of overoccupancy, not being solvable through isolated measures, which can even worsen the situation of the entire system.

The decision to interdict an overcrowded prison facility carries with it the risk of shifting the problem to another prison facility that, until then, did not experience an excess of the contingent. An effective way of mitigating this risk is the implementation of a Prison Capacity Regulation Center, which will allow the flow of entrances and exits from prison facilities from a systemic perspective.

In addition to the task forces and the possibility of decreeing interdiction, there is a list of faculties available to magistrates that demonstrate their leading role in exercising control over the prison population. The Judiciary is responsible for determining the arrest warrants, deliberating exclusively on the reasonableness, proportionality, and necessity of arrest or prevention. Furthermore, the judicial measure is imposed on the Executive Branch which is responsible for complying with it with the maximum diligence. Chapter 4 of this Handbook will analyze various tools available to the criminal magistracy to effectively regulate the contingent of prison capacity.

2.4 Because it contributes to public safety

The prison **apparatus high budget and social cost do not produce constricting effects on crime**, as the continuous increase in the imprisonment rate do not follow any consistent reduction in violence rates or improvement in public safety indicators.

During 2000 and 2017, the number of people imprisoned in the country increased from 232,000 to 726,000, while the annual homicide rate per 100,000 inhabitants in Brazil grew from 27.35 in 2000 to 31.59 in 2017[104]. In the same period, the homicide rate in the Northeast region increased from 19.78 to 48.78[105]. It is worth noting that reported rapes increased from more than 12,000 in 2011 to more than 22,000 in 2016[106]. Only in 2018, there were 57,956 homicides in Brazil[107], and about 1.2 million people lost their lives due to intentional homicide between 1991 and 2017[108]. In absolute numbers, Nigeria

[103] In several states, there are specific regulations for the procedure for interdiction of a prison unit. They are carried out by the Criminal Execution Judge, which generally requires inspection reports, technical reports, photographs of the place, and hearing from other organs of the justice system and the Federal Government, Executive, and participation of the General Justice Department.

[104] BRAZIL. IPEA, Instituto de Pesquisa Econômica Aplicada (Institute for Applied Economic Research); FBSP Fórum Brasileiro de Segurança Pública (Brazilian Forum on Public Safety). **Atlas da Violência 2017**. Brasília: Ipea; FBSP, 2017. Available at: https://www.ipea.gov.br/atlasviolencia/publicacoes/47/atlas-da-violencia-2017

[105] BRAZIL. IPEA, Instituto de Pesquisa Econômica Aplicada (Institute for Applied Economic Research); FBSP Fórum Brasileiro de Segurança Pública (Brazilian Forum on Public Safety). **Atlas da Violência – Homicídios**. Available at: https://www.ipea.gov.br/atlasviolencia/dados-series/20

[106] BRAZIL. IPEA, Instituto de Pesquisa Econômica Aplicada (Institute for Applied Economic Research); FBSP Fórum Brasileiro de Segurança Pública (Brazilian Forum on Public Safety). **Atlas da Violência – Estupros.** Available at: https://www.ipea.gov.br/atlasviolencia/dados-series/89

[107] BRAZIL. IPEA, Instituto de Pesquisa Econômica Aplicada (Institute for Applied Economic Research); FBSP Fórum Brasileiro de Segurança Pública (Brazilian Forum on Public Safety). **Atlas da Violência 2020.** Brasília: Ipea; FBSP, 2020. Available at: https://www.ipea.gov.br/atlasviolencia/publicacoes/51/atlas-da-violencia-2020

[108] UN, United Nations. **ONU**: Brasil tem a segunda maior taxa de homicídios da América do Sul. 2019. Available at: https://news.un.org/pt/story/2019/07/1679241

and Brazil, representing only 5% of the global population, concentrate 28% of the number of homicides worldwide[109].

In Brazilian penal establishments, according to UNODC data, the homicide rate of people arrested per group of 100,000 was 26.7, while the overall rate was 8.5 in 2016[110]. In absolute numbers, the CNMP accounted for 1,714 people killed in the Brazilian prison system in 2016[111]. The vote of Rapporteur Justice Marco Aurélio in the context of the precautionary measure of ADPF Nº. 347 confirms this analysis: "The Judiciary, when implementing an excessive number of pre-trial detentions, puts into practice the 'culture of imprisonment', which, once again, **heightened prison overcrowding and did not diminish social insecurity in cities and rural areas"**[112].

Data collected in 2019 from Senappen indicate that 0.38% of the prison population is imprisoned for criminal offenses related to Public Administration[113]. In the same sense, the decision of the precautionary measure in ADPF Nº. 347 points out that:

> *"[...] Brazilian society, with good reason, is plagued by two lines of criminality: the criminality that imports violence and the criminality associated with corruption latu sensus corruption, from active and passive corruption to bid fraud. Because interestingly, the preferred clientele of the penitentiary system is not one or the other. Most people in Brazil are not in prison for either violent or white-collar crimes. More than half of the Brazilian prison population is arrested for drugs or stealing. Moreover, the rate of people arrested for white collar — it is embarrassing to say — is below 1% in these global statistics.* ***I am arguing about demonstrating that we hold a lot — to use a commonplace — but we hold it badly.*** *In order not to remain just in the rhetoric of the sentence, I am trying to demonstrate that we do not arrest those that Brazilian society considers great villains. The homicide rate in Brazil — this, yes, a violent and serious crime — is less than 10%. A tiny number of people are convicted of violent crimes[114]".*

In 2019, the CNJ carried out the first electronic Prison Task Force[115] based on implementing the new system (SEEU) in the state of Espírito Santo and the activity resulted in a reduction in the number

[109] UNODC, United Nations Office on Drugs and Crime. **Global Study on Homicide:** Homicide trends, patterns, and criminal justice response. Vienna: UNODC, 2019. Available at: https://www.unodc.org/documents/data-and-analysis/gsh/Booklet2.pdf

[110] Ibid.

[111] BRAZIL. CNMP, Conselho Nacional do Ministério Público (National Council of the Public Ministry). **Sistema Prisional em Números.** Available at: https://www.cnmp.mp.br/portal/relatoriosbi/sistema-prisional-em-numeros

[112] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[113] BRAZIL. SENAPPEN, Secretaria Nacional de Políticas Penais (National Secretariat of Penal Policies). **Levantamento Nacional de Informações Penitenciárias** – julho a dezembro de 2019. Brasília: Senappen, 2020. Available at: https://app.powerbi.com/view?r=eyJrIjoiMmU4ODAwNTAtY2IyMS00OWJiLWE3ZTgtZGNjY2ZhNTYzZDliIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9

[114] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560

[115] In a update of the carceral task force model, conducted by the CNJ since 2008, along with the Fazendo Justiça Program, in a partner¬ship between the National Council of Justice and de United Nations Development Program, with full support of the Ministry of Justice and Public Security. The new methodology utilizes the new SEEU, a tool developed by the CNJ to centralize and unify penal enfocement throughout the country and allow the process filtering in accordance to pre-stablished criteria, making the reviewing process more agile and less onerous (BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Mutirões e Inspeções.** Available at: https://www.cnj.jus.br/sistema-carcerario/mutirao-carcerario/).

of incarcerated people[116]. The governor of Espírito Santo found that: **"We reduced the number of individuals entering the prison system and, at the same time, managed to reduce the number of homicides. We prove that the statement that the fewer people deprived of liberty, the greater the number of crimes is false"**[117]. In 2019, Espírito Santo had less than a thousand homicides (978) per year for the first time since 1992. In addition, the data disaggregation[118].

In the same direction, the US Supreme Court decision found that statistical evidence shows that prison populations had been reduced without adversely affecting public safety in some California counties, several states, and Canada. The court further examined that the various methods available to reduce overcrowding, involving early departures and non-custodial measures, would have little or no negative impact on public safety. In judging a landmark case involving the state of California, the Supreme Court took these concerns into account. It allowed the state flexibility to select the most appropriate means of reducing overcrowding[119].

SCIENTIFIC EVIDENCE

THE REGULATION OF PRISON CAPACITY DOES NOT RESULT IN CRIMINAL RAISE

The cross between measures to reduce overcrowding and impact on crime was developed in a US study, analyzing more than 12 surveys considering early release programs from the prison system for 23 years in several US states, cities, and Canada. The analyses, which are based on data from 1981 to 2004, found the following findings: [120]:

- Studies did not reveal significant differences in criminal reoffending rates between individuals released on early release and those who were not benefited from this measure. In some cases, people released in advance had even lower relapse rates than other individuals in custody.

- In **Wisconsin**, no evidence was found that early release at 135 days compared to 90 days resulted in a disproportionate increase in criminal activity.

[116] Until October 2019, a date that ended a special regime of action of the Court of Justice of Espírito Santo, at least 969 people had benefited from a less severe penalty regime. The tendency was a prolongation of effects of the joint carceral task force due to the number of peti¬tions under analysis (BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Relatório mutirão carcerário eletrônico:** Espírito Santo. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/566).

[117] BRAZIL. Governo do Estado do Espírito Santo (Government of the State of Espírito Santo). **Espírito Santo fecha 2019 com maior redução de homicídios dolosos em 26 anos.** 2020. Available at: https://sesp.es.gov.br/Notícia/governo-do-estado-apresenta-balanco-sobre-reducao-da-criminalidade-em-2019

[118] ES BRASIL. **Espírito Santo registra redução da criminalidade em 2019**. 2020. Available at: https://esbrasil.com.br/reducao-da-criminalidade-es/

[119] UNITED STATES. Supreme Court of the United States. **Brown, Governor of California, *et. al.* Vs. Plata *et. al.*** Available at: https://supreme.justia.com/cases/federal/us/563/493/

[120] KRISBERG, Barry; GUZMAN, Carolina; TSUKIDA, Chris. **Accelerated Release:** a Literature Review. Views from the National Council on Crime and Delinquency, 2008. Available at: https://core.ac.uk/display/71341499

• In **Florida**, during 18 months of follow-up, individuals participating in the Community Follow-up Program had lower rates of new convictions than those who spent nine months in prison.

• In **Canada**, more than half of the study group completed their non-custodial sen-tences or successfully lived in the community for at least one year after release.

• In the state of **Illinois**, the early release of 21,000 individuals was promoted, reducing the number of the prison population by 10%. As a result, the new crimes committed by these people accounted for less than 1% of all crimes in the state. In addition, released individuals had the same reoffending rates as those serving whole sentences.

2.5 Because other policies already regulate prison capacity, and it works

Different policies face the same problem in accommodating society's high needs and the limited resources to provide them. It required a state organization with rigorous efficiency to respond to this challenge. Thus, the Public Power has used tools that provide this balance in public services and avoid their collapse and the disproportionate decline in the quality of services.

In formulating public policy management, the Brazilian State has developed **integrated management mechanisms** between the branches through networks, institutional flows, and coordination at the national, State, and municipal levels. Especially in the Unified Health System (SUS) and the Unified Social Assistance System (SUAS), edited norms for planning, implementation, monitoring, and evaluation through collaborative processes between civil society and the Public Power.

This accumulation was consolidated through laws, decrees, reference documents, surveys, diagnoses, resolutions by rights councils and professional councils, and the result of discussions at conferences and public hearings, among other instruments.

In this context, four public policies must be highlighted: the management of public universities capacity, through the Unified Selection System (SISU), the accommodation control in inpatient care, through Regulatory Complex, the adjustment of accommodations for institutional care within the highly complex social assistance policy, through the Health Care Centers and the Prison Capacity Regulation Center of the juvenile justice system.

PRACTICAL EXPERIENCE
REGULATION IN EDUCATION

The Unified Selection System (SISU) is a computerized system managed by the Ministry of Education, through which vacancies are made available in undergraduate courses nationwide by public and accessible higher education institutions for students to register and apply for it. Regulated by Normative Ordinance Nº. 21/2012 of the Ministry of Education, SISU imposes an autonomous selection process concerning those carried out within the scope of private higher education institutions and is governed exclusively based on the results of the *Exame Nacional do Ensino Médio* (Brazilian High School National Exam) — ENEM. Based on the grades obtained, the student is classified in the vacancy option for which he/she applied, observing the limited occupations available at the university of his/her choice. The system also creates a waiting list after the first call for applications for possible available vacancies[121].

PRACTICAL EXPERIENCE
REGULATION IN HEALTH

The Ministry of Health regulated, through Ordinance Nº. 1,559/2008, the National Policy for the Regulation of the SUS. This regulation aims to provide an adequate alternative to the needs of individuals through urgent care, consultations, hospital accommodations, and other necessities, including actions of medical codes in emergencies regarded as pre-hospital and hospital care, control of available beds and appointment schedules, and specialized procedures. In addition, it standardizes requests for methods through care protocols and establishes references between units of different levels of complexity, with local, intercity, and interstate coverage. The technical sector responsible for regulation is called the Regulatory Complex, with a central function of coordination and integration[122].

[121] BRAZIL. MEC, Ministério da Educação (Ministry of Education) **Normative Ordinance Nº 21** – Provides for the Unified Selection System (Sisu). Brasília: MEC, 2012. Available at: https://sisugestao.mec.gov.br/docs/portaria-2012-21.pdf

[122] BRAZIL. MS, Ministério da Saúde (Ministry of Health). **Ordinance Nº 1,559** – Establishes the National Policy for Regulation of the Unified Health System (SUS). Brasília: MS, 2008. Available at: http://bibliotecadigital.economia.gov.br/handle/123456789/934

PRACTICAL EXPERIENCE

SOCIAL ASSISTANCE REGULATION

The social assistance policy develops actions for the institutional reception of children, juveniles, and young people separated from family life in cases of significant vulnerability. This reception takes place in equipments known as shelters or "home". To regulate the occupation of these places, Shelter Centers were created based on Resolution Nº. 31/2013[123] of the National Social Assistance Council and guidelines from the Ministry of Social Development and Fight against Hunger (MDS) for their operation. The Center is responsible for receiving requests from municipal bodies by telephone or electronically, accompanied by a Welcoming Guide. Once the request is accepted, the Center analyzes the case, liaises with the team of the regionalized service to identify the most suitable accommodations available, communicates the information to the applicant, and, finally, forwards the child or juvenile to the reception unit[124].

PRACTICAL EXPERIENCE

REGULATION IN THE JUVENILE JUSTICE SYSTEM

Even before the Collective HC Nº 143,988/ES injunction in 2018, several Brazilian states had already implemented the Prison Capacity Regulation Center for the juvenile justice system centered on *numerus clausus*, including Paraná and Santa Catarina. Based on the cooperation between the different actors of the juvenile justice system, the Executive Branch has the responsibility to ensure the maintenance of the occupation within the capacity of juvenile justice units. They also establish tools such as the waiting list and replacement by open-ended measures, which, according to the rules of the National Service of Juvenile Justice System (SINASE), are under the responsibility of the municipalities. Currently, after the extension of the STF decision, they are in the process of implementing Prison Capacity Regulation Centers in the State Social Assistance Systems education across the country.

[123] BRAZIL. CNAS, Conselho Nacional de Assistência Social (National Council for Social Assistance). **Resolution Nº 31**. Approves principles and guidelines for regionalization within the scope of the Unified Social Assistance System (SUAS), parameters for the regionalized offer of the Specialized Protection and Assistance Service for Families and Individuals (PAEFI), and the Reception Service for Children, Adolescents, Young people up to twenty-one years old, and eligibility criteria and sharing of federal co-financing resources for qualified expansion of these services. Brasília, 2013. Available at: https://aplicacoes.mds.gov.br/snas/regulacao/visualizar.php?codigo=4255

[124] Ibid., p. 44-46.

WHAT IS A PRISON CAPACITY REGULATION CENTER?

3 What is a Prison Capacity Regulation Center?

For the purposes of this Handbook, the Prison Capacity Regulation Center is defined as a management tool for the occupation of vacancies based on the principle of taxability and designed to regulate the balance of prison occupacy. In the prison context, the occupancy balance seeks to maintain the prison population inside its maximum capacity. The Prison Capacity Regulation Center, promotes this scenario, through the tools explained in Chapter Four, using a systemic perspective between the prison entrance and exit doors, maintaining the maximum capacity of one person for each accommodation.

3.1. Systemic perspective

While all the advances in systematically organizing numerous public policies are coordinated and integrated across all state levels, the Brazilian State lacks efficient policies regarding the prison system. Although there have been basic norms inside the Criminal Execution Law and a brief mention in Law Nº. 13.675/2018 — which establishes the Single Public Security System (SUSP) — **there is not, in practice, a single system of penal policies**[125]. Nevertheless, various normative acts, judicial precedents, and international and national documents exist. Those elements work as recognition factors for governance and public policy arrangements inside the systemic logic framework for structuring penal policies.

From a critical perspective of the penal model, the respective policies aim at overcoming a historical discourse rooted in this argument that deprivation of liberty[126] is the only possible state response to a criminal offense. They mobilize a series of penal responsibilization policies involving, besides prison, detention control hearings, including previous and further social care for parolees, penal alternatives, electronic monitoring, house arrest, restorative practices, and social care to a released individual, among others[127]. Finally, they also include strategies against overcrowding inside the prison system.

In addition, in the case of penal policies, even though this policy regards the state Executive Branch, the Judiciary Branch plays a crucial role since the magistrature has the responsibility to grant regular criminal enforcement, from the gateway to the exit doors of the prison. Finally, the magistrates play a fundamental role in developing strategies to solve the Brazilian prison problems.

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[125] BRAZIL. LABGEPEN, Laboratório de Gestão de Políticas Penais (Penal Policy Management Laboratory). **Nota sobre a proposta do Sistema Nacional de Segurança Pública**. Departamento de Gestão de Políticas Públicas da Universidade de Brasília (GGP/UnB). Brasília: UnB, 2017. Available at: https://1d352858-43e2-49b9-90a7-2167536ef2a9.filesusr.com/ugd/6598ff_740ab4326e394734ae661ebd96018eea.pdf.

[126] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Modelo de gestão da política prisional:** caderno I: fundamentos conceituais e principiológicos. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/556

[127] VITTO, Renato C. P. de; DAUFEMBACK, Valdirene. **Para Além da Prisão:** Reflexões e Propostas Para Uma Nova Política Penal no Brasil. Belo Horizonte: Letramento, 2018.

In this scenario, the necessity of establishing a Prison Capacity Regulation Center grows, considering the whole penal cycle, from entry to exit doors. Those actions are permeated by different penal answers to prison and rooted in an observation of the constitutional guarantees for the people deprived of liberty regarding individualization actions and searching to reverse the inhuman and degrading conditions imposed on the carceral population. The Prison Capacity Regulation Center is more than merely controlling the prison capacity, imposing limits and restrictions. **The definition of prison capacity control goes beyond and turns itself into a strategy of inter-institutional approach, close coordination between actors**, and cooperation between the Judiciary, the Executive, and other institutions. Also, in systematization, data production, research promotion, evaluation, monitoring, and policies based on evidence, as it will be discussed in Chapter 5.

ATTENTION POINT

ON THE DEFINITION OF THE STRUCTURAL CONCEPT: REGULATION

There are many discussions on defining the word "regulation" across various fields: life science, law, economy, sociology, and political science. There are a variety of meanings, approaches, and objectives that may get in conflict with each other. The definition chosen in this Handbook refers to a multitude of different concepts, such as the homeostasis concept (biology), control (mechanics), domination and power (political science), and self-regulation (economy). Two main ideas connect to the etymological concept of regulation within the law. The first refers to implementing and establishing rules and norms; the other refers to **maintaining or re-establishing the balance in a particular system**[128].

3.2. Principle of Carceral Legality

Prison capacity regulation finds its fundaments in the Principle of Carceral Legality, also known as *numerus clausus* ("closed number"). The idea behind it is both intuitive and straightforward: there is a maximum number of vacancies and each vacancy can only be occupied by a single individual.

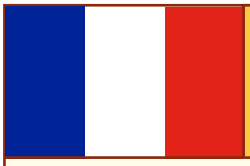
This principle has daily practical applications in vital public policies. For instance, in section 2.5 of this Handbook, such access to higher public education through accommodation regulation, health services, and the reception provided by social assistance constitutes a structural principle of the

[128] MOREIRA, Vital; MAÇÃS, Maria Fernanda dos Santos. **Autoridades reguladoras independentes:** estudo e projecto de lei-quadro. Coimbra: Coimbra Editora, 2003.

management model of these policies. Moreover, the principle also applies to private domains. To exemplify, the organization of any event in closed areas requires observations of the full capacity rules and monitoring mechanisms on entrance and permanence of the people by square meter, following the location characteristics. The Public Power, through normative editing, licenses, and permits, is responsible for determining and supervising the place's capacity, guaranteeing the emergency exit routes to prevent fire and other possible accidents. Infringement in this norm can cause administrative fines and a possible embargo by the Fire Department. In Criminal Justice, the Principle of Carceral Legality is a limiting normative seeking to match the numbers between prison capacity and inmates' population. In other words, there is only one person for each accommodation.

This concept was born in France in 1989 when the Minister of Justice requested Gilber Bonnemaison a study that demonstrated proposals oriented to "**improve in a long-lasting way the operation of the penitentiary public service**". The resulting report, known as the Bonnemaison Report, supports using the *numerus clausus* in the penal system. In addition, Bonnemaison suggested that once the institution's maximum capacity is reached, efforts must be made to remove individuals with measures other than prison.

The creators of the Principle of Carceral Legality point out that the measure would not constitute an obstacle to judicial independence and liberty to judge. However, it would allow the judge to base his/her decision in each case on a systemic view, thus recognizing the role of the Judiciary in regulating penal policies. On the contrary, applying the principle of "one person per accommodation" would end the overcrowding problem, fixing a situation that has harmful effects on the set of actors in the criminal justice system, it would alleviate tensions in the prison environment, creating an environment more conducive to the work of criminal police agents and professionals from other services, favoring the process of social resettlement and ensuring better conditions for serving a sentence[129].



INTERNATIONAL EXPERIENCE

FRANCE: FROM AN INCIPIENT IDEA TO APPROPRIATION BY THE JUSTICE SYSTEM

Since it was presented in the report by deputy Bonnemaison in 1989, public authorities have debated the *numerus clausus*. Indeed, close coordination between the Legislative, Executive, and Judiciary was proposed to introduce a mechanism to regulate prison entries and exits. There is an agreement that prison overcrowding is a structural problem in the criminal justice system. Therefore, tackling the issue requires concentrated efforts and responsibilities by each Branch. In recent years, the ***Syndicat de la Magistrature***, a class entity created over

[129] FRANCE. Conseil Économique et Social (Economic and Social Council). **Rapport fait au nom de la Commission d'Enquete sur na situation dans les prisons françaises**. Paris: Conseil Économique et Social, 2006, p. 26. Available at: https://www.lecese.fr/sites/default/files/pdf/Avis/2006/2006_02_donat_decisier.pdf

over 50 years ago that represents approximately 30% of the French Judiciary, has emerged as an essential supporter of the *numerus clausus* adoption in the penal system. The health crisis caused by the new coronavirus pandemic led the entity to publish an open letter to the President of the Republic and a technical note with the title "*Numerus clausus*: yes, it is possible, and it is time"[130].

The entity recognizes that the measures taken to prevent prison contagion by Covid-19 – in line with the standards advocated in CNJ Recommendation Nº. 62/2020 – managed to alleviate the situation of overcrowding in those units, demonstrate that overcrowding is a treatable problem. Consequently, the number of people imprisoned in France has fallen below its capacity for the first time in decades. Given this achievement, the judicial entity encourages using prison taxability as a regulating mechanism to deal with prison capacity, preventing a return to an overcrowding scenario, considering that it would be an irreversible phenomenon by following the current data tendency.

The ***Association Nationale des Judges d'Application des Peines – ANJAP*** – an equivalent to the National Association of Criminal Enforcement Judges — also encourages the principle of prison taxability adoption. Since 2013, they have developed a mechanism to regulate prison entries and exits, part of the proposals for reforming the institution's criminal enforcement policy. However, as the president of the ANJAP states, "overcrowding harms all actors in the penal system, it is an obstacle in the fight against re-entry, it costs the State dearly and, despite this belief being widely shared, it has not changed anything"[131] (free translation).

The National Union of Prison Directors (***Syndicat National des Directeurs Pénitentiaires***, SNPD, in French) is another professional association that also joined the supporters of the *numerus clausus* motivated by the success in reducing overcrowding as a result of the measures to prevent contagion by Covid-19. The Open Letter addressed to the President of the Republic[132], published on April 20, 2020, concludes that "only an organization rebalance of the Ministry of Justice and the responsibilities of the actors of criminal enforcement will make it possible to effectively tackle prison overcrowding [...] and rethinking the meaning of punishment in 21st century France. This solution has just been put into practice!" (free translation).

[130] SYNDICAT DE LA MAGISTRATURE DE FRANCE (French Magistrates' Union). ***Numerus clausus*, oui c'est possible, et c'est le moment.** Available at: https://www.syndicat-magistrature.fr/notre-action/justice-penale/enfermement-peines/1824-numerus-clausus-oui-cest-possible-et-cest-le-moment.html

[131] LE PARISIEN. ***Surpopulation carcérale:*** Si une personne rentre en prison, une autre doit sortir. 2020. Available at: https://www.leparisien.fr/faits-divers/surpopulation-carcerale-si-une-personne-rentre-en-prison-une-autre-doit-sortir-14-05-2020-8316675.php

[132] CFDT, Syndicat National des Directeurs Pénitentiaires de France (National Union of Prison Directors of France). **Lettre ouverte au Président de la République**. 2020. Available at: https://directeurspenitentiaires.wordpress.com/wp-content/uploads/2020/04/lettre-ouverte-au-prc3a9sident-de-la-rc3a9publique-sur-lencellulement-individuel.pdf

The proposal was born in France and soon gained supporters in the country and internationally[133]. In Brazil, the concept also gained essential supporters. **Nilo Batista** adds, "if it were possible to choose a principle for penal enforcement, we would not hesitate to mention that of *numerus clausus*". It is also crucial to indicate that its adoption "alongside the obvious benefits for penitentiary coexistence, would displace state investments from the infertile construction of more and more prisons for control programs and assistance to released persons"[134]. At the same time, **Rodrigo Roig** states that the adoption of the principle is technically possible. However, it also requires "the political will to implement it, but above all the courage to structurally reform Brazilian criminal policy and materialize the principle of human dignity as a concrete barrier to protect prison overcrowding"[135].

Applying the **Principle of Legality** intends to bring about a transformation in penal enforcement, aiming to offer a definitive answer to the problem of prison overcrowding. *Ad hoc* measures to combat overcrowding, such as Carceral Task Forces or transfers between units, bring immediate incremental results of extreme relevance for the people benefited, but without systemic or sustainable reach in the medium and long term. As highlighted by Rodrigo Roig, transferring individuals to other prisons to temporarily relieve their capacity only displaces overcrowding to another prison facility and, in practice, would be equivalent to circumventing the principle of *numerus clausus*[136]. Therefore, the guiding postulate of the *numerus clausus* seems to reduce the prison population, not create new accommodations. Thus, it indicates the need to regulate the transit between the access and exit doors of the prison system.

The author conceives three possible modalities of *numerus clausus*, which can be applied exclusively or in combination:[137]

• Preventive *numerus clausus*: prohibition of new access to the prison system when the unit's accommodation has reached its maximum capacity, with the resultant modification of the sentence into another non-custodial action. As before the imprisonment itself, it would not depend on subjective or objective conditions but only on ascertaining the surplus of the contingent.

• Direct *numerus clausus*: granting a pardon or measures other than imprisonment to people who are already in prison, notably to those who are close to reaching the legal period for release. Alternatives to imprisonment can act as a healthy alternative to prison illegality under overcrowded conditions[138].

• Progressive *numerus clausus*: a cascade (chain) transfer system, with an individual moving from a closed to a semi-open regime or from a semi-open to an open regime (or house arrest) and, finally, to someone who is in one of these modalities to conditional release (a kind of "special conditional release").

The details of the modalities of *numerus clausus* are detailed in Chapter 4 of this Handbook. This section will discuss the adjustment tools for both the entry and exit gates.

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[133] FRANCE. Assemblée Nationale (National Assembly). **Rapport d'Information Nº 652:** deposé par la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République, en conclusion des travaux d'une mission d'information sur les moyens de lutte contre la surpopulation carcérale. Paris: Assemblée Nationale, 2013. Available at: https://www.assemblee-nationale.fr/dyn/14/rapports/cion_lois/l14b0652_rapport-information

[134] BATISTA, Nilo. **Novas Tendências do Direito Penal.** Rio de Janeiro: Revan, 2004.

[135] ROIG, Rodrigo Duque Estrada. Um princípio para a execução penal: *numerus clausus*. In: **Revista Liberdades,** Nº 15, p. 118, 2014.

[136] Ibid., p. 108.

[137] Ibid., p. 114–117.

[138] Ibid., p. 116.

The **Principle of Legality** is also widely recognized by international law. For example, in 2013, the United Nations Office on Drugs and Crime (UNODC) published a **Handbook on Strategies to Reduce Overcrowding in Prisons**, which advocates taking prison capacity into account in the enforcement of detention[139]. The document recommends denying imprisonment in facilities that, due to overcrowding, do not offer acceptable accommodation and care conditions for the person in custody under national and international standards. It also recommends that judges take responsibility for granting the rights of the people deprived of liberty to serve their sentence in a dignified place across all steps of the judicial process.

As mentioned in topic 2.1, it is worth reiterating some international standards in this subject. Thus, the Inter-American Human Rights System stipulates among the **Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas** that "persons deprived of their liberty must have adequate space"[140] concerning accommodation and hygiene needs (Principle XII). In addition, Principle XVII, specifically dedicated to the formulation of standards against overcrowding, provides that:

> *The occupation of an institution over its maximum capacity must be prohibited by law. In cases where such overcrowding results in human rights violations, it must be considered cruel, inhuman, or degrading treatment or punishment. The law must establish remedies intended to address any situation of overcrowding immediately.* ***The competent judicial authorities must adopt adequate measures without effective legal regulation.*** *Once overcrowding is observed, states must* ***investigate the reasons for such a situation and determine the corresponding individual responsibilities*** *of the authorities who authorized that situation. Moreover, states must adopt measures to* ***prevent the repetition of such cases****.*[141]

In the national legal system, legality is formally recognized as a guiding principle of criminal policy through **CNPCP Resolution Nº. 5/2016**, which "provides for indicators for resolving maximum capacity issues in penal establishments — *numerus clausus*"[142]. This Resolution derives from the attribution conferred on the CNPCP by the Criminal Execution Law to determine the maximum capacity limit of penal establishments, taking into account their nature and peculiarities (art. 85, single paragraph). The Resolution also reaffirms that the capacity of the penal establishment must be compatible with its structure and purpose, considering that "overcrowding is not compatible with the process of resocialization and that Brazilian prisons — evidence of the inefficiency of the public security — indicate an upsurge in criminality, including an expansion in reoffending rates".

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[139] UNODC, United Nations Office on Drugs and Crime. **Handbook on strategies to reduce overcrowding in prisons.** New York: UNODC, 2013, p. 62. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

[140] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas.** Washington: IACHR, 2008, p. 16. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[141] Ibid., p. 21.

[142] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 5.** Provides for Extraordinary and Specific Guidelines for Penal Architecture, designed to combat the spread of the new Coronavirus (2019-nCoV) within penal establishments. Brasília: CNPCP, 2020. Available at: https://dspace.mj.gov.br/handle/1/327

As follows, the Criminal Execution Law equally charges the CNPCP with the mission to propose rules on the architecture and construction of criminal establishments and shelters; it has fulfilled its responsibility by issuing Resolution Nº 9/2011, an instrument that establishes the basic guidelines for prison architecture and sets the standards for the optimum accommodation numbers. Chapter 4.1 analyses in detail the aspects of prison architecture. Specifically, the Resolution establishes very clear and objective prescriptions to conduct the work of the Judiciary in favor of reducing overcrowding. For example, with male units, it requires "a mandatory overcrowding reduction plan, with goals to be set and achieved by the authorities" and stipulates a "balance through a **control filter on the prison's entries** (detention control hearings and control of the appropriate duration of the process until sentencing) and the **organization of the waiting queue at the prison exit door** with systematized criteria (early release of convicts in the situation of lack of accommodations), the latter considering the guidelines of Binding Precedent Nº 56".

Based on CNPCP Resolution Nº 5/2016, **the first national initiative to implement the Principle of Legality in the prison system** was carried out through the conclusion of an international technical cooperation agreement between the Court of Justice of Paraná and the Organization of American States (OEA).

NATIONAL CASE — PARANÁ

PILOT PROJECT FOR THE MANAGING OF PRISON CAPACITY BY THE OPERATION OF PENAL ENFORCEMENT COURTS

In 2017, the Court of Justice of the State of Paraná (TJPR), the Public Prosecutor's Office, the Public Defender's Office, the Brazilian Bar Association Section (OAB/PR), and the state Executive Branch, together with the Organization of American States (OAS) formulated an Agreement Memorandum to "develop and implement, in the state of Paraná, projects, programs and practices in sentences and juvenile justice actions, particularly prioritizing the following topics, without prejudice to others: a. Modulation of interventions that guarantee the reduction of occupancy beyond the limit and, at the same time, allow a more effective control of the capacity of prison spaces[143]. In the same year, Court Monitoring and Supervision Groups of the Paraná Court of Justice (GMF/PR) edited Resolution Nº 1/2017[144], which establishes the implementation of a pilot project to apply the *numerus clausus* principle, in partnership with the National Council of Justice.

[143] BRAZIL. Governo do Estado do Paraná (Government of the State of Paraná); MPPR, Ministério Público do Estado do Paraná (Public Prosecutor's Office of the State of Paraná); OAS, Organization of American States. **Memorando de Entendimento**. 2017.

[144] BRAZIL. TJPR, Tribunal de Justiça do Paraná (Court of Justice of the State of Paraná); GMF/PR, Monitoring and Supervision Groups of the Paraná Court of Justice. **GMF/PR Resolution Nº 1. 2017**. Available at : https://www.tjpr.jus.br/documents/188253/6059935/Resoluc%CC%A7a%CC%83o+GMF-PR+01-17.pdf/7365538f-7424-9b6d-feac-c3df3cfd6c67

The "Legal Occupancy Rate" project aimed to control overcrowding in the state, mainly focused on the high number of people imprisoned in police departments. The innovation suggested by the GMF/PR proposed that each court that joined the project would define a number of vacancies according to the criminal cases and the work routine of the court. Available spaces in these establishments would be identified with letters and numbers, followed by the person's name and date of admission. Those intended for convicted persons would be indicated by the letters "CD" and those reserved for pre-trial detainees by "PR". In the case of admission beyond capacity, the individual code would be identified by the letters "EX". In addition, a list of provisional detainees and another of convicts would be made available on the GMF/PR and Senappen/PR websites, with weekly updates organized in descending order of occupation time and indicating the court responsible for the arrest.

At the time of consideration and decision concerning the imprisonment order, the magistrate would have information on the available accommodations at his/her disposal. In the case of an order of detention, the warrant of arrest must indicate the accommodation destined for that convict. If the designated location is unavailable, the judge would consider the application of an alternative measure to imprisonment, pardon or review the detention of another individual already incarcerated under his/her jurisdiction. If this procedure is unsuccessful, the authority will consult the GMF/PR about the possibility of additional accommodations (with the acronym AD), whose occupation would be allowed for a maximum period of 30 days until mechanisms are implemented by other courts to balance the prison occupation.

Initially implemented in Curitiba, the project had the help of 32 Criminal Execution Courts from 21 counties in Paraná. Information on the TJPR website indicates an initial decrease in the overcrowding rate. After 60 days of implementation, the courts responsible for 2,465 pre-trial detainees in police stations reduced this number to 2,006, from 182% to 152% in overcrowding[145].

However, the project encountered development tribulations, and its application was restricted. In particular, by advocating an innovative approach, which sets the judge as the protagonist of penal policy, some magistrates expressed difficulties in overcoming the understanding that the problem would be exclusively the obligation of the Executive Branch[146]. At the same time, an administrative process was initiated by the Public Prosecutor's Office contesting GMF/PR Resolution Nº 1/2017[147]. However, in February 2020, the Sub-Attorney General's Office for Legal Affairs (MPPR/SUBJUR) filed it for lack of legal grounds[148].

[145] BRAZIL. TJPR, Tribunal de Justiça do Estado do Paraná (Court of Justice of the State of Paraná). **Projeto do GMF-PR pretende acabar com a superlotação em presídios.** 2017. Available at: https://www.tjpr.jus.br/destaques/-/asset_publisher/1lKI/content/projeto-do-gmf-pr-pretende-acabar-com-a-superlotacao-em-presidios/18319

[146] COELHO, Priscila. **Um preso por vaga:** estratégias políticas e judiciais de contenção da superlotação carcerária. Fundação Getúlio Vargas, São Paulo, 2020. Available at: https://repositorio.fgv.br/items/23eddb15-a51a-41d1-9743-b5376203d5d5

[147] MPE/PR Protocol Nº 15,103/2017.

[148] BRAZIL. MPE/PR, Ministério Público do Estado do Paraná (Public Ministry of the State of Paraná). **Decisão**. Subprocuradoria-Geral de Justiça para Assuntos Jurídicos.

In the face of overcrowding problems, adopting the *numerus clausus* is a relevant restraint measure based **on a necessary deviation of enforcement compensation**.

It should also be mentioned that the regulation of prison capacity flows points to the adoption of a customized management model, shifting away from pre-established formats that tend to be incompatible with local requirements. On the contrary, it is proposed that the Judiciary use its exclusive competence over the entrance and exit doors of the prison system to influence the conformation of a Prison Capacity Regulation Center model adapted to the specificities of **each criminal court** and criminal enforcement, taking into account the prison facilities under its jurisdiction.

HOW TO IMPLEMENT A PRISON CAPACITY REGULATION CENTER?

4 How to implement a Prison Capacity Regulation Center?

The management of prison capacity involves utilizing different criteria for the Judiciary to manage existing prison accommodations. This chapter discusses a series of tools at the disposal of the Prison Capacity Regulation Center, which can be entirely or partly adopted with different combinations according to the local reality.

As long as founded on the **Principle of Legality *(numerus clausus)***, a capacity regulation policy can be implemented in several ways. The actions presented here work as a "toolbox" available to the Judiciary, which can choose those that best suit its reality. The presentation of these measures in this Handbook offers innovative and valuable subsidies for the work of magistrates. Still, **they do not constitute pre-conditions for implementing a Prison Capacity Regulation Center**. On the contrary, those actions work with different conformations and various tools.

Everything will rely on the conditions and decisions of the Judiciary and other local actors based on their necessities and demands. The Handbook seeks to help expand the judicial capacity to think and experiment with new answers to an old and challenging problem. Thus, the actions proposed by this Handbook are not meant to stifle or make overcrowding control impractical. In each of the following topics, we indicate alternative solutions if it is impossible to adopt each tool.

The **five areas** are (i) spatial tools; (ii) adjustment tools at the entrance door; (iii) adjustment tools at the exit door; (iv) administrative action tools; and (v) technological tools.

4.1. Spatial tools

As a pillar of the current criminal justice system in the country, the prison is located in a geographic area constituted by the social and legal relations that delimit it. Like any human space, the prison produces different effects on certain people. Therefore, those effects also result from processes delimited by the prison administration bodies, legislation, and community of people deprived of liberty, servants, and visitors that make up the daily dynamics of a prison[149]. Nevertheless, space evolves through the tendency of society. With that in mind, the Prison Capacity Regulation Center can be a driving force to rethink, resize and modify this environment.

The spatial tools presented in this section involve, firstly, a micro-scale – related to the description of the actual maximum capacity of each prison – and a macro-scale – referring to prison zoning within Brazilian states.

[149] SANTOS, Milton. **Por uma Geografia Nova:** da Crítica da Geografia a uma Geografia Crítica. 6th edition. São Paulo: Edusp, 2008.

4.1.1. Actual maximum capacity certification

The prison capacity management policy should consider the following question: How many accommodations are in each penal establishment? However, before answering this question, it is necessary to define the actual capacity of each prison unit.

First, the reflection on space management in penal establishments must start with defining what "prison capacity" is. On the one hand, the mark of this concept relies on the physical-structural aspects of long-stay spaces of individuals — cells — and on the other hand, the proportionality, and connection of these spaces with others of collective and intermittent use, as well as the services provided for work, education, health, among others.

Thus, it is unreasonable, for instance, that an existing space inside a prison that has not been designed and destined for the specific purpose of accommodating an individual counts as an accommodation or even marked as space available for adding other people in the same condition.

The Concept of "accommodation"

For this Handbook, a prison capacity is a minimum habitable space intended for long-term occupation by a single person, with regular and non-intermittent use, architecturally designed to house a person deprived of liberty. In addition, this space has to be in operational conditions of use, considering the proportionality between beds, services, transit, assistance, and routines of the penal establishment.

For most of the day, the people deprived of liberty are accommodated in long-stay spaces in penal establishments, regularly referred to as cells, dormitories, or accommodations[150]. However, they cannot always be called "accommodations" — when setting the number of those spaces in a determined prison. That happens because there are cells utilized in a transitory or intermittent way. For instance, we can consider the cells in the triage and admissions section of newly admitted individuals, where they stay for a few hours or a few days for internal registration, and medical examinations, among others. Also, the health section or infirmary incorporates some cells for administering medication or treatment to people deprived of liberty. Lastly, the isolation or "solitary" cells cannot be counted as a potential accommodation since their use is limited to a maximum period described in penal legislation. In addition, special attention is given to spaces intended to protect the physical integrity of people who would be at

[150] BRAZIL. MNPCT, Mecanismo Nacional de Prevenção e Combate à Tortura (National Mechanism for the Prevention and Combat of Torture). **Relatório de missão a unidades de privação de liberdade no Tocantins.** Brasília: MNPCT, 2017. Available at: https://mnpctbrasil.wordpress.com/wp-content/uploads/2019/09/relatoriotocomassinatura.pdf

risk if accommodated among the general population. Cells in these spaces are called "safe" and tend to imply worse detention conditions.

Therefore, only the location within a cell or dormitory intended for a permanent stay within prison routines — such as the cells in the standard pavilions, can be considered an "accommodation." Attention must be paid to the nature of these cells — whether individual or collective – and their structural measurements. In addition, it is essential to emphasize that the accommodations destined for women should include spaces for newborns in cases in which the Judiciary determines or maintains their imprisonment, as recommended by CNJ Resolution Nº. 369/2021[151] and international guidelines. Similarly, the prison capacity must also include accessible space, preferably with a universal design, for the dignified custody of people with disabilities, especially wheelchair and crutch users[152].

International guidelines set out in the Nelson Mandela Rules state that accomodation should not be occupied by more than one person, except in special circumstances, such as temporary overcrowding[153]. However, there are not specific or technical guidelines regarding the layout and design of prisons and cells.

The demand for a minimum individual cell is based on **proxemics**, which deals with the spatial dimension between the private, personal, social, and public. Proxemics is a field of investigation focused on describing the relations between individual spaces in a social environment and discussing the adequate distance between individuals[154]. The decrease in this distance can cause a psychological state called "crowding", due to the person's lack of control over the elements of the environment, making the environment threatening and insecure and triggering negative reactions, especially "aggressive, defensive behaviors, distancing, withdrawal, etc."[155]. Cells with little individual space generate, therefore, this feeling of crowding and tend to favor aggressive and defensive behaviors, due to the insecurity felt. A minimum space is crucial for a process of regulating interpersonal limits that balances the circumstance of being alone or isolated at certain times and being accessible and in contact with people at others[156].

In line with these primary human conditions, the guidelines developed by the **European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)** serve as a reference, which stipulates what it calls a "minimum habitable space" in detention facilities. They are:

- 6m² of living space for a single-occupancy cell + sanitary facility (bathroom);

[151] OHCHR, United Nations Human Rights Office. **The Tokyo Rules:** United Nations Standard Minimum Rules for Non-custodial Measures. 1992. Available at: https://www.ohchr.org/sites/default/files/tokyorules.pdf
[152] BRAZIL. **Decree Nº 6,949**. Promulgates the International Convention on the Rights of Persons with Disabilities and its Optional Protocol. Brasília, 2009. Available at: https://www.planalto.gov.br/CCIVIL_03/////_Ato2007-2010/2009/Decreto/D6949.htm
[153] UNODC, United Nations Office on Drugs and Crime. **The Bangkok Rules** – United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary. 2011. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf
[154] HALL, Edward T. **A Dimensão Oculta.** São Paulo: Martins Fontes, 2005.
[155] FISCHER, Gustave-Nicolas. **Psicologia Social do Ambiente.** Instituto Piaget, 1994.
[156] PRADO, Adriana R. de Almeida. **Desenho Universal:** Caminhos da Acessibilidade no Brasil. São Paulo: Annablume, 2010.

• 4m² of living space per person in a multiple-occupancy cell + fully partitioned sanitary facility (bathroom);

• at least 2m between the walls of the cell; and

• at least 2.5m between the floor and the ceiling of the cell[157].

In the case of multiple-occupancy cells, which are the vast majority in the country, the maximum occupancy limit of up to four inmates is indicated as a desirable parameter by adding 4m² per additional inmate to the minimum living space of 6m² in a total of 18m²[158]. In individual and multiple-occupancy cell formats, sanitary installations are not included and require additional space to the minimum recommended dimensions.

The standards established by the CPT are adopted worldwide and recognized in the jurisprudence of international courts and tribunals in several countries. The European Committee does not consider these minimum measurements absolute. So, a tiny deviation from its minimum standards does not automatically imply inhuman and degrading treatment. In this sense, other mitigating factors must be present at that location, such as detainees spending considerable time outside their cells in workshops, classes, or other daily activities. Even in these cases, the CPT still recommends that the minimum standard be respected[159].

Table 2: CPT's Architectural standards[160]

International Standards - CPT					
Characteristics of the cell	**Nº. of individuals in custody**	**Minimum area (m²)**	**Minimum diameter (m)**	**Minimum cubage (m3)**	**Bathroom**
Individual	1	6	2	15	Additional space
Collective	2	10	2 +	25	Additional space
	3	14	2 +	35	Additional space
	4	18	2 +	45	Additional space

From the minimum height of 2.5 meters and an additional 4m² for each new inmate in a cell, it is possible to devise the standards marked in the table above. However, the table is still incomplete due to the lack of precise international regulations regarding, for instance, the minimum area for bathrooms inside cells.

[157] CPT, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. **Living space per prisoner in prison establishments:** CPT standards. Strasbourg: Council of Europe, 2015. Available at: https://rm.coe.int/16806cc449

[158] Ibid.

[159] Ibid.

[160] Ibid.

Concerning the national standards on the cell structure, the **Criminal Execution Law (LEP)** Nº. 7,210/1984 establishes requirements for the cellular unit in its art. 88. The article mentions that the individual cells must have a **minimum area of 6m²**, including a "dormitory, toilet, and washbasin". In addition, the legislation ensures the "health of the environment through aeration, insolation and adequate thermal conditioning for human existence".

In 2011, the National Council of Criminal and Penitentiary Policy (CNPCP) detailed penitentiary architectural standards through CNPCP Resolution Nº. 9/2011, which defines the "Basic guidelines for penal architecture". The regulation describes the individual cell as "the smallest possible cell of a penal establishment". Furthermore, it stipulates that its space must include a bed, circulation area, and personal hygiene space, containing at least a washbasin and sanitary device. The shower, however, could be installed in a different place. In addition, the Resolution reaffirms the minimum area of 6m² provided by law, adding the requirement that the minimum cubage is 15m³ and the minimum diameter of 2m. Finally, the Resolution innovates concerning international references by introducing essential variables for the composition of the cellular space, such as clarifications on the minimum components of sanitary facilities, information for the layout of cells with accessibility for people with disabilities, and minimum height standards for beds — bunk or triple bunk bed[161].

Table 3: Architectural standards — CNPCP Resolution Nº. 9/2011

National standards					
Characteristics of the cell	**Nº of individuals in custody**	**Minimum area (m²)**	**Minimum diameter (m)**	**Minimum cubage (m3)**	**Bathroom**
Individual	1	6	2	15	Included in the minimum area
Collective	2	7	2	15	Included in the minimum area
	3	7.70	2.60	19.25	Included in the minimum area
	4	8.40	2.60	21	Included in the minimum area
	5	12.75	2.60	31.88	Included in the minimum area
	6	13.85	2.85	34.60	Included in the minimum area

A point worth noting is the multi-occupancy cells. Nelson Mandela's Rules emphasize that "where dormitories are used, they must be occupied by individuals carefully selected as being suitable

[161] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 9**. Basic guidelines for penal architecture. Brasília: CNPCP, 2011. Available at: https://www.gov.br/senappen/pt-br/pt-br/composicao/cnpcp/resolucoes/2011/resolucao-no-9-de-09-de-novembro-de-2011.pdf/view

to associate with one another in those conditions". The rules also point out the need for periodic supervision by night. In addition to procedural issues, collective dormitories imply a series of adversities. The CPT points out that there is little to be said in favor and much to be said against collective dormitories, especially large-capacity dormitories that inevitably imply a lack of privacy in everyday life and a substantial risk of oppression and violence. Multi-occupancy cells favor the creation of subcultures, self-government regimes, and encouraging criminal groups. These agreements make it challenging, if not impossible, to supervise criminal police officers daily and, gravely, jeopardize the managing of incidents such as conflicts and riots, enabling the use of force necessary and, at times, inevitable. Collective cells with large numbers of individuals feed all these problems, especially when the whole establishment is overcrowded[162]. In addition, collective cells favor the spread of infectious diseases among their occupants, a situation exarcebated by the global Covid-19 pandemic.

Beyond the aspects of the minimum dimensions required for cell sizes, the CNPCP Resolution Nº 9/2011 adds that the **concept of accommodation does not end with the area of the cell** but also with how the number of cells, and people occupying them, are related to other services and activities of the unit. In other words, "accommodation" is also set from "calculations of personal space/person for each type of space/time/activity"[163]. Therefore, prison capacity and architectural projects must collaborate, **considering the prison management, the activities carried out, the flow of people and equipment, the number of professionals operating the routine, and the users' profiles**. In this perspective, prison capacity is guided by the proportionality of spaces concerning users — inmates, criminal police agents, technical professionals, teachers, health teams, managers, family members, etc. — and the integration of the areas that make up penitentiary services[164].

The issue is not only technical. It is about the ability of a penal establishment to provide dignified and humane treatment to people deprived of liberty, following the law. Therefore, the simple definition of minimum area overshadows a set of complex variables related to physical elements, such as space, temperature, ventilation, lighting, noise, humidity, and hygiene; regimental aspects, such as imprisonment time, schedules, activities outside the accommodation place; and services, such as health, work, electricity, security, food, communications[165].

Regarding this subject, CNPCP Resolution Nº 9/2011 made substantial progress by establishing guidelines on the typology of facilities (vertical or horizontal). It includes layout standards, building

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[162] CPT, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. **Living space per prisoner in prison establishments**: CPT standards. Strasbourg: Council of Europe, 2015. Available at: https://rm.coe.int/16806cc449

[163] BRAZIL. MNPCT, Mecanismo Nacional de Prevenção e Combate à Tortura (National Mechanism for the Prevention and Combat of Torture); LABGEPEN, Laboratório de Gestão de Políticas Penais (Penal Policy Management Laboratory); NUPES/UFAL, Núcleo de Pesquisas sobre Projetos Especiais da Universidade de Alagoas (Center for Research in Special Projects of the Federal University of Alagoas. **Nota Técnica** – Análise sobre os impactos da alteração da Resolução 09, de 18 de novembro de 2011, do CNPCP que define as Diretrizes para Arquitetura Penal no Brasil. Brasília: MNPCT; LabGEPEN/UnB; NuPES/UFAL, 2018. Available at: https://mnpctbrasil.files.wordpress.com/2019/09/nupes.pdf

[164] Ibid., p. 12; 16.

[165] SALINAS, Raúl. **Sobrepoblación penitenciaria y derechos humanos.** Tesis, Universidad Nacional de La Plata, 2017. Available at: http://sedici.unlp.edu.ar/handle/10915/61025

and prison facility restoration, and setting minimum areas for modules intended for different purposes – such as education, work, visitation, and administrative space, among others – according to each type of penal establishment. However, six years later, the Council edited **CNPCP Resolution Nº 6/2017**, loosening the guidelines in CNPCP Resolution Nº 9/2011, excluding the reference tables for the minimum length of prison modules. However, it kept the minimum area references for cells and courtyards. According to the normative act preamble, the change was justified by the "lack of accommodations in the penitentiary system [which] reached unsustainable levels to offer a robust effort in making new accommodations viable"[166].

Federal penitentiary supervisory authorities and universities expressed themselves unfavorably regarding the measure, indicating that the new provision directly affects the entire text of CNPCP Resolution Nº 9/2011, **regressing to a concept of prison capacity that would no longer consider the proportionality between beds and the services, flows, and establishment routines**[167]. During the Covid-19 pandemic, the CNPCP also enact Resolution Nº 5/2020, authorizing the installation of temporary structures to face the new Coronavirus regarding individuals' triage, health units, and group risk accommodations[168]. However, there was no change in the regulation of prison capacity.

In the current scenario, there is no single standard for defining what constitutes prison capacity. As a result, different actors adopt different criteria, which results in divergent datasets among the various sources available, whether from information from state secretariats of penitentiary administration, the Public Prosecutor's Office, Courts of Auditors, or the CNJ itself. In addition, infrastructure reforms can **artificially increase the number of beds** without necessarily increasing the physical space of the unit, generating even more significant distortions[169].

It is also necessary to remember that the places to be counted are those **spaces that are functional** and in conditions to be used. In many units, cells, sections, or even entire pavilions may be at risk of deactivation due to a lack of habitability resulting from accidents, fires, riots, and deterioration of the physical, electrical, and water-sanitary structure. Thus, the only way to determine the number of adequate accommodations is by subtracting from the declared capacity the spaces that are deactivated[170].

Other relevant spaces are those used as **informal accommodation**, which does not fit the concept of prison capacity. Formal accommodation would be that space architecturally designed to serve the

[166] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution N° 6**. Provides for the relaxation of the Basic Guidelines for Penal Architecture in Annex 1 of Resolution N° 9 of November 18, 2011, which deals with the Penal Architecture Guidelines. Brasília: CNPCP, 2017. Available at: https://www.gov.br/senappen/pt-br/composicao/cnpcp/resolucoes/2017/resolucao-n-6-de-07-de-dezembro-de-2017.pdf/view

[167] BRAZIL. MNPCT, Mecanismo Nacional de Prevenção e Combate à Tortura (National Mechanism for the Prevention and Combat of Torture); LABGEPEN, Laboratório de Gestão de Políticas Penais (Penal Policy Management Laboratory); NUPES/UFAL, Núcleo de Pesquisas sobre Projetos Especiais da Universidade de Alagoas (Center for Research in Special Projects of the Federal University of Alagoas. **Nota Técnica** – Análise sobre os impactos da alteração da Resolução 09, de 18 de novembro de 2011, do CNPCP que define as Diretrizes para Arquitetura Penal no Brasil. Brasília: MNPCT; LabGEPEN/UnB; NuPES/UFAL, 2018, p. 58. Available at: https://mnpctbrasil.files.wordpress.com/2019/09/nupes.pdf

[168] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 5**. Provides indicators for setting maximum capacity in penal establishments, numerus clausus. Brasília: CNPCP, 2016. Available at: https://www.gov.br/senappen/pt-br/pt-br/composicao/cnpcp/resolucoes/2016/resolucao-no-5-de-25-novembro-de-2016/view

[169] SINDASP, Sindicato dos Agentes Penitenciários do Estado de São Paulo (Union of Penitentiary Officers of the State of São Paulo). **SAP cria 1,7 mil novas vagas em penitenciárias.** 2014. Available at: https://www.sindasp.org.br/sap-cria-17-mil-novas-vagas-em-penitenciarias

[170] SALINAS, Raúl. **Sobrepoblación penitenciaria y derechos humanos.** Tesis, Universidad Nacional de La Plata, 2017, p. 58. Available at: http://sedici.unlp.edu.ar/handle/10915/61025

original purpose of housing people deprived of their liberty and to be used as overnight accommodation, commonly called a "cell." Those spaces must include adequate sleeping furniture, access to drinking water and toilets, natural light and air, and reasonable condition for privacy and security against third-party intrusions. On the other hand, informal accommodation can be defined as a space conceived for purposes other than housing people – such as patios, workshops, classrooms, administrative offices, kitchens, warehouses, sports, or sanitary facilities. However, those spaces started to serve as accommodation for individuals due to overcrowding, transforming them into precarious installations made of unsuitable materials in patios, corridors, and sheds, among others[171].

Informal accommodations are standard in some prisons in the country, as already registered in the states of Pernambuco and Roraima[172]. However, they should not be considered within the concept of prison capacity. Moreover, the CNPCP expressly prohibits, for calculating the accommodations, for instance, the "number of improvised mattresses on the floor of the penal facility"[173].

The National Council of Justice endorses the necessity to set consistent national standards in adherence to international guidelines in the **report on the Provisional Presidential Decree (MPV) about Brazil** in May 2021. The document was addressed to the Inter-American Court of Human Rights after provocation for the CNJ to manifest itself in the records. Those records are related to implemented measures for the *Instituto Penal Plácido de Sá Carvalho* (Plácido de Sá Carvalho Penal Institute) in Rio de Janeiro, *Complexo Penitenciário de Curado* (Curado Penitentiary Complex), in Pernambuco, and the *Complexo Penitenciário de Pedrinhas* (Pedrinhas Penitentiary Complex), in Maranhão, among others. As a result, the CNJ expressly indicated its commitment to the "effective observance of a uniform standard on the calculation (to guarantee legal assurance and avoid the artificial creation of new accommodations)", in addition to committing to the enactment of a normative act determining the definition of the notion of "prison capacity"[174].

The actual maximum capacity of penal facilities

The concept of vacancy is the starting point for defining the **capacity** of a penal facility, that is, how many accommodations or inmates the place can hold. The total number of existing accommodations determines the capacity of a prison facility that respects the individual minimum area and excludes deactivated and informal living spaces. On the other hand, actual capacity comes from the on-site verification of the living-spaces conditions indicated by the penitentiary administration. This no-

[171] PARAGUAY. MNPT, Mecanismo Nacional de Prevención de la Tortura (National Mechanism for the Prevention of Torture). **Pabellón la bronca** – Índice de ocupación de Instituciones de Privación de Libertad de la República del Paraguay. Asunción: MNPT, 2018. Available at: https://mnp.gov.py/wp-content/uploads/PabellonLaBronca.pdf

[172] BRAZIL. MNPCT, Mecanismo Nacional de Prevenção e Combate à Tortura (National Mechanism for the Prevention and Combat of Torture). **Relatório de visitas a Pernambuco**. Brasília: MNPCT, 2016. Available at: https://mnpctbrasil.wordpress.com/wp-content/uploads/2019/09/relatoriope2016.pdf

[173] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 5.** Provides indicators for setting maximum capacity in penal establishments, numerus clausus. Brasília: CNPCP, 2016. Available at: https://www.gov.br/senappen/pt-br/pt-br/composicao/cnpcp/resolucoes/2016/resolucao-no-5-de-25-novembro-de-2016/view

[174] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Informe sobre as Medidas Provisórias adotadas em relação ao Brasil:** Unidade de Internação Socioeducativa/ES, Instituto Penal Plácido de Sá Carvalho/RJ, Complexo Penitenciário de Curado/PE e Complexo Penitenciário de Pedrinhas/MA. Brasília: CNJ, 2021, p. 54; 72. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/484

tion recognizes the management difficulties in accurately attributing the structural capacity in prisons. Moreover, it acknowledges that many reforms are conducted informally, without projects or submission to regulatory prerequisites, such as the technical term of responsibility (ART) and the assignment of architects and engineers. Faced with the controversial reliability of technical information obtained by management bodies, the idea of identifying and certifying the actual capacity was born.

However, using terms such as "adequate, sufficient, appropriate, or decent" to characterize prison conditions and their capacity should be avoided due to their high degree of flexibility and absolute dependence on a case-by-case and subjective interpretation[175]. Along these lines, prison capacity would become a tricky concept, with an elasticity that can make overcrowding more or less apparent[176]. Objective criteria are always preferable, notably from the diagnosis of minimum areas and the relationship between spaces, in characterizing a prison space.

The **Principles and Best Practices for the Protection of Persons Deprived of Liberty in the Americas**, approved in 2008 by the Inter-American Commission on Human Rights (IACHR), guide this conception. The accommodations available in each prison are defined "according to international standards related to living conditions". That information must be public, accessible, and regularly updated to ensure the "actual maximum capacity rate", in other words, not just that formally considered.

Likewise, experiences in other countries highlight the importance of verifying the actual capacity of penal establishments. In **Argentina**, the Supreme Court judged in 2005 the collective *habeas corpus* filed in favor of Horacio Verbitsky, which dealt with overcrowding in prisons and police establishments in Buenos Aires. The Court requested the provincial Executive Branch to prepare a detailed report on the specific conditions of custody, involving the "characteristics of the cell, the number of beds, hygiene conditions, access to sanitary services, etc." to assess the necessity to maintain detention, or to order non-custodial measures[177]. In this same decision, the Supreme Court determined a reform of penal legislation to handle prison capacity. As a result, the Public Defender's Office and other organizations proposed a bill that creates a body responsible for determining the capacity of each establishment. Also, the bill paid particular attention to the "minimum area for each detainee", made up of representatives of the Ministries of Justice, Public Health, Infrastructure, and Human Rights Secretariat[178]. The proposal remains under debate.

In **Paraguay**, the **National Mechanism for the Prevention of Torture** (MNP) adopted the maximum actual capacity in the region's most significant nationwide prison-by-prison on-site verification effort ever undertaken. In the innovative 2018 report "*Pabellón la Bronca: índice de ocupación de instituciones de privación de liberdad de la República del Paraguay*", the Mechanism identified that the actual capacity

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[175] SALINAS, Raúl. **Sobrepoblación penitenciaria y derechos humanos.** Tesis, Universidad Nacional de La Plata, 2017, p. 42. Available at: http://sedici.unlp.edu.ar/handle/10915/61025

[176] ALBRECHT, Hans-Joerg. **Prison Overcrowding** – Finding Effective Solutions: Strategies and Best Practices Against Overcrowding in Correctional Facilities. Freiburg: Max Planck Institute for Foreign and International Criminal Law, 2012. Available at: https://static.mpicc.de/shared/data/pdf/research_in_brief_43_-_albrecht_prisonvercrowding.pdf

[177] ARGENTINA. Suprema Corte de La Nación (Supreme Court of the Nation). **Recurso de Hecho** – Verbitsky, Horacio s/ *habeas corpus*. Available at: https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoSumario.html?idDocumentoSumario=11602

[178] RODRIGUEZ, María Noel. **Estrategias y buenas prácticas para reducir el hacinamiento en las instituciones penitenciarias.** Kyoto: UNAFEI, 2010. Available at: https://www.unafei.or.jp/publications/pdf/12th_Congress/25Maria_Noel_Rodriguez.pdf

of the prison system was 4,310 accommodations, considering the smallest area provided by international standards, with the minimum of 7m² per individual in deprivation of liberty. Meanwhile, the Ministry of Justice data indicated 9,491 prison accommodations. However, with the prison population at the time of 14,561 people, the study demonstrated the imprecision of the official occupancy rate, which was 153.4%. In contrast, the real occupancy rate was 337.8%, more than double[179].

In the **United Kingdom**, the Ministry of Justice establishes the Certified Normal Accommodation (CNA) — the maximum capacity parameter outlined by the country's prison administration service for an adequate and decent standard of accommodation for all people arrested. The certification of a prison facility derives from cell certifications, which set the authorized function and usage for each cell. For example, no cell must be used for the isolation of individuals unless it is certified. It also cannot be used if it exceeds the maximum operating capacity indicated on the cell certificate. The CNA baseline is the total of all certified long-stay accommodation in an establishment, except isolation cells, medical cells, or rooms in training prisons. In addition, the in-use CNA is also adopted, which refers to the essential CNA minus spaces not available for immediate use, such as damaged cells, cells under construction, or empty due to lack of staff[180].

In the **United States**, the definition of prison capacity is guided by three different concepts: **Rated capacity**: the number of people or beds a facility can hold, as set by a rating official; **Operational capa-city**: the number of people a facility can hold based on staffing and services; and **Design capacity**: the number of people a facility can hold, as set by the architect or planner[181]. These three stated capacities can vary significantly within US states. For example, on December 2019, the state of Alabama was operating at 98% of capacity, based on declared operational capability, and 176% based on design capacity. By any measure, there was critical occupancy in Alabama prisons[182].

In Brazil, local experiences also evaluate the physical spaces of penal facilities by independent bodies, notably the Public Defender's Office. For example, in **Rio Grande do Sul** state, the State Public Defender's Office has, in its structure, the Department of Engineering, Architecture, Maintenance (DEAM), which conducts technical inspections of prisons together with public defenders. As a result of these inspections, they produced reports that consider the standards of CNPCP Resolution Nº. 09/2011, Nelson Mandela Rules, and the Brazilian Health Regulatory Agency (ANVISA)[183].

The **Criminal Execution Law** summarizes guidelines regarding establishing the actual capacity of penal facilities, designating the CNPCP as the central institution in this attribution. It specifies that "the penal facility must have a capacity compatible with its structure and purpose" (art. 85, *caput*) and

[179] PARAGUAY. MNPT, Mecanismo Nacional de Prevención de la Tortura (National Mechanism for the Prevention of Torture). **Pabellón la bronca** – Índice de ocupación de Instituciones de Privación de Libertad de la República del Paraguay. Asunción: MNPT, 2018, p. 22-23. Available at: https://mnp.gov.py/wp-content/uploads/PabellonLaBronca.pdf

[180] UNITED KINGDOM. Ministry of Justice. **Certified Prisoner Accommodation** – PSI 17/2012. London: 2012. Available at: https://assets.publishing.service.gov.uk/media/63f88afe8fa8f527f110a2e3/certified-prisoner-accommodation-pf.pdf

[181] UNITED STATES. BJS, Bureau of Justice Statistics. **Prisoners in 2019**. Washington, DC: BJS, 2020. Available at: https://www.bjs.gov/content/pub/pdf/p19.pdf

[182] PRISON POLICY INITIATIVE. **Since you asked:** just how overcrowded were prisons before the pandemic, and at this time of social distancing, how overcrowded are they now? Available at: https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/

[183] BRAZIL. DPE/RS, Defensoria Pública do Estado do Rio Grande do Sul (Public Defender's Office of the State of Rio Grande do Sul). **Relatório N° 2/2020** – Vistoria Técnica à Unidade Prisional Estadual do Município de Rosário do Sul/RS. Diretoria de Engenharia, Arquitetura e Manutenção Predial (DEAM). Porto Alegre: DEP/RS, 2020.

that "The National Council of Criminal and Penitentiary Policy **must determine the maximum capacity limit of the establishment**, considering its nature and specificities" (art. 85, sole paragraph).

Likewise, a fundamental aspect considered in delimiting prison capacity is the nature of its occupation in terms of the legal status of the person arrested, whether submitted to pre-trial detention or penal enforcement. For example, the LEP establishes that "the provisional detainee must be separated from the convict by *res judicata sentence*" (art. 84). Similarly, the Nelson Mandela Rules stipulate that "the different categories of people deprived of liberty must be kept in separate institutions or parts of institutions, taking account of their sex, age, criminal record, the legal reason for their detention, and the necessities of their treatment" (rule 11). Therefore, **the definition of prison capacity must contemplate the differentiation between provisional detainees and convicts** and factors related to prison management.

The legislation sets the indicators for assessing the maximum prison capacity in CNPCP Resolution Nº. 5/2016, which resumes the criminal facilities architectural criteria of **CNPCP Resolution Nº. 9/2011**. Therefore, it highlights that the maximum limit of the units built with federal resources is: (i) 300 people in maximum security facilities; (ii) 800 in medium security facilities; (iii) 1,000 in agricultural, industrial, or similar colonies; (iv) 300 in the observation center; and (v) 800 in the public jail. In addition, **CNPCP Resolution Nº. 5/2016** reiterates that: (i) Each cell module must not exceed 200 people; (ii) Multi-occupancy cells must not exceed 8 people; and (iii) For separateness purposes, the number of single cells must be at least 2% of their total capacity.

Finally, the Resolution prescribes that there must be a collegiate deliberation between the manager of the state penitentiary administration and the state Penitentiary Council to certify the actual capacity of each penal facility that "has been built or expanded before Resolution Nº. 9, of November 18, 2011, of the CNPCP" (art. 3). It also requires the following minimum indicators: the opening date of the penal establishment; the date of the last expansion of prison capacity; the municipality; the abbreviation of the penal unit; and the maximum capacity of each penal establishment.

The normative act establishes a mechanism for evaluating and reviewing this state-level regulation by the National Council of Criminal and Penitentiary Policy (CNPCP), based on the request of any interested parties, founded on the provisions of art. 85, sole paragraph of the LEP. The Council is also responsible for consolidating and publishing statistical data on the subject[184].

[184] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 5**. Provides indicators for setting maximum capacity in penal establishments, numerus clausus. Brasília: CNPCP, 2016, art. 3, § 3. Available at: https://www.gov.br/senappen/pt-br/pt-br/composicao/cnpcp/resolucoes/2016/resolucao-no-5-de-25-novembro-de-2016/view

ATTENTION POINT

CONSTRUCTION OF NEW PRISONS

The standards indicated in this chapter suit existing penitentiaries and future units. It is crucial to ensure that the architectural projects of new constructions consider single and multi-occupancy cells according to the minimum area standards and other spaces and services, like health, work, and education modules. The Nelson Mandela Rules also state that the maximum capacity must not exceed 500 people per establishment. This regulation aims to **avoid the adoption of a construction model which privileges the overcrowding phenomena**. In Paraguay, units were designed to accommodate up to four people in cells of 11 or 12 m², reproducing the conditions of the system in terms of overcrowding, deficiencies in medical care, food supply, and access to education and work.

Defining the capacity in a penal institution presupposes a diagnosis of the occupancy spaces designed to accommodate people deprived of their liberty in a respective unit. For instance, the **architectural survey methods** use an on-site measurement of formal structures built with manual or digital sketches, complemented by aerial images and georeferenced online tools such as Google Earth and others.

These surveys must also consider the area of each single or multi-occupancy cell and the correspondence of these spaces with the minimum dimensions established by CNPCP Resolution Nº. 9/2011. In addition, they must observe the proportion between the number of cells, the standards of minimum floor space, and additional prison facility rooms destined for the standard penal services like adequate medical, work, education, contact with the outside world, etc. Furthermore, regarding gender diversity, it is essential to distinguish areas for accommodating individuals of different legal statuses —whether in pre-trial detention or by conviction — and gender diversity — if men or women, for example.

Once these stages have been completed, the next step is the technical analysis of the data collected, aimed at comparing the spaces diagnosed with the minimum area parameters for individual and collective cells set out in CNPCP Resolution Nº. 9/2011 and their proportionality with other spaces intended for the provision of essential penal services. Once this procedure has been completed, it will be possible to gauge the actual maximum capacity of the prison. This achieves the **certification of the actual maximum capacity**.

This tool presupposes, by definition, an **interdisciplinary activity** that contains knowledge of architecture, design, engineering, and prison management. Therefore, executing this elementary tool to control overcrowding includes engaging professionals who may be part of the Court's staff. Also, there is a possibility of engaging in partnerships with other institutions, such as universities, civil society organizations, and other actors.

Publicity and easy access to information regarding prison capacity are also provided for in the Principles and Good Practices on Deprivation of Liberty of the Inter-American Commission of Human Rights (IACHR), which emphasize that States institute procedures "through which people deprived of their liberty, their lawyers or non-governmental organizations may challenge the data about the number of vacancies in an establishment or its occupancy rate, individually or collectively". The IACHR Principles also ensure that, in the event of a challenge, the work of independent experts will be authorized[185].

Finally, the actual maximum capacity of prison facilities is not a fixed and permanent reality. Over time, prison facilities change due to structural reforms, deterioration, natural wear of buildings, whether as a result of phenomena such as fires, floods, and other damages. Thus, there is a need to periodically evaluate the prison's capacity, considering the temporal changes and conditions of prison living spaces. This obligation of regular occupancy verification is also established in the IACHR[186] Principles and Good Practices on Deprivation of Liberty.

It is possible to adopt two models for the certification of the actual maximum capacity: the external and internal evaluation models. The external evaluation model utilizes an architectural survey in loco and technical analysis carried out by different organizations and with institutional independence concerning the penitentiary administration. Institutions such as universities, research centers, architecture and engineering departments of the Court itself, and mechanisms for preventing and combating torture, among others, can acquire certification. The experiences of Argentina and Paraguay inspire this model. In the internal evaluation model, the Executive Branch itself, through the designation of a specific technical sector or specialized employees, to the same on-site survey and analysis of the spaces against the current standards. The internal certification model comes from the experiences of the US and UK. In any case, both models are covered by the Inter-American guidelines and thus fall within the framework defined by CNPCP Resolution Nº. 5/2016.

[185] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas**. Washington: IACHR, 2008. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[186] Ibid.

STEP BY STEP:

CERTIFICATION OF THE ACTUAL CAPACITY OF A PRISON FACILITY

1. Architectural survey of each penal establishment, including analysis of the ground plan, on-site survey, collection of aerial images, georeferencing, etc.

2. Confrontation of the survey of each cell with the standards of minimum floor space.

3. Certificate of capacity for each cell.

4. Confrontation of proportionality between adequate cells, necessary services, and available staff.

5. Determination of differentiated spaces destined for convicted individuals in pre-trial detention, men, women, and, when applicable, specific rooms for indigenous people, LGBTI people, and individuals with safety measures status.

6. Certificate of the actual capacity of each penal establishment.

AN INDISPENSABLE TOOL?

The definition of the actual maximum capacity of each prison facility undoubtedly supplies the Judiciary with reliable information and an eventual resizing of the number of officially reported accommodations. In addition, it ensures adherence to national and international guidelines on adequate spaces for detention. However, it is possible that, in some instances, it is not feasible to develop this activity in the short term. Nevertheless, this should allow the implementation of the Prison Capacity Regulation Center, which can utilize the capacity declared by the prison authorities and include in its planning the adequate survey of each prison.

4.1.2. Penitentiary zoning

How many vacancies can the local prison system hold? The answer relies on two steps. First, it depends upon the definition of each penal establishment's actual maximum capacity in applying the methods indicated in the previous item. Second, it relates to penitentiary zoning. Only from these two steps will be viable to estimate the number of accommodations in the prison system in a given location. This tool is closely related to the individuals' relocation tool between correctional facilities, detailed in item 4.4.2 of this Handbook.

Deprivation of liberty does not emerge in a delocalized way. On the contrary, the prison location and material conditions interfere profoundly with the lives of people deprived of liberty. For example, the proximity to their previous residence, commonly associated with the place of residence of their family members, allows them to regularly receive visits and additional supplies — such as food, hygiene materials, and other consumer goods authorized by the prison administration. Often, these supplies complement the deficient diet the prison administration provides, among other items that are sometimes not offered, such as clothes, shoes, soap, shampoo, and toothbrushes. Thus, those items usually work as an essential element to relieve the dire conditions of imprisonment. In addition, family closeness favors some bene-fits — such as brief time outside the prison and the possibility of working and studying close to where they will live after their release.

The inmates' closeness to their community of origin decreases the risk of breaking the social and affective bonds, favoring the reintegration process. It also contributes to avoiding the transposition of the individuals' sentence to their family members, as the latter will not have to travel long distances to attend the visits. Furthermore, this action helps save costs, especially in transport, particularly for the poorest, and the loss of income due to eventually lost workdays. Finally, from the inmate's standpoint, the closer the prison unit is to their home, the easier it will be for them to return to their residence and the more effective it will be the prevention of criminal reoffending, for example[187].

In this context, it is crucial to undertake penitentiary zoning, comprehended by the demarcation of geographic zones, favoring the administration of criminal justice and the deprivation of liberty within a jurisdictional area. Also, it is crucial to consider that the individuals must be imprisoned in the penal establishment closest to their residence or family. This notion has solid legal support in international standards and national legislation, particularly regarding sentenced persons.

The **Nelson Mandela Rules** provide that "people deprived of liberty must be allocated, to the extent possible, to prisons close to their homes or the places of social rehabilitation"[188]. Concerning women deprived of their liberty, the **Bangkok Rules** point out that: "women in deprivation of liberty must be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the avail-

[187] UNODC, United Nations Office on Drugs and Crime. **Handbook on strategies to reduce overcrowding in prisons.** New York: UNODC, 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

[188] UNODC, United Nations Office on Drugs and Crime. **The Nelson Mandela Rules:** The United Nations Standard Minimum Rules for the Treatment of Prisoners. 2015, Rule Nº 59. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

ability of appropriate programs and services"[189]. Likewise, the Inter-American Commission's Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas indicated that the transfer of persons deprived of liberty should take "into account the need of persons to be deprived of liberty in places near their family, community, their defense counsel or a private attorney and other State body in charge"[190].

The international jurisprudence ratified those standards and had a binding effect on the Brazilian State. In the case of Nortín Catrimán and others vs. Chile, the **Inter-American Court of Human Rights** establishes international guidelines for penitentiary zoning, with effects throughout Latin America, imposing centrality on the right to family interaction and proximity to penal establishments that allow regular and not excessively expensive visits[191].

JURISPRUDENCE

CASE OF NORTÍN CATRIMÁN AND OTHERS VS. CHILE, IDH COURT

"The visiting of inmates' family members is an essential element to protect the individual's family and the inmate himself/herself because it represents an opportunity for contact with the outside world and because the family members support people deprived of their liberty while they serving their sentence is fundamental in many aspects, ranging from affective and emotional support to financial support. [...] States, as guarantors of the rights of individuals in their custody, must adopt the most appropriate measures to facilitate and to implement contact between the individuals deprived of liberty and their families"[192].

There are many examples in Comparative Law. For instance, in **Mexico**, they coined the term **natural center**, based on the work of the *Instituto Nacional de Ciencias Penales (INACIPE)*, the recent General Criminal Execution Law, approved in 2016, which expressly guarantees family proximity as a inmate's right[193]. Article 49 of the Mexican law states: "Persons in custody must serve their pre-trial prison sentence in facilities close to the place where their trial is located. Convicted persons will be able to serve their sentences in the prisons closest to their place of residence. This provision does not apply to organized crime and other persons deprived of their liberty who require special security measures under the penultimate paragraph of art. 18 of the Constitution".

[189] UNODC, United Nations Office on Drugs and Crime. **The Bangkok Rules** – United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders with their Commentary. 2011. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf

[190] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas**. Washington: IACHR, 2008, Principle Nº 4. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[191] I/A COURT H.R, Inter-American Court of Human Rights. **Norín Catrimán y otros (dirigentes, miembros y activista del pueblo indígena Mapuche) Vs. Chile – Sentencia**. 2014. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_279_esp.pdf

[192] Ibid.

[193] MEXICO. **National Law on Criminal Enforcement**. Available at: https://www.diputados.gob.mx/LeyesBiblio/pdf/LNEP.pdf

In the **United States**, the Federal Law known as the First Step Act of 2018 requires the Federal Bureau of Prisons to house inmates in facilities that are as close as possible to their primary residence, and as far as possible, within an accessible by car[194].

In **Brazil**, the Criminal Execution Law also adheres to this principle. For example, art. 90 recommends that men's penitentiary must be built far from the urban center, but "**at a distance that does not restrict visitation**". Also, art. 103 reinforces penitentiary zoning by determining that each judicial district must have at least one public jail, making clear the purpose of protecting the **"inmate's stay in a place close to his social and family environment**". The only exception is in relation to the federal penitentiary system, as provided in art. 86.

Although these provisions are *a priori* applicable to sentenced persons, evaluating the penitentiary zoning for individuals submitted to **pre-trial detention** must take into account this issue. Nevertheless, considering the temporary and exceptional nature of this type of detention, another vital element must be considered: the proximity to the Court responsible for the pre-trial measures and to the Court designated to hold the case[195].

ATTENTION POINT

PENITENTIARY ZONING AND VIDEOCONFERENCE

The criminal hearing by videoconference was allowed in the country by Law Nº. 11,900/2009, which amended Brazilian Code of Criminal Procedure (CPP) art. 185. The amendment changes the possibility of videoconference hearings to exceptional circumstances based on restricted purposes. The rule is face-to-face hearings. In this sense, it is impossible to justify making prison zoning more flexible due to videoconferencing and allocating individuals to places that are very distant from their families.

[194] UNITED STATES. BOP, Federal Bureau Of Prisons. **First Step Act Overview.** Available at: https://www.bop.gov/inmates/fsa/

[195] UNODC, United Nations Office on Drugs and Crime. **Handbook on strategies to reduce overcrowding in prisons.** New York: UNODC, 2013, p. 170. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

EXCEPTION:
FEDERATIVE UNIT

The only exception to prison zoning in the Brazilian legal system is prescribed in the Criminal Execution Law and involves people imprisoned in federative units. The art. 86, § 1, described in Law Nº. 10,792/2003, authorizes the deprivation of liberty sentences far from the sentencing court and even outside the federation unit where that individual was prosecuted, in the following terms: "§ 1 The Federal Union may build a criminal establishment far from the place of conviction to collect convicts when the measure is justified in the interest of public safety or of the convict him/herself".

Detention in federal units managed by Senappen, is the only legally permitted condition for adopting videoconference judicial hearings. Law Nº. 13,964/2019 rewrote the LEP, indicating that this model will be preferred (art. 52, VII). In all other cases, physical presence at hearings is the rule.

The United Nations Office on Drugs and Crime (UNODC) warns that building prisons in remote locations can entail lower upfront costs – in terms of land acquisition, for example — and can prove less cost-effective in a long-term scenario. This issue emerges due to the higher cost of transporting goods, services, and individuals in deprivation of liberty. Also, the possible need to pay for personnel accommodation or provide incentives for their living in remote areas and difficulties encountered in accessing services — such as education, health, medical, and emergency — can interfere in this matter. Other indirect costs are related to the fact that public agents stationed in remote areas often experience high levels of stress and absenteeism, especially when separated from their families[196].

The actual capacity of the local prison system

From establishing the actual capacity of each prison and the notion of penitentiary zoning, there have been improvements in determining the capacity of the local prison system. For this, **it is necessary to define the "local" system and the differences between state and national systems**. The local character is restricted through the zoning of the penal system in adherence with the penitentiary zoning.

Each state must define areas around prisons that are close to each other. Those spaces, although within a reasonable distance, should be associated with a crowded urban center to ensure the visit of family members and other people who live there. Also, this suggestion aims to facilitate access to health services, work, and competent justice system bodies.

[196] UNODC, United Nations Office on Drugs and Crime. **Handbook on strategies to reduce overcrowding in prisons.** New York: UNODC, 2013. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf

In the country, the procedure already exists in several units of the federation. For example, the state of São Paulo divides its territory into five regions: Capital and Greater São Paulo, Vale do Paraíba and Coast, Central Region, Northwest Region, and West Region[197]. In 2013, the São Paulo Court of Justice established its penitentiary zoning through ten State Department of Criminal Enforcement (DEECRIM), with the designation of magistrates responsible for criminal execution in these prison areas[198]. In turn, the administration of the state of Goiás adopts eight subdivisions under the responsibility of Regional Penitentiary Coordinations[199]. In Pará, the State Secretariat of Penitentiary Administration (SEAP) zoned its territory into eleven Integration Regions[200].

[197] BRAZIL. Governo do Estado de São Paulo (Government of the State of São Paulo). **Unidades Prisionais.** Secretaria de Administração Penitenciária de São Paulo (SAP/SP). Available at: http://www.sap.sp.gov.br/

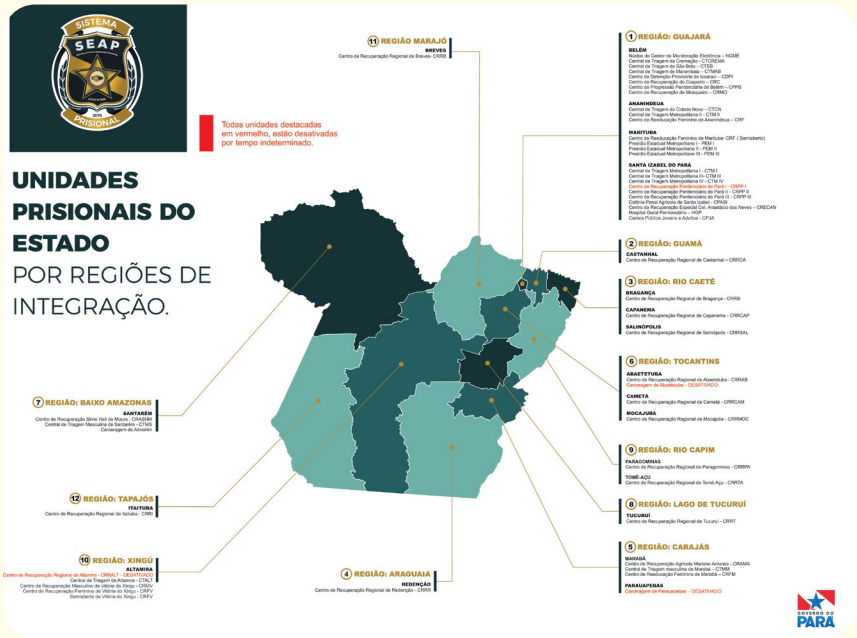
[198] BRAZIL. TJSP, Tribunal de Justiça de São Paulo (Court of Justice of the State of São Paulo). **Corregedoria Geral da Justiça**. Departamento Estadual de Execuções Criminais (DEEX). Available at: https://www.tjsp.jus.br/Corregedoria/Corregedoria/Deex

[199] BRAZIL. Governo do Estado de Goiás (Government of the State of Goiás). **Telefones e Mapas das Regionais.** Diretoria Geral de Administração Penitenciária de Goiás (DGCAP/GO). 2016. Available at: https://www.policiapenal.go.gov.br/sem-categoria/telefones-e-mapas-regionais.html

[200] BRAZIL. Governo do Estado do Pará (Government of the State of Pará). **Unidades Prisionais do Estado:** por regiões de integração. Secretaria de Administração Penitenciária do Pará (SEAP/PA). Available at: https://www.seap.pa.gov.br/node/140.

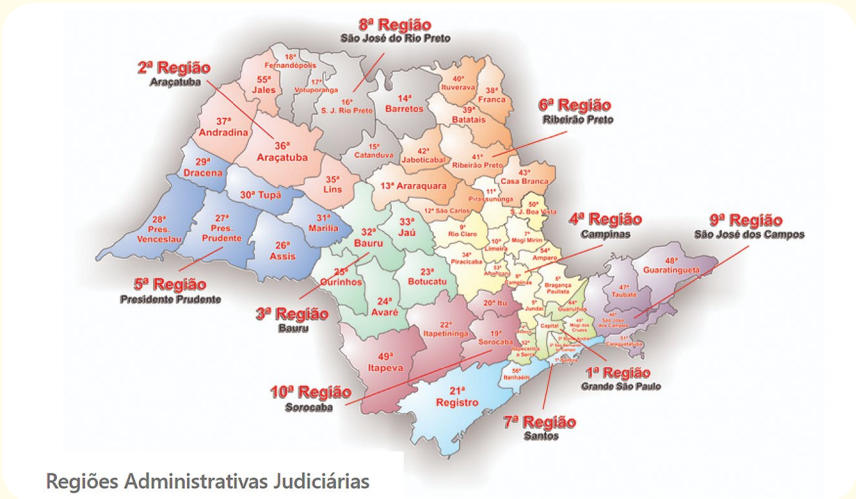
PRACTICAL EXPERIENCE

PARÁ'S PENITENTIARY ZONING



Source: SEAP/PA, available at: <https://www.seap.pa.gov.br/node/140>

SÃO PAULO'S PENAL ENFORCEMENT ZONING



Source: TJSP, available at: <https://www.tjsp.jus.br/QuemSomos/QuemSomos/RegioesAdministrativasJudiciarias>.

The first step to determine the actual capacity of the local prison system involves a cartographic procedure. This method delineates the regions of penitentiary administration and penal jurisdiction. This procedure can be conducted either directly by the Court itself — with architecture and engineering professionals from its staff — or through a partnership with other institutions — such as universities, research centers, technical inspection bodies (such as mechanisms to prevent torture), and civil society organizations. Furthermore, it is important to highlight other standards for regionalization — population density, administrative and jurisdictional decentralization, close coordination with other public policies (especially in health, education, and social assistance), and local productive arrangements. In this line, the creation of penal establishments in small municipalities is avoided, which affects the principle of penitentiary zoning and results in increased expenses and operational difficulties of other public policies.

Once the prison borders have been decided in the state, a report must be written and submitted to the National Council of Criminal and Penitentiary Policy (CNPCP). This report should comply with the provisions of art. 3 of CNPCP Resolution Nº. 5/2016, already mentioned. Similarly, in addition to the report submitted to this federal body, the functioning of the Prison Capacity Regulation Center requires that information on actual capacity is also available to all magistrates with criminal jurisdiction, as discussed below.

STEP BY STEP:
FINDING THE ACTUAL CAPACITY OF THE LOCAL PENITENTIARY SYSTEM

1. Definition of the actual capacity of each establishment **(previous item)**:

    a. Architectural survey of each penal establishment.

    b. Analysis of the results: comparison with minimum area standards and other spaces for penal services; and

    c. Certification of the actual capacity of each penal establishment.

2. Division of state territory into penitentiary administration regions.

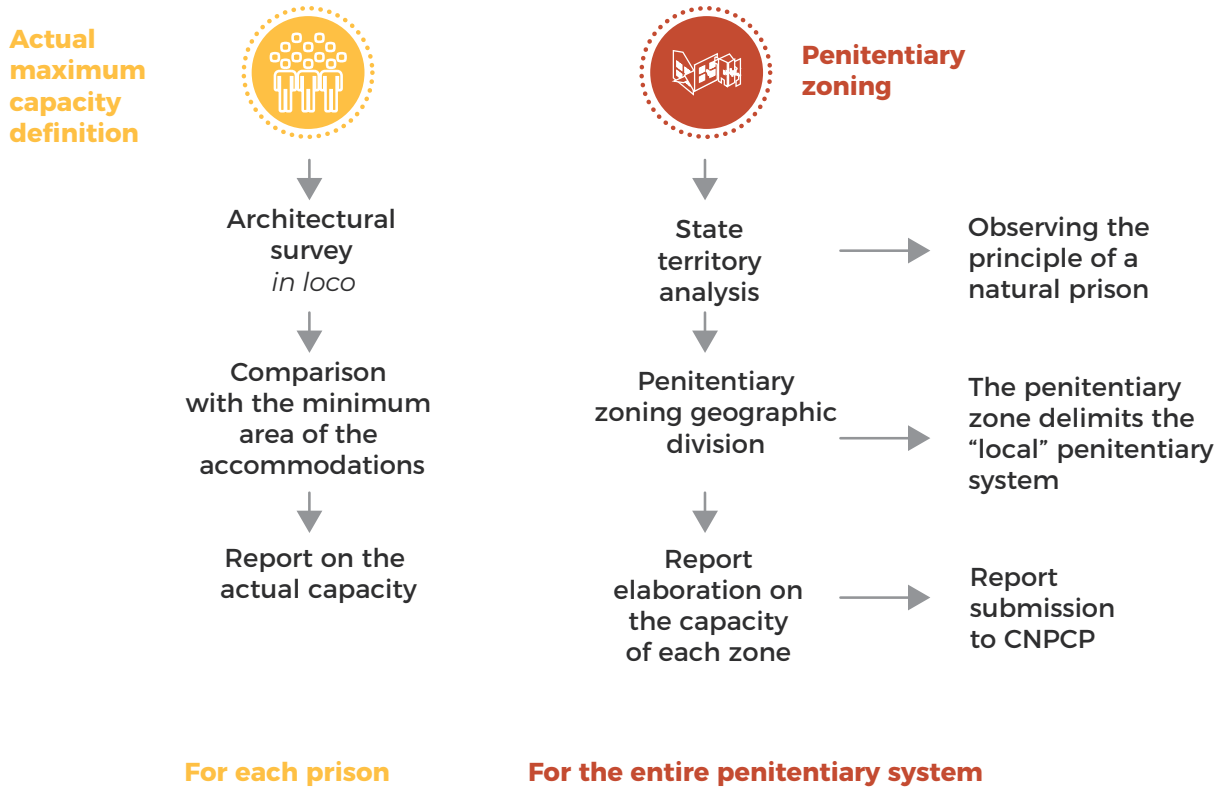
3. Report defining the actual capacity of the penitentiary system of each region and the state as a whole.

4. Submission of the report to the National Council of Criminal and Penitentiary Policy (CNPCP Resolution Nº. 5/2016).

AN INDISPENSABLE TOOL?

Prison zoning ensures the rights of persons deprived of their liberty. Therefore, it is an indispensable tool for the Prison Capacity Regulation Center. It is essential to emphasize that it is an easy-to-implement action and that many states already have these zones clarified.

FLOWCHART OF THE SPATIAL TOOLS



4.2. Technological tools

The Prison Capacity Regulation Center requires reliable and accessible information regarding the penal institution's capacity and occupation rate. From the normative framework and experiences identified in prison capacity regulation, there is a crucial role to be performed by information technology systems (IT). Those tools can help jurisdictional provisions in prison capacity management and prevent prison overcrowding. Therefore, it is important to emphasize two leading technological solutions: the real-time information system and the Critical Occupancy Alert Tool (SAOC).

4.2.1. Real-time information system

The first technological tool involves a solution for accessing information. On the one hand, the actual capacity of a prison facility and the local prison system as a whole, and, on the other, the real-time inmate's accommodation. This diligence is supported by international standards related to facing prison overcrowding[201].

The data from the dynamics between people's entrance and exit from the prison system are crucial for international obligations regarding the Brazilian State, as noted in the **International Convention for the Protection of All Persons from Forced Disappearance, internalized by the Decree Nº 8,767/2016**. This decree establishes in the art. 17.3 that the State "will ensure the compiling and maintenance of one or more official register and/or updated records to the people incarcerated, which **will readily be at disposal**, on request of any judicial authorities". In the same article, the official registers should contain, besides the individual identification number: (i) the date, hour, and place where the person was arrested and the authority identification who conducted the procedure; (ii) the prison facility where that person was taken, **admission date**, and the authority responsible for the facility; and (iii) the **release — or transfer — date and place** to another detention center, the destine and the authority responsible for that same transference[202]. Furthermore, the provision emphasizes that the data on entrance and exit should be readily accessible — or even in realtime — "promptly made available" — to any judges with jurisdictional competence.

The **Nelson Mandela Rules** prescribe a standardized file management system in every place where persons are imprisoned. Procedures must be in place to ensure a secure audit trail and prevent unauthorized access to or modification of any information in the system[203]. The system will also aim to "generate reliable data on trends and characteristics of the prison population, including **occupancy rates, in order to create a basis for evidence-based decision-making**"[204].

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[201] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas**. Washington: IACHR, 2008. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[202] BRAZIL. **Decree Nº 8,767**. Promulgates the International Convention for the Protection of All Persons against Enforced Disappearance. Brasília, 2016. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/decreto/d8767.htm

[203] UNODC, United Nations Office on Drugs and Crime. **The Nelson Mandela Rules:** The United Nations Standard Minimum Rules for the Treatment of Prisoners. 2015, Rule Nº 6. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

[204] Ibid., Rule Nº 10.

The European Source Book of Crime and Criminal Justice Statistics, developed with the support of the Council of Europe, underlines the importance of producing "flow" data from the prison population and not just "stock" data. These refer to the number of persons deprived of their liberty in penal establishments on a given day. Flow data refer to the number of people admitted to penal establishments during the year (entry flow) and those who left the same penal establishments during the year (exit flow)[205]. Information on inflows and outflows considerably increases the precision and accuracy of the data and enables much more informed decision-making by the criminal Judiciary.

Internationally, several countries have advanced information technology (IT) solutions to guarantee instant access to this data type. For example, Italy has developed an easy-to-use digital network that allows prison authorities to establish a daily picture of how many individuals are detained in each prison in the country, which plays a positive role in relieving prison overcrowding[206].

In Brazil, **CNPCP Resolution Nº. 5/2016**, which promotes *numerus clausus* figures, provides explicitly that information technology systems must be a necessary part of prison capacity management. Also, the normative act explains that: "Any extrapolation of capacity — observed from the data of Single Registry of Persons Deprived of Liberty in the Penal Facility (CadUPL) — Resolution Nº. 2/2016 of the CNPCP — the director of the penal unit must issue an electronic alert (Annex I) to the judge responsible for Criminal Execution, the Community Council, the Public Defender's Office, the Brazilian Bar Association (OAB), and the Public Prosecutor's Office" (art. 5, § 2). Finally, there is a reference to CNPCP Resolution Nº. 2/2016, which sets the CadUPL. This mention has the function of harmonizing national data and making transparency a mandatory process regarding the "capacity of a penal unit" and "total number of individuals in deprivation of liberty" (Annex 1 of the Resolution).

The CNJ Resolution Nº. 214/2015, which regulates the activities of the **GMFs** in the Courts, appoints the attribution of "inspect and monitor the people's entry and exit through the prison system" (art. 6, II), as well as supervise the feeding of CNJ systems, with emphasis on Detention Control Hearing System (SISTAC), the National Prison Monitoring Bank (BNMP), and Unified Electronic Execution System (SEEU). Therefore, the normative act includes the tool within the scope of the Judiciary.

Moreover, the CNJ's electronic systems have gradually adapted to the provisions of **Law Nº. 12,714/2012**, which provides a method for monitoring sentence execution, pre-trial detention, and security measures. In particular, its art. 4 indicates that the system will be "programmed to inform timely and automatically, by electronic notification" the dates referring to the conclusion of the inquiry; accusation; obtaining regime progression; probation; carrying out the dangerousness cessation exam; framing in the hypotheses of pardon or commutation of sentence. Moreover, this functionality is already incorporated into the Unified Electronic Execution System (SEEU) in light of art. 6, III of CNJ Resolution Nº. 280/2019, which can significantly facilitate the management of prison accommodations in criminal enforcement.

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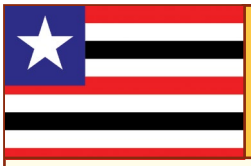
[205] HEUNI, European Institute for Crime Prevention and Control. **European Sourcebookof Crime and Criminal Justice Statistics 2014**. 5th edition, 2nd revised printing. Helsinki: 2017, p. 267. Available at: https://wp.unil.ch/europeansourcebook/files/2018/03/Sourcebook2014_2nd_revised_printing_edition_20180308.pdf

[206] COE, Council of Europe. **Key messages and conclusions of the High Level Conference "Responses to Prison Overcrowding"**. 2019. Available at: https://rm.coe.int/key-messages-and-conclusions-rev/1680947163

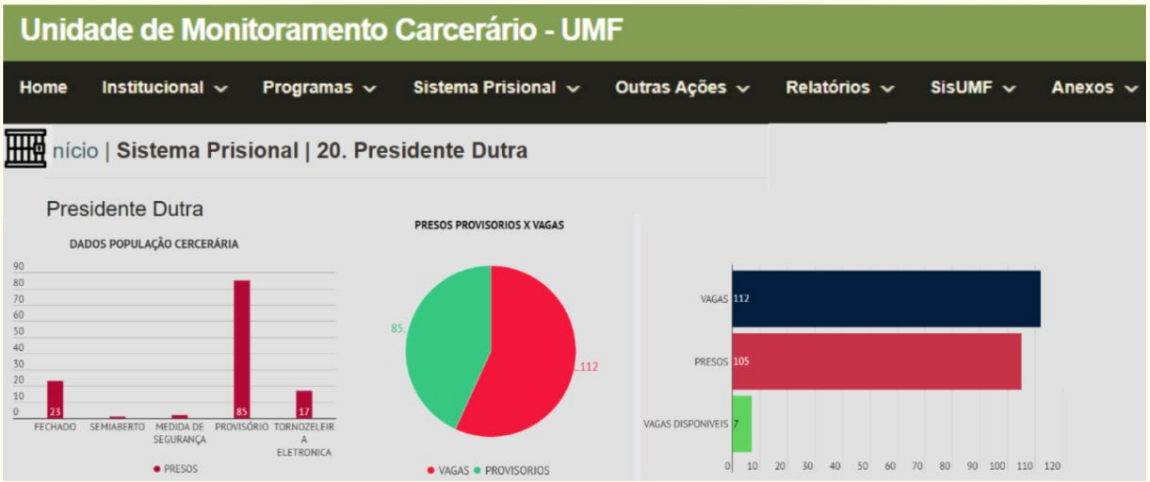
There are already initiatives developed in Brazil. For example, in **Paraná**, the normative act of the GMF for the implementation of the pilot project of *numerus clausus* establishes that "no arrest will be considered and decided without the prior existence of information about the availability of an accommodation that authorizes the implementation of the respective act" (art. 9th)[207]. In **Maranhão**, the Penitentiary System Monitoring and Inspection Unit (UMF) of the Court of Justice created the project "DataUMF and Interactive Map" through the Technical Cooperation Agreement Nº. 34/2019, signed with the State Secretariat of Penitentiary Administration (SEAP). The project is intended to integrate the TJMA and SEAP systems to allow magistrates "the monitoring and control, in realtime, of the number of pre-trial detainees and convicts under their responsibility, supplying them with better management of the processes under their responsibility, and inhibiting the maintenance of prisons with an excessive deadline"[208].

The CNJ has been working intensively to supply information technology tools that encourage the interaction of local systems with judicial systems. They are also working on controlling prison occupation directly through the **Unified Electronic Execution System (SEEU) and the National Prison Monitoring Bank (BNMP).**



PRACTICAL EXPERIENCE

TJMA PROJECT: "DATAUMF AND INTERACTIVE MAP"



Source: https://youtu.be/thnpk3W96Iw

[207] BRAZIL. TJPR, Tribunal de Justiça do Paraná (Court of Justice of the State of Paraná); GMF/PR, Monitoring and Supervision Groups of the Paraná Court of Justice. **GMF/PR Resolution Nº 1**. 2017. Available at : https://www.tjpr.jus.br/documents/188253/6059935/Resoluc%CC%A7a%CC%83o+GMF-PR+01-17.pdf/7365538f-7424-9b6d-feac-c3df3cfd6c67

[208] BRAZIL. TJMA, Tribunal de Justiça do Maranhão (Court of Justice of the State of Maranhão). **Judiciário e SEAP discutem sistema de integração penitenciário**. Available at: https://www.tjma.jus.br/midia/portal/noticia/502561

AN INDISPENSIBLE TOOL?

Real-time information about the occupancy rate contributes to the judge's decision-making, considering the overcrowding situation in his/her sentences. While this information is valuable and pertinent, it would not be an indispensable tool, especially considering the "real-time" variable. Other shared information arrangements, like bimonthly – or monthly – disclosure of prison occupancy, could promote mobilization of the justice system to develop a procedural revision of the existing cases oriented to decompress existing prison facilities.

4.2.2. Critical Occupancy Alert Tool (SAOC)

It is convenient to establish a Critical Occupancy Alert Tool, with the proposed acronym SAOC, in technological solutions for regulating prison capacity. This tool requires direct interaction with the information system explained in the previous topic. It also supplies decision-makers with alerts in distinct colors concerning the prison system's occupation condition. It then prompts the adoption of the Prison Capacity Regulation Center tools.

The tool is motivated by the health control policy of Covid-19 and international experiences. For example, due to the pandemic, Brazilian states created mechanisms to monitor administrative regions based on epidemiological data and hospital bed occupancy. This initiative aimed to quickly apply stringent measures of physical distancing to avoid a health system collapse and an increase in deaths[209]. In this regard, alert levels were demarcated by color and region according to the capacity of the local health system and the evolution of pandemic data — as was the case in São Paulo[210].

In the prison field, the state of **Michigan — US** established a prison occupancy of less than or equal to 95% to embrace emergency measures to reduce overcrowding. With that measure implemented, the highest governmental bodies were provoked to act when it reached this level[211]. Likewise, the **European Committee on Crime Problems (CDPC)** recommends that a prison capacity of 90% is an indicator of imminent overcrowding, and should give rise to immediate measures to avoid further congestion[212].

Based on these references, this system was designed with at least three alert levels: green, yellow, and red. The **green alert** corresponds to the occupation of less than 90% of the region's prison sys-

[209] BRAZIL. FIOCRUZ, Fundação Oswaldo Cruz (Oswaldo Cruz Foundation). **Posicionamento da Fundação Oswaldo Cruz (Fiocruz)**. 2020. Available at: https://agencia.fiocruz.br/sites/agencia.fiocruz.br/files/u91/relatorio_distanciamentosocial.pdf

[210] BRAZIL. Governo do Estado de São Paulo (Government of the State of São Paulo); SABESP, Companhia de Saneamento Básico do Estado de São Paulo (Basic Sanitation Company of the State of São Paulo). **Entenda as cores para enfrentarmos a Covid 19**. Associação Sabesp. Available at: http://www.associacaosabesp.com.br/headline/entenda-cores-covid-19

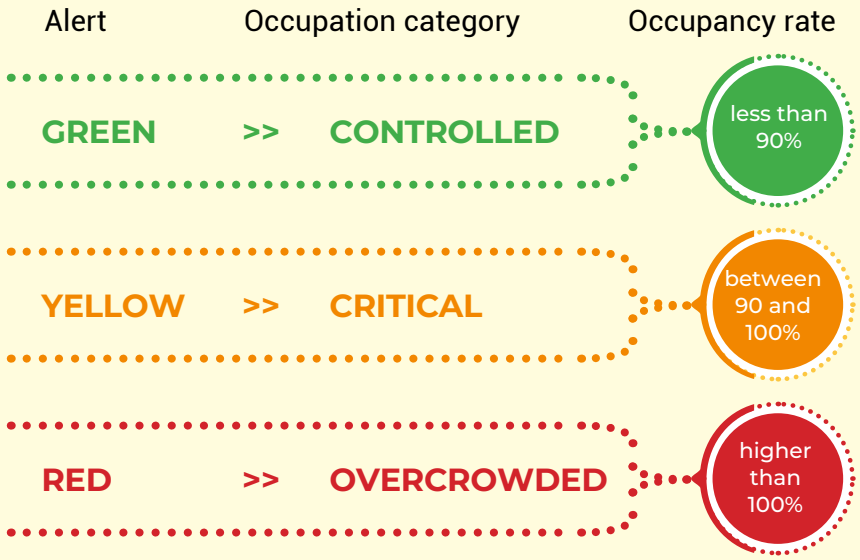
[211] PITTS, James M. A.; GRIFFIN III, O. Hayden; JOHNSON, W. Wesley. Contemporary prison overcrowding: short-term fixes to a perpetual problem. In: **Contemporary Justice Review**, v. 17, Nº 1, p. 124-139, 2014.

[212] CDPC, European Committee on Crime Problems. White Paper on Prison Overcrowding. 2016, par. 20. Available at: https://rm.coe.int/16806f9a8a

tem. This stage is considered a controlled prison capacity. A balanced prison system provides routines, procedures, and essential services to individuals in criminal enforcement and pre-trial detention.

The **yellow alert** corresponds to an occupation greater than 91% and less than 100% of the prison system, which requires attention because it characterizes a critical occupation rate. This point indicates the need to apply the Prison Capacity Regulation Center and adopt some tools to prevent an increase in the occupancy rate or, preferably, to reduce the capacity to the level of the controlled phase.

Finally, the **red alert** corresponds to prison occupancy above 100% and violates the legality principle. This circumstance will require adopting all available penal regulation tools so that occupation returns to its previous levels.



AN INDISPENSABLE TOOL?

The alert system for prison occupation has a low operational cost, and it is easy to implement the tool. The alert system allows a more efficient regulation regarding prison capacity. Thus, the system implementation is highly recommended, even if, in a strict sense, it is possible to operate the Prison Capacity Regulation Center without it.

4.3. Prison capacity regulation tools at the entrance door

In this third block of tools, this Handbook will focus on the adjustment tools for prison capacity at the entry point to the prison system. Qualifying the entrance process enhances capacity management from a preventive perspective, reaching the source of prison overcrowding in the country. Two tools are covered in this section: the waiting list and temporary exceeding accomodations. The topic below will discuss the criteria for decision-making at the entrance door, underlining the central role that the institution of the detention control hearing has acquired.

4.3.1. The waiting lists

The waiting list is one of the main tools regarding the Prison Capacity Regulation Center. In this sense, the waiting list aims to record the information of people who have had a pre-trial detention or prison sentence ordered against them and who must have the fulfillment of this decision postponed due to the lack of accommodations in the local penitentiary system.

This action is connected to the gateway to criminal justice and preventive measures to minimize overcrowding or aggravating existing ones. It can also be understood as a **preventive** *numerus clausus*, a step before imprisonment[213]. Thus, it guarantees a mechanism for late entry into the prison when there is a scenario of overcrowding.

The **European Committee on Crime Problems (CDPC)**, in the White Paper on Prison Overcrowding statement, points out the use of waiting lists in case of severe overcrowding in several European countries[214]. On the other hand, the Supreme Court of the state of Tennessee, USA, since 1995, has considered that people who are prosecuted and not yet in prison must immediately present themselves for imprisonment. Still, they may not be arrested due to overcrowding. It has also been established that the time for serving a sentence starts counting from the day of the trial, even if the person is still free. However, this measure applies solely to driving under alcohol or other substances[215].

At the national level, the CNJ regulated this tool within the scope of the juvenile justice system through CNJ Resolution Nº. 367/2021. This normative specifies the waiting list as "the list of juveniles that await their entrance into a restriction or deprivation of liberty unit of the State System of Juvenile Justice Assistance , when the percentage of 100% occupancy of juvenile justice units is exceeded" (art. 4, II) and stipulates the inclusion of juveniles on the list as soon as there is unavailability of a vacancy. The normative act determines the inclusion of juveniles in an open-ended program while they remain on the waiting list (art. 9, §1).

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[213] ROIG, Rodrigo Duque Estrada. Um princípio para a execução penal: *numerus clausus*. In: **Revista Liberdades**, Nº 15, p. 104-106, 2014.
[214] CDPC, European Committee on Crime Problems. White Paper on Prison Overcrowding. 2016, par. 21. Available at: https://rm.coe.int/16806f9a8a
[215] UNITED STATES. Supreme Court of Tennessee. **State *Vs.* Walker** – 905 S.W.2d 554. 1995. Available at: https://law.justia.com/cases/tennessee/supreme-court/1995/905-s-w-2d-554.html

In criminal justice, the waiting list follows similar patterns. For example, suppose there is a disproportionate occupation of the local penitentiary system. In that case, the **accused may be placed on the waiting list and not subjected to arrest. However, the measure of house arrest may be imposed, eventually associated with electronic monitoring.**

The waiting list must be built and operated based on clear and objective conditions. **It is recommended to follow the chronological order of inclusion on the waiting list**, disregarding other criteria. The chronological parameter avoids a series of mishaps, in particular conflicts involving decisions made by magistrates on several types of criminal offenses or even on the various legal status of individuals. Care for chronology reaffirms the sovereignty of all judicial decisions under a strictly objective and proportional logic.

The period to remain on the waiting list must be based on proportionality and reasonableness. As a temporary solution, staying on the waiting list must not lead to situations where the arrest is not carried out for long months or even years after the court decision or sentence. In that case, the waiting list would lose much of its force — either considering a precautionary objective in the case of pre-trial detention or the punitive and rehabilitative purpose in the case of imprisonment by conviction. With that said, it would not be reasonable to consider that the individual remains indefinitely at the mercy of the availability of the State[216].

The permanency on the waiting list must follow the legal deadlines for maintaining the detention employed. In the case of **pre-trial detention**, the maximum period of 90 days is provided in art. 316, sole paragraph of the CPP, the period after which the judge must reassess the relevance of maintaining or revoking the imposed measure. It is a tool that must be subject to strict examination by the Judiciary. In the case of **temporary detention**, the strict term is established by Law Nº. 7,960/1989. **There is also the need for a provisional detention order, prioritizing the adoption of a different precautionary measure when there is no justified risk of evidence-gathering obstruction or escape risk. A waiting list is a tool limited to those cases that carefully comply with legal requirements and should not be trivialized by including persons in provisional release with penal alternatives or electronic monitoring.**

Regarding the **detention resulting from a condemning criminal sentence**, it can be temporarily included on the waiting list through late submission regarding an imprisonment decision. However, this is an atypical measure when the system is overcrowded and other gateway tools are already at their limit, such as excess vacant spaces, dealt with in the following item. However, the **determination of late detention enforcement** does not imply revocation or replacement of the existing court order, nor does it entail any consequence of a jurisdictional nature. On the contrary, it is a measure of an administrative nature and works as an extraordinary application in line with the dismal prison overcrowding situation. Furthermore, this time-deferred measure is convenient when a warrant of arrest affects a person responding to the process in liberty. In this sense, an eventual deferral in starting the sentence, with the

[216] ROIG, Rodrigo Duque Estrada. Um princípio para a execução penal: *numerus clausus*. In: **Revista Liberdades**, Nº 15, p. 169, 2014.

adoption of other non-custodial measures while on the waiting list, tends to have less harmful impacts than several types of detention.

In the same aspect, an excessive delay cannot be conceived under penalty of severe damage to the administration of justice and the person deprived of liberty himself/herself. The person cannot remain waiting indefinitely for the availability of accommodation without being able to start serving a sentence for the crime he/she has committed. Therefore, it is recommended to reference the maximum period of 180 days as proposed in art. 9, § 4 of CNJ Resolution Nº. 367/2021[217].

ATTENTION POINT

LATE ARREST OF WARRANTY ENFORCEMENT

It is a measure that does not change the judicial decision that decreed the arrest. It only delays its fulfillment due to the emergency context resulting from prison overcrowding.

As for the **moment of inclusion on the waiting list**, there is a strong parallel with the real-time information tool on the occupancy rate (Chapter 4.2.1), given the need for data regarding conditional release to non-custodial measures. However, this time, the insertion can be immediate after consulting the electronic system containing information on the occupation of the local prison system. Also, the waiting list can be used not immediately but within a short period, having the person being held in surplus spaces – a tool detailed in the next topic. In the latter, the arrest order will be demanded and subsequent release with replacement by measures other than imprisonment. In this sense, the waiting list is less preventive and more remedial.

It is also possible to have an accommodation **immediately released to include one more person in pre-trial detention** in cases where the judge, according to the rules of the local judicial organization, can immediately reassess other measures previously imposed. This procedure works either in the authorization custody context or in assessing the arrest resulting from a court order. The waiting list, in this circumstance, may be dispensable.

[217] The provision mentioned above supplies for a period of "150 days from the inclusion of the juvenile on the waiting list without an ac¬commodation being available", and the Public Prosecutor's Office and the Defense must be heard by the judicial authority sequentially. Thus, considering the legally established deadlines for the manifestation of 15 days for each entity, the final deadline will be 180 days

AN INDISPENSABLE TOOL?

A waiting list is a fundamental tool for managing prison overcrowding, significantly impacting the criminal justice entry point. Thus, it is highly advised to incorporate it into the prison capacity management policy. However, it would be possible to implement the Prison Capacity Regulation Center without facing the entrance door and focusing only on the exit, particularly penal enforcement. In this case, the precautionary removal tool is indispensable (Chapter 4.4.1). Hence, the Centrer must use at least the waiting list or precautionary removal to have effects aimed at the Principle of Legality. Without any of them, it is impossible to conceive a Prison Capacity Regulation Center.

4.3.2. Exceeding accomodations

In any location, the penitentiary is fed by several sources, including detention control hearing centers, criminal courts, and criminal enforcement courts. Thus, situations may occur in which multiple arrest warrants or numerous flagrant offenses are carried out on the same day and within a system with maximum occupancy or even overcrowded. Such situations can result from operations against criminal organizations, investigations coordinated by the judicial police, or arrests in the act of many co-accused, as in the case of theft from financial institutions, for example. The question then arises, how to coordinate observance with these arrest warrants and an already crowded system?

The **exceeding accommodations tool was made to face this scenario**. This tool is characterized by accommodating — for a determined period — a person in a facility with a 100% or more occupancy rate level. During this time, the Judiciary must carry out procedural review actions — explained in depth in the following topic — to release other people imprisoned in the system or reassess prisons decreed in excess spaces to rebalance the penitentiary occupation within its capacity.

International experience guides actions like this tool. In **Belgium**, the Court of Auditors recognizes that there can be a "negotiated capacity," which exceptionally exceeds "right after a crisis" the actual capacity of prison, whereas through a protocol signed between the Justice, the prison manager, and the unions. The protocol establishes an occupancy limit and the actions to be taken for the prison. It is noted, however, that the practice must be exceptional so that it does not become the norm, making detention conditions much worse[218].

The first issue to consider regards the number of **exceeding accommodations** that can be authorized. Although there are different understandings among the overcrowding reduction programs, the

[218] BELGIUM. Cour des comptes (Court of Auditors). **Mesures de lutte contre la surpopulation carcérale**. Rapport de la Cour des comptes transmis à la chambre des représentants. Bruxelles: Cour de Comptes de Belgique, 2012, p. 29. Available at: https://www.ccrek.be/fr/publication/mesures-de-lutte-contre-la-surpopulation-carcerale

standard is a **maximum of 10% over the capacity** of the penal establishment. The CNPCP sets this limit for male units, from which it is necessary to adopt urgent measures: "When the capacity exceeds 10% of its total, the director of the prison facility must formally inform the Criminal Enforcement Judge, the Supervisor of the GMF, and the President of the Penitentiary Council acknowledging the fact and soliciting actions" (art. 5, § 3)[219]. Concerning female units, CNPCP Resolution Nº. 5/2016 is even more restrictive: "Concerning **women**, it is expressly forbidden to stay in penal establishments whose capacity is beyond their limit, and the Director of the penal establishment must expressly bring the information of the fact to the Supervisor of [GMF], requesting the adoption of actions" (art. 6).

In **Paraná**, the regulation of the GMF/PR for the *numerus clausus* state project considers as exceeding accommodations "any exceeding accommodation occupied in penitentiary establishments that do not exceed the limit of their prison capacity by 10%" (art. 10, § 1)[220]. In any case, it is imperative to point out that, **under no circumstances the number of excess accommodations must result in critical overcrowding — 120% or more occupancy —** a mark above which there are unmistakable infringements of the responsibilities of the Brazilian State, according to international jurisprudence[221]. In the decision of HC Nº 143,988/ES, the STF stipulates a similar parameter, establishing an occupation of 119% as the most critical limit for overcrowding in the juvenile justice system.

The second factor considered is the **period for occupancy of accommodations**, which has a length of stay of 30 days as a standard in different overcrowding control policies. However, again, this period is a typical example internationally and nationally.

The **Michigan State** Legislature decreed the Prison Overcrowding Emergency Powers Act in 1980, which demands that if the capacity of the state's prison system is exceeded for 30 consecutive days and all administrative resources are taken, the Michigan prison authority certifies the overcrowding to the governor. Once the governor receives the certification, he/she must declare a state of emergency and apply the exceptional criterion of reduction of sentence by temporal proximity with a prison period[222]. The resolution of the GMF of **Paraná** the project against overcrowding states that: "If there is no opportunity to reconsider between the previously determined prisons, exceptionally, the Criminal Court or Criminal Enforcement Court may consult the GMF/PR about the existence of additional accommodations (individualized by the combination of the letters AD, followed by a sequential numerical order) and temporary, always and in any case, **restricted to 30 days**" (art. 10)[223].

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[219] BRAZIL. CNPCP, Conselho Nacional de Políticas Criminais e Penitenciárias (National Council of Criminal and Penitentiary Policy). **Resolution Nº 5**. Provides indicators for setting maximum capacity in penal establishments, *numerus clausus*. Brasília: CNPCP, 2016. Available at: https://www.gov.br/senappen/pt-br/pt-br/composicao/cnpcp/resolucoes/2016/resolucao-no-5-de-25-novembro-de-2016/view

[220] BRAZIL. TJPR, Tribunal de Justiça do Paraná (Court of Justice of the State of Paraná); GMF/PR, Monitoring and Supervision Groups of the Paraná Court of Justice. **GMF/PR Resolution Nº 1**. 2017. Available at: https://www.tjpr.jus.br/documents/188253/6059935/Resoluc%CC%A7a%CC%83o+GMF-PR+01-17.pdf/7365538f-7424-9b6d-feac-c3df3cfd6c67

[221] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil**. Resolução da Corte IDH. Assunto do Complexo Penitenciário de Curado. 2018. Available at: https://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf

[222] PITTS, James M. A.; GRIFFIN III, O. Hayden; JOHNSON, W. Wesley. Contemporary prison overcrowding: short-term fixes to a perpetual problem. In: **Contemporary Justice Review**, v. 17, Nº 1, p. 135, 2014.

[223] BRAZIL. TJPR, Tribunal de Justiça do Paraná (Court of Justice of the State of Paraná); GMF/PR, Monitoring and Supervision Groups of the Paraná Court of Justice. **GMF/PR Resolution Nº 1**. 2017. Available at: https://www.tjpr.jus.br/documents/188253/6059935/Resoluc%CC%A7a%CC%83o+GMF-PR+01-17.pdf/7365538f-7424-9b6d-feac-c3df3cfd6c67.

Finally, adopting temporary exceeding accommodations must be an exceptional use, restricted to the context of many individuals arrested due to police operations, an atypical number of *flagrante delicto* arrests on a given day, or similar situations. There must be no additional accommodations — with regular or customary occupation — otherwise, efforts to combat overcrowding will be frustrated, and a state of affairs already recognized as unconstitutional will be legitimized.

AN INDISPENSABLE TOOL?

Temporary exceeding accommodations are not part of the prison capacity management policy. However, it is reiterated that its use must be exceptional and respond to unusual and atypical fluctuations in the pattern of prisons in the locality. In a typical scenario, it should be neither necessary nor used.

4.3.3. Decision-making criteria in detention control hearings for all types of arrest

At the entry point of the prison system, it is fundamental to understand the decision-making criteria provided for in the legislation and the nature of the prison to adopt the two tools indicated above. Persons entering the prison system can be categorized into precautionary detention by converting arrest into *flagrante delicto*, pre-trial detention by court order, and arrest by conviction.

In all these circumstances, arrested persons will be brought — within 24 hours — before the authority court at the detention control hearing. The Supreme Court decision, in line with the regulatory appeal — in the scope of the Constitutional Complaint – RCL 29,303/RJ — establishes that the detention control hearing "is not limited to the environment of people arrested in *flagrante delicto*, reaching, as now provided for, in the Code of Criminal Procedure, also those arrested as a result of temporary and pre-trial arrest warrants". The Supreme Court established that international norms do not make a distinction based on the prison modality and that there is support in the opening clause of art. 5, § 2 of the Constitution. In addition, it emphasizes that CNJ Resolution Nº. 213/2015 already provided for consistent standards for the detention control hearing "as a result of enforcement of pre-trial detention or definitive arrest warrants, applying, where applicable, the established procedures [in] Resolution" (art. 13).

In addition, the CNJ published CNJ Recommendation Nº. 91/2021, which orients the Courts in conducting the detention control hearings considering all arresting hypotheses and "**assures the judicial control of prison utilizing detention control hearings decisions**, issued by the Supreme Court in the records of Complaint Nº. 29,303/RJ, following the provisions of CNJ Resolutions Nº. 213/2015 and Nº. 357/2020" (art. 2, I).

In this sense, the detention control hearing becomes a **foundation for regulating prison capacity at the entrance door**. In addition to its objectives of controlling the legality of prison, the objective of

preventing prison overcrowding also emerges, especially in analyzing the application of a precautionary measure or maintaining the prison and preventing and combating torture and ill-treatment. Some differentiating criteria deserve consideration.

Relying on the type of arrest

For the modality of **pre-trial detention by converting the arrest into flagrante delicto**, the presumption of innocence must be taken into account to delay the individual's entry into an overcrowded penitentiary system. This decision will be taken at the detention control hearing considering actions other than imprisonment or replacement by house arrest, whenever possible, according to each case. In assisting judicial provision in evaluating arrests in *flagrante delicto*, the following five stages of the decision-making process are outlined by the CNJ in the two Handbooks on decision-making in the detention control hearing, involving general standards and standards on crimes and specific profiles[224]. As the local penal system is overcrowded, it is recommended that prisons in this modality use the waiting list tool cautiously to avoid the inclusion of people who would be eligible for alternative injunctions.

The decision on **pre-trial detention resulting from a court order** issued within the scope of the police investigation or the criminal details phase also aligns with the presumption of innocence principle. However, considering that it is a judicial decision based on more solid elements than just the information of the act, it is assumed that it has already been observedwhen the decision was taken. Therefore, in these cases, prisons are more eligible to use the exceeding accommodation tool, requiring systemic procedural reviewing actions in other prison facilities, particularly the pre-trial sentences with expired or repeatedly renewed deadlines. However, the reassessment of the measure of arrest determined is encouraged, especially when the time between the court order and its enforcement is meaningful, allowing the reassessment of pre-trial detention.

In the context of overcrowding, the **arrest by conviction** will be responsibility of the competent judge at the detention control hearing for this type of arrest, considering the late entry of this person into the prison system, favoring his/her inclusion on the waiting list or his/her transfer to a prison with additional accommodations. In particular, a criterion that can be considered would be the preference for prison entry for those with longer sentences.

According to groups susceptible to specific vulnerabilities

Additionally, it is essential to point out that in the judicial evaluation of prisons at the gateway to criminal justice, it is responsibility of the judge to consider the differentiated and proportional treatment of groups susceptible to specific vulnerabilities in the deprivation of liberty.

Subjective vulnerabilities of individuals subjected to criminal jurisdiction have been the object of growing concern in the decision-making process. At the international level, the **Nelson Mandela Rules**

[224] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbooks on decision-making in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/651

state that the prison administration must take account of the individual needs of people deprived of liberty, in particular, the most vulnerable categories in prison settings[225]. The **IACHR Principles and Good Practices on Deprivation of Liberty** demonstrate that some groups require special health care measures and differentiated accommodations. They list groups susceptible to specific vulnerabilities: elderly, pregnant women, breastfeeding mothers, persons with disabilities, people living with HIV/AIDS and/or tuberculosis, and persons with terminal diseases[226]. **Prison Reform International (PRI)**, a multilateral criminal justice reform initiative, adds people with mental illness and drug addiction to these groups, indicating the need for state answers related not to imprisonment, but to health care[227].

National legislation also incorporated the concern regarding adopting differentiated treatment for certain groups in conditions of vulnerability in prison. As a result, the Code of Criminal Procedure, after the reform promoted by Law Nº 12,403/2011, known as the alternative measures law, started to incorporate many of these groups, including the elderly, people with serious illnesses, pregnant women, and men and women responsible for the care of children or people with disabilities (arts. 318 *et seq.*). These changes backed the specific conditions by replacing the prison with a house-arrest modality. The **Criminal Execution Law** also provides favorable conditions for the elderly, those with serious illnesses, pregnant women, and people with children under 18 years of age or with disabilities (arts. 112, §§ 3 and 117). Additionally, these categories of people deprived of liberty have benefited through **Christmas pardon decrees** published annually by the Presidency of the Republic. Despite some variation in the content of pardons, vulnerable groups are often managed, expanding the age range of children to 14 years of age (exceeding the legal limit of 11 years of age), including those responsible for people with severe chronic illness, in addition to people with disabilities and identified indigenous people[228].

Similarly, the CNJ has regulated procedural and administrative aspects concerning the provision of criminal justice to specific groups. For example, CNJ Resolution Nº. 369/2021 establishes guidelines for replacing prison for **pregnant women, mothers, fathers, and guardians of children and people with disabilities** based on arts. 318 and 318-A of the CPP and the *habeas corpus* decisions handed down by the STF in HC Nº. 143,641/SP and HC Nº 165,704/DF[229]. Among the procedures, judicial systems and records must include data on pregnancy, lactation, condition of being a father or mother, or responsible for people under their care (art. 2). The systems must also have a device to alert the judge when the person arrested belongs to the group mentioned above (art. 3). The CNJ also provides substantial subsidies for the treatment of this group, in particular at the penitentiary entry, in the Handbook for

[225] UNODC, United Nations Office on Drugs and Crime. **The Nelson Mandela Rules**: The United Nations Standard Minimum Rules for the Treatment of Prisoners. 2015, Rule Nº 2. Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

[226] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas**. Washington: IACHR, 2008, Principles X; XII. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

[227] PRI, Penal Reform International. **Ten-Point Plan to Reduce Prison Overcrowding.** London: PRI, 2012. Available at: https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf

[228] BRAZIL. **Decree Nº 9,246.** Grants Christmas pardon and commutation of sentences and takes other measures. Brasília, 2017. Available at: https://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/d9246.htm

[229] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 369**. Establishes procedures and guidelines for replacing the deprivation of liberty of pregnant women, mothers, fathers and guardians of children, and people with disabilities, in accordance with arts. 318 and 318-A of the Criminal Procedure Code, and in compliance with the collective habeas corpus orders granted by the 2nd Panel of the Federal Supreme Court in HCs Nº 143,641/SP, and Nº 165,704/DF. Brasília: CNJ, 2021. Available at: https://atos.cnj.jus.br/atos/detalhar/3681

Decision-Making in Detention Control Hearing[230] and the Manual of Social Protection in Detention Control Hearing[231].

In the CNJ Resolution Nº. 287/2019, the **indigenous** people were subject to criminal justice, prioritizing standards regarding the specific mechanisms in their community to which the accused person belongs after prior consultation (art. 7)[232]. However, in exceptional cases when the application of a custodial sentence is inevitable, the magistrate must consider the cultural, social, and economic characteristics, the person's statements, and anthropological expertise.

In addition, the preferential adoption of the special semi-liberty regime provided for art. 56 of Law Nº. 6,001/1973 (Indigenous Statute) for sentencing to imprisonment and detention after consultation with the indigenous community (arts. 9 and 10). The CNJ also elaborated practical guidelines in the handbook elaborated on this resolution[233].

CNJ Resolution Nº. 348/2020, on the other hand, provides for procedures involving the **LGBTI population**. This resolution recognizes that the deprivation of liberty, in this case, is usually associated with measures and spaces intended for their protection, which may imply a significant restriction on their rights compared to the prison population in general. Also, it determines that it is responsibility of the judge to define, in a reasoned decision after consultation with the person, which penal establishment will hold the person. For instance: whether male, female, or other — and authorizing the possibility of changing the prison facility at any time of the criminal proceedings or penal enforcement (art. 7). Equally, there are helpful guidelines on this group in the Social Care Handbook mentioned above[234] and in the recently released a Manual of the CNJ Resolution Nº. 348/2020[235].

Addressing specifically efforts to relieve overcrowded prisons in the context of the **Covid-19 pandemic**, the CNJ launched Recommendation Nº. 62/2020. This norm considers groups that are in a vulnerable condition, substituting eventual imprisonment for non-custodial measures[236]. It recommends the reassessment of pre-trial detention, with priority given to pregnant and lactating women; mothers or persons responsible for a child up to 12 years of age; the person with a disability; elderly; indigenous people; people who fall within risk groups regarding the pandemic. These groups are also covered in detail in the CNJ[237] handbooks.

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[230] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbooks on decision-making in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/651

[231] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbook of social protection in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/654

[232] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 287**. Establishes procedures for the treatment of indigenous people accused, defendants, convicted or deprived of liberty, and provides guidelines to ensure the rights of this population within the criminal scope of the Judiciary. Brasília: CNJ, 2019. Available at: https://atos.cnj.jus.br/atos/detalhar/2959

[233] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Manual da Resolução n° 287/2019:** Procedimentos relativos a pessoas indígenas acusadas, rés, condenadas ou privadas de liberdade. Brasília: CNJ, 2019. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/278

[234] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Manual da Resolução n° 287/2019**: Procedimentos relativos a pessoas indígenas acusadas, rés, condenadas ou privadas de liberdade. Brasília: CNJ, 2019. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/278

[235] BRAZIL CNJ, Conselho Nacional de Justiça (National Council of Justice). **LGBTI People in the Penal System: booklet for the Implementation of CNJ Resolution Nº 348/2020**. Brasília: CNJ, 2023. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/863

[236] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Recommendation Nº 62/2020**. It recommends that Courts and magistrates adopt preventive measures against the spread of infection by the new coronavirus – Covid-19 within the criminal and juvenile justice systems. Brasília: CNJ, 2020. Available at: https://atos.cnj.jus.br/atos/detalhar/3246

[237] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). Executive summary: handbooks on decision-making in detention control hearings. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/651

ATTENTION POINT

GROUPS THAT ARE SUSCEPTIBLE TO SPECIFIC VULNERABILITIES IN THE PENAL SYSTEM

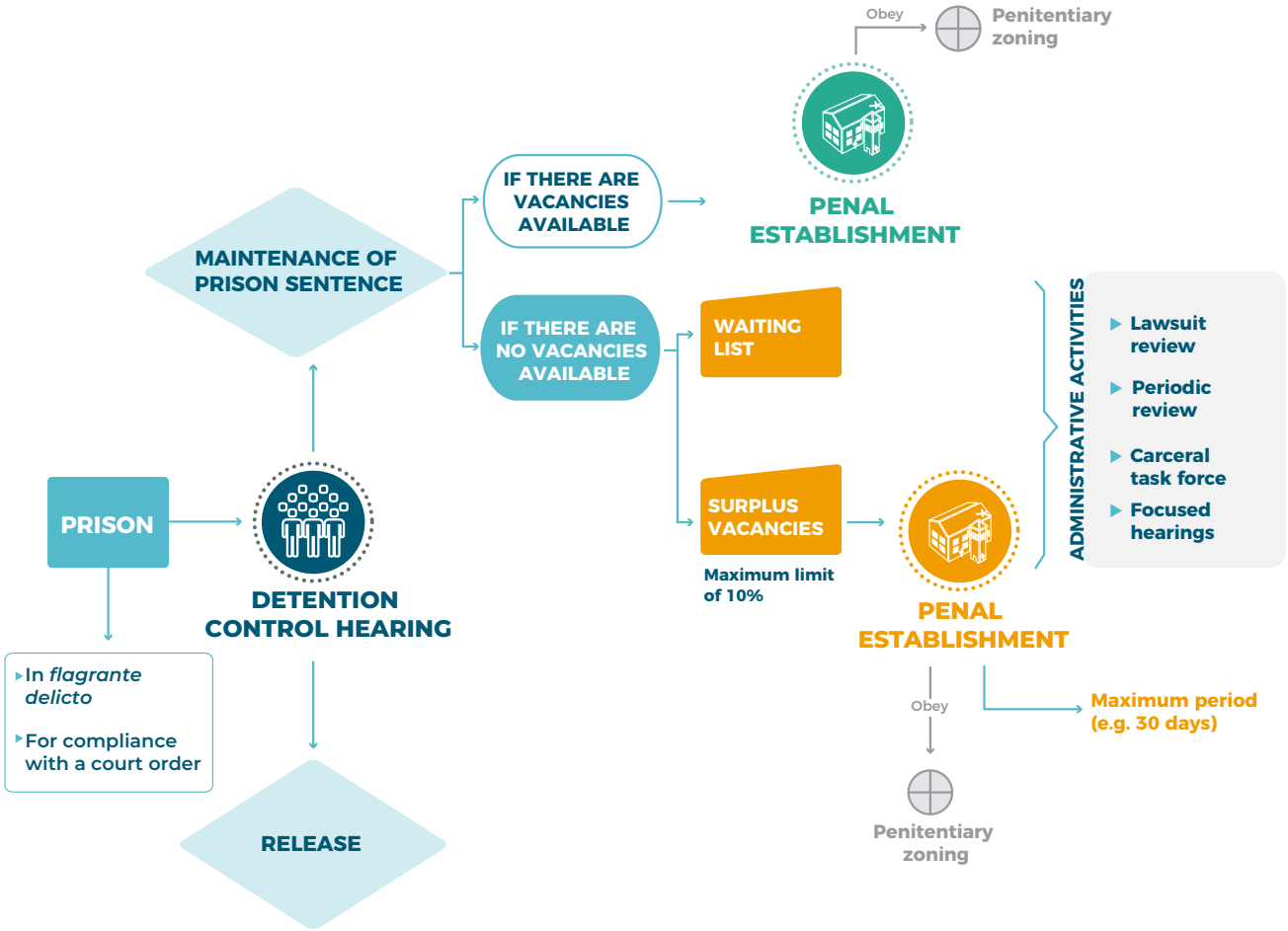
1. Elderly;
2. People with disabilities;
3. People with serious illnesses;
4. Pregnant women, breastfeeding mothers, or mothers responsible for children or persons with deficiency;
5. Men responsible for children or people with disabilities;
6. People with dependence on alcohol or other drugs[238];
7. LGBTI population; and
8. Indigenous people.

Thus, it is recommended that stocking management actions consider the inequalities that affect this audience, with analysis under different aspects, such as race/color, ethnicity, sex, gender identity, sexual orientation, belief or religion, location, housing, insertion in the job market, migration status, age, education, health condition, and others. Understanding that the overlapping of exclusions and discrimination aggravates the psychosocial condition of the subjects, the regulation of prison capacity and the granting of different measures in prison must seek to alleviate the risks and difficulties disproportionately suffered. It is also worth mentioning the international standards that prohibit the imposition of more rigorous or less adequate conditions of deprivation of liberty that affect a particular group[239].

[238] The legal framework for mental health in Brazil prioritizes outpatient treatment in an open environment. This framework follows the provisions of Law Nº 10,216/2001, which aims to ensure the rights and protection of people with mental disorders. Also, it redirects the mental health care model and the International Convention on the Rights of Persons with Disabilities and its Optional Protocol (Decree Nº 6.949/2009), which has constitutional status. In the same sense, CNJ Resolution Nº 113/2010 addresses the procedure relating to the custodial sentence and a security measure. It sets that the "judge competent to execute the security measure, whenever possible, will seek to implement anti-asylum policies". Thus, the deprivation of liberty of a person with a mental disorder in conflict with the law must be exceptional.

[239] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas.** Washington: IACHR, 2008, Principle XIX. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp

FLOWCHART OF THE REGULATION OF PRISON CAPACITY AT THE ENTRANCE DOOR



4.4. Prison capacity regulation tools at the exit door

In fourth place, regulation tools emerge at the exit door of the prison system. All the initiatives studied at the Prison Capacity Regulation Center worldwide use this regulation tool. Faced with the disastrous context of prison overcrowding, which is most responsible for the unconstitutional state of affairs, these tools can remarkably affect an immediate decline in prison over occupation and mediate improvement in the deprivation of liberty.

These powerful tools must be highly appreciated and put into practice. First, two tools for regulating the prison exit are presented: precautionary removal and transference between penal establishments. Next, some criteria of an extraordinary nature that guides the judges responsible for the application of these tools are presented.

4.4.1. Precautionary removal

The concept of precautionary removal was developed by the Rio Grande do Sul Judiciary as a tool to relieve overcrowded prisons by applying the Principle of Carceral Legality[240]. It is based on adopting non-custodial measures by releasing the person already imprisoned in a penal establishment. It has the legal nature of an extraordinary direction, without provision in a specific law, which, like other tools discussed in this Handbook, is based on the needs imposed by the context of overcrowding.

Precautionary removal occurs when the Judiciary determines the release of a person arrested due to the harmful and illegal conditions of deprivation of liberty. These conditions constitute misconduct of enforcement and inhuman and degrading treatment, not due to the recognition of benefits provided in the law in a specific way. Regarding the decision of the 1st Court of Criminal Enforcement of the County of Porto Alegre, in the precautionary removal, there is "only the exit due to lack of suitable accommodations"[241]. Removal is "precautionary" precisely because it seeks to preserve the personal integrity and dignity of those in state custody in an exceptional and extraordinary context and **covers provisional detainees and those already serving their sentences**.

In the Covid-19 pandemic's context, the National Council of Justice recently advocated the adoption of the measure by the Judiciary across the country. With CNJ Recommendation Nº. 62/2020, the precautionary removal of persons subject to:

• pre-trial detention, for the "reevaluation of pre-trial detentions, under the terms of art. 316, of the Code of Criminal Procedure" (art. 4, I, b).

Criminal enforcement by:

• "granting early removal from the closed and semi-open regimes, according to the guidelines established by Binding Precedent Nº. 56 of the Supreme Court" (art. 5, I);

• "granting house arrest concerning all persons imprisoned in an open and semi-open regime" (art. 5, II); and

• "to hold under house arrest a person arrested with a suspected or confirmed diagnosis of Covid-19, upon medical report, in the absence of adequate isolation cells in the penal establishment" (art. 5, IV).

For both legal circumstances, conditions of detention were considered crucial. Therefore, the CNJ recommends granting liberty to people imprisoned "**in penal establishments that are over-occupied,**" also pointing out conditions such as the unavailability of a medical team. Also, in this scenario, units are subject to interdiction orders, and actions are determined by international standards, as well as verification that the facilities would be conducive to the spread of the virus (arts. 4, I, b and 5, I, b). The

[240] BRAZIL. TJRS, Tribunal de Justiça do Estado do Rio Grande do Sul (Court of Justice of the State of Rio Grande do Sul). **Interdição da Penitenciária Estadual de Charqueadas, Penitenciária Modulada de Charqueadas e Penitenciária Estadual de Arroio dos Ratos**. 1º Juizado da 1ª Vara de Execuções Penais da Comarca de Porto Alegre.
[241] Ibid

recommended measures can be classified within the conceptual landmark of precautionary removal due to their innovative nature in the face of the expressed norms and their rationale being centered on the conditions of detention, notably overcrowding. Therefore, indirectly, it comes from the constitutional and legal provisions that ensure the minimum conditions of deprivation of liberty, consistent with the fundamental principle of human dignity. It is worth mentioning that CNJ Recommendation Nº. 62/2020 has materialized in dozens of court decisions across the country.

Once the nature of the tool is understood, the next step is to anticipate its effects. It is essential to dictate a rule on the conditions of precautionary removal, especially regarding the subsequent legal impact and the validation of the substitutive measures of imprisonment. The effects of precautionary removal can be long-lasting or temporary.

Long-lasting effects: early removal from prison

There are **long-lasting effects** when the removal implies anticipation of the progression in the prison regime, which can be understood within the institute of "early removal," according to the Binding Precedent Nº. 56 of the STF. However, **in principle, early removal is limited** to the semi-open and open regimes, designating different options when there are no accommodations in penal or industrial colonies, for the semi-open regime, or in shelters or similar facilities, for the open regime.

The judge can then determine "the early removal of a convict in a regime with a lack of accommodations," being able to submit the individual either to electronic monitoring, to house arrest, or even to replace the open regime regarding right-restricting sentences and/or education.

Although the precedent does not expressly address the hypothesis of overcrowding in the closed regime, one of the most severe problems in the country, its *ratio essendi* is applicable to resolve this extraordinary situation of illegality. Therefore, applying the precedent for this regime would fit within the precautionary removal tool.

When the release to less restrictive prison regimes is anticipated, it is possible to find a semi-open and open regime overcrowded or even with no penal establishments locally. Therefore, there would be a precautionary removal from the closed to the semi-open regime from then on. The regulation is guided by the normative landmark established by the Binding Precedent Nº. 56. It moves from extraordinary measures to control overcrowding to guaranteeing rights for people deprived of liberty in legal terms. Thus, there are no tools but benefits legally guaranteed, which must only be implemented by the Judiciary.

This dynamic could characterize what Rodrigo Roig calls progressive *numerus clausus*: "with the move of a person from the closed regime to the semi-open regime, of another person from the semi-open regime to the open regime (or house arrest) and, finally, of someone who is in one of these modalities for probation"[242].

[242] ROIG, Rodrigo Duque Estrada. Um princípio para a execução penal: *numerus clausus*. In: **Revista Liberdades**, Nº 15, p. 116, 2014.

Applying early removal from the closed regime would change the person's legal status, with long-lasting effects on the rights he/she starts to acquire and enjoy in criminal enforcement. Therefore, it is recommended that the consequences of precautionary removal be perennial, notably with the adoption of an early removal, for the security of the legal process and predictability of jurisdictional provision.

Temporary effects

On the other hand, it is also possible to conceive **temporary effects** when the substitutive measure would be precarious. However, the personal or institutional conditions are still the same, such as the lack of available floor spaces in the local penitentiary system. Hence, the judge, faced with prison overcrowding, can determine the replacement of provisional detention or the closed regime with **house arrest**.

House arrest, as a precautionary nature, is regulated in arts. 317 to 318-B of the CPP, and, in the context of criminal enforcement, in arts. 117, 146-B, and 146-C of LEP. The conditions provided by law are primarily associated with people deprived of liberty in vulnerable situations – the elderly, serious illness, pregnancy, childcare, and people with disabilities, for example.

However, going beyond these personal conditions and approaching an application based on the conditions of the detention, in general, and on overcrowding, in particular, precautionary removal tools could be helpful. This hypothesis is named *numerus clausus directo*, which would involve granting house arrest "to those closest to reaching the legal term for liberty"[243].

The jurisprudence related to the Covid-19 pandemic collaborates with examples in its application. The Court of Justice of the State of Piauí, in a 2020 collective *habeas corpus* decision, stated that "the granting of house arrest as a remedy for the illegality of imprisonment under conditions of overcrowding follows the same premises as the authorization of house arrest in the face of the inexistence of shelters or lack of accommodations".

It indicated a basic assumption that "the convict cannot remain in a more severe regime, or under more harsh conditions, than what was established in a court decision". Still, the Court recognized that the measure does not solve "the severe problem of population boasting in prison". Nevertheless, "it represents a relevant alleviation of the overcrowding situation"[244].

It is not necessarily a matter of changing the legal status, meaning that being subjected to house arrest would not imply the progression to a closed regime but rather that the house arrest detention could substitute the latest.

Thus, house arrest would be precarious, and the person could eventually return to the penal establishment for reasons such as violating the conditions of the new regime, due to other changes recognized in court, or even the end of the overcrowding situation. It would be a decision that "will not necessarily imply advance release to less restrictive prison regimes"[245].

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[243] Ibid.

[244] BRAZIL. TJPI, Tribunal de Justiça do Estado do Piauí (Court of Justice of the State of Piauí). **Habeas Corpus.**

[245] BRAZIL. TJRS, Tribunal de Justiça do Estado do Rio Grande do Sul (Court of Justice of the State of Rio Grande do Sul). **Interdição da Penitenciária Estadual de Charqueadas, Penitenciária Modulada de Charqueadas e Penitenciária Estadual de Arroio dos Ratos**. 1º Juizado da 1ª Vara de Execuções Penais da Comarca de Porto Alegre.

Even if temporary, **establishing a deadline and adequate conditions to restrict possible prison re-entry is recommended, guaranteeing reasonable conditions of predictability and legal certainty**. The potential of the precautionary removal tool to remedy severe violations of fundamental rights and alleviate degrading conditions of detention is enormous. Moreover, it is one of the most important tools for regulating prison capacity.

AN ESSENTIAL TOOL?

Precautionary removal is the most common tool, with quicker and more practical effects for managing prison overcrowding. It can be argued that not taking account of this tool can turn any policy for regulating prison occupancy innocuous. However, strictly speaking, it is possible to control the prison capacity, albeit less effectively, through the cumulation of other tools, especially those at the entry door of the prison system. In any case, it would be inadvisable to dispense with this tool.

4.4.2. Transfer between penal establishments

The transfer between penal establishments is one of the most common tools for regulating prison capacity in the country; however, it is almost always disconnected from the basic rules of the prison system. Thus, individuals are transferred from a very overcrowded prison to a slightly less overcrowded one. However, the landmark of the Prison Capacity Regulation Center paradigm is different. The transfer becomes a procedure strictly associated with a Legal Occupancy Rate and goes **from the first option to the last one.**

How transfers are processed today does not solve the problem of overcrowding; in fact, they displace it. The **Inter-American Court** recognizes that it is not viable "to present a solution to the current situation utilizing transfers to other penal facilities because these cannot receive individuals. If such transfers are maintained, it will generate greater overcrowding in other penitentiary centers", and they would bring "risk of alterations of the order, riots and disastrous results for inmates and officials"[246].

These adverse effects have been documented in other countries, even after paradigmatic decisions, as in the case of **Brown v. Plata**, decided by the United States Supreme Court in 2011. For example, after establishing an overcrowded prison maximum capacity in California, studies showed that four years later, there were unintended consequences, such as an increase in the population in the already

[246] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil.** Resolução da Corte IDH. Assunto do Instituto Penal Plácido de Sá Carvalho. 2018, par. 116. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf

overcrowded prisons at the municipal level (county) and more significant pressure to transfer individuals out of state. As a result, as of April 2015, about 8,300 Californian inmates had been transferred to prisons in other states. The gravity of the scenario was so significant that a new court decision was issued prohibiting the California prison administration from transferring new individuals out of state to reduce its prison population[247].

International standards guide a **regulation on individual transference**, considering the following requirements: prior authorization by a competent institution; consent of the transferred person; observation with penitentiary zoning; and exceptionality of its use.

The Inter-American Commission Principles and Best Practices for the Protection of Persons Deprived of Liberty in America state that transfers must be subject to evaluation and prior authorization by competent authorities. In addition, the IACHR establishes that "the transfers of persons deprived of liberty must be authorized and supervised by the competent authorities, who must, in all circumstances, respect the dignity and fundamental rights"[248].

International regulations also support the consultation and consent of the sentenced person subject to the transfer. The Council of Europe — in landmark Decision Nº. 2,008/909/JHA provides for cooperation to comply with sentences in criminal matters in the European Union — protects the convict opinion and notification of the sentenced person. It establishes that the recognition and enforcement of the sentence imposed in another European country "may be forwarded to the executing State for the purpose of its recognition and enforcement of the sentence only with the consent of the sentenced person, in accordance with the law of the issuing State" (art. 6). Also, it must be given to the sentenced person an opportunity to state his/her opinion orally or in writing[249].

Federal law in the **United States**, through the First Step Act, also makes the transfer subject to these considerations and an inmate's preference for staying at his/her current facility or being transferred[250]. In **Mexico**, the legal regulation on criminal enforcement establishes the possibility of voluntary and involuntary transfers. For volunteers, it is stipulated: "when a sentenced person is interested in being transferred to another prison, the competent authority will require his/her express consent in the presence of his/her defense attorney" (art. 50). For involuntary transfers, it is determined: "The involuntary transfer of persons deprived of liberty which have been prosecuted or convicted must be previously authorized in a public detention control hearing by the controlling or sentencing judge, as the case may be. A resource may challenge this decision" (art. 51)[251].

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[247] NEWMAN, Sandra J.; STRUYK, Raymond J. Housing, and Poverty. In: **The Review of Economics and Statistics**, v. 65, Nº 2, p. 243. 1983.
[248] IACHR, Inter-American Commission on Human Rights. **Principles and good practices for the protection of people deprived of their liberty in the Americas.** Washington: IACHR, 2008, Principle IX, item 4. Available at: https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/principlesdeprived.asp
[249] COE, Council of Europe. **Framework Decision Nº 2008/909/JAI**. Council on the application of the principle of mutual recognition to judgments in criminal matters which impose sentences or other measures involving deprivation of liberty for the purposes of executing those judgments within the European Union. 2008. Available at: https://eur-lex.europa.eu/legal-content/PT/TXT/?uri=CELEX:32008F0909
[250] UNITED STATES. BOP, Federal Bureau Of Prisons. **First Step Act Overview**. Available at: https://www.bop.gov/inmates/fsa/
[251] MEXICO. **National Law on Criminal Enforcement**. Available at: https://www.diputados.gob.mx/LeyesBiblio/pdf/LNEP.pdf.

In any case, international references emphasize the need for any transfer to comply with prison zoning, a tool provided in this Handbook. Also, **CNJ Resolution Nº. 367/2021** regulates the management of prison accommodations in the juvenile justice system. Art. 12, III points out that the transfer of the juvenile can only be made "to other units that do not have an occupancy capacity greater than the projected limit of the establishment" and emphasizes the condition that they are "in a location close to the residence of his/her family members". This normative act of the CNJ states that "the transfer of adolescents between juvenile justice units will be exceptional and based on Individual Assistance Plan (PIA)" (art. 13), scoring as authoritative hypotheses of crisis management, risk of death, and riots, as well as adapting to the unit's capacity to occupy the prison facility through hearing the juvenile, the Public Prosecutor's Office, and the defense, with the decision being made by the judge.

Due to the prescription of strict rules for transfers between penal establishments, **this tool must have restricted and exceptional use**. Furthermore, in any case, it must respect the actual maximum capacity of the destination establishments.

AN INDISPENSABLE TOOL?

A transfer is a standard tool, and its operation is relatively easy. Therefore, despite having a restricted and exceptional character, it can help regulate prison capacity at the exit door. However, it is not essential.

PRISON CAPACITY REGULATION CENTER AT THE ENTRANCE DOOR AND EXIT DOOR – COMPARATIVE TABLE

Table 4: Regulation at the entrance door and exit door

Moment	Tools	Limit	Type of Prison	Deadline
Entrance doorgateway	Waiting list	Undefined, however proportionate to the monitoring services of non-deprivation of liberty measures	Pre-trial detention	Until 90 days (art. 316, CPP, sole paragraph) to judicial review
			Arrest by conviction	Until 180 days
	Exceeding accommodations	Up to 10% above the actual maximum capacity of the penal establishment	Applicable to all types of prison	Until 30 days

Exit door	Precautionary removal	Undefined, however proportionate to the monitoring services of non-deprivation of liberty measures	Pre-trial arrest	The period of 90 days shall be considered (art. 316, CPP sole paragraph) in the case of maintenance or renewal of the measure
			Arrest by conviction	Preferably grants the progression of penalty regime
	Transfers	Restricted to limited penal establishments in the local penitentiary zoning and according to the procedural status of the person	Pre-trial arrest	Follow the ordinary legal deadlines
			Arrest by conviction	Follow the ordinary legal deadlines

4.4.3. Extraordinary decision-making criteria

The establishment of criteria for managing prison capacity is part of an anomalous and calamitous context that is overcrowding, which demands the definition of exceptional rules. These extraordinary criteria do not replace but complement the ordinary rules provided in criminal law. It is not about creating rights, nor does it necessarily require a legislative change since such changes would have the power to regulate the standard conditions of occupation within the limit of penitentiary capacity. On the contrary, extraordinary criteria are understood as a necessary response to an equally extraordinary context.

When penal establishments operate within an established and actual maximum capacity, the system works within the legal framework, being able to comply with minimum principles of human dignity and penitentiary regularity. Consequently, the legally established regulations tend to be adequate for criminal jurisdiction, with prevision, in pre-trial detention, of review every 90 days (art. 319 of the CPP) and, in criminal enforcement, the sentence progression regime, as well as the recognition of sentence remission for work, study, or reading. However, when prisons are overcrowded, the scenario is different. The current regulation may not be able to deal with the excessive number of incarcerated individuals, which causes cruel, inhuman, and degrading treatment inherent to overcrowding. As a result, new criteria are needed to reduce excessive occupancy and adapt prison reality to legality.

Thus, these criteria do not concern CPP or LEP rules that protect the rights of persons arrested in the regular context of criminal prosecution and criminal enforcement. **These are extraordinary criteria because they are limited to the context of prison overcrowding and only for the time it exists.** With an innovative nature, they allow the judge to handle an exceptional reality and ensure that the critical standards on deprivation of liberty in the Brazilian legal system are enforced.

The criteria set out in this topic refer to innovative elements for prison capacity management that go beyond the rights and rules already established by law. Despite being extraordinary, the criteria for controlling overcrowding must **be clear and transparent**. Its application involves substituting or adopting measures other than prison, supervised locally by services offered by the Executive or Judiciary. However, international guidelines on the subject point out that the absence of certain services, work opportunities, or stable housing, for example, should not constitute a reason to refuse or postpone release under conditions other than detention[252].

This section presents **five criteria for the exit door**, observed from research in national and international experiences: (i) temporal proximity to the deadline of the imposed prison measure; (ii) percentage of time served in prison; (iii) penal compensation; (iv) vulnerable groups; and (v) penitentiary zoning. These criteria can be adopted selectively or cumulatively, depending on the decision taken by the Prison Capacity Regulation Center management, described in Chapter 5 of this Handbook.

Temporal proximity to the prison term

One of the most common extraordinary criteria in experiences managing overcrowded prisons is the proximity to the prison term. In the case of criminal enforcement, it would be the temporal proximity to the acquisition of the benefit of progression from the closed regime to the semi-open regime or the open regime, as provided for in art. 112 of the LEP, after the amendment made by Law Nº. 13,964/2019. In the case of pre-trial detention, it would apply to the proximity to the period of 90 days under the terms of art. 316, sole paragraph of the CPP, also amended by the same law. This proximity can acquire different modulations: variable proximity or fixed proximity.

[252] COE, Council of Europe. **Recommendation Nº 2003/22**. Committee of Ministers to member States on conditional release (parole). 2003. Available at: https://rm.coe.int/16800ccb5d.

ATTENTION POINT

GENERAL REGIME OF RELEASE TO LESS RESTRICTIVE PRISON REGIMES

LEP. Art. 112. The imprisonment sentence must be conducted progressively, with the transfer to a less strict regime, to be determined by the judge, when the individual has served at least:

I - 16% (sixteen percent) of the penalty, if the convict is a first offender and the crime has been committed without violence or serious threat to the person;

II - 20% (twenty percent) of the penalty, if the convict is a recidivist offender in a crime committed without violence or serious threat to the person;

III - 25% (twenty-five percent) of the penalty, if the convict is a first offender and the crime has been committed with the use of violence or serious threat to the person;

IV - 30% (thirty percent) of the penalty, if the convict is a recidivist offender in a crime committed with the use of violence or serious threat to the person;

V - 40% (forty percent) of the penalty, if the convict is a first offender convicted of the commission of a heinous crime or equivalent;

VI - 50% (fifty percent) of the penalty, if the convict is:

a) a first offender convicted of the commission of a heinous crime or equivalent, resulting in death, prohibited conditional release;

b) convicted of exercising the command, individual or collective, of a structured criminal organization for the commission of a heinous crime or equivalent; or

c) convicted of the crime of organizing a private militia;

VII - 60% (sixty percent) of the penalty, if the convict is a recidivist offender convicted of the commission of a heinous crime or equivalent; and

VIII - 70% (seventy percent) of the penalty, if the convict is a recidivist offender in a heinous crime or equivalent with a death result, prohibited conditional release.

In the case of **variable proximity**, the model adopted comes from a decision of the Court of Justice of the State of Rio Grande do Sul. This sentence determined the granting of liberty to "individuals who meet the requirements and who are closer to the date of release to less restrictive prison regimes" in chronological order of proximity to the objective requirement"[253]. This decision also establishes that the person may progress from one regime to another while free due to prison overcrowding, with the time elapsed being counted as served[254].

In this legal framework, the possibility of an individual obtaining early release in penal enforcement will depend on a case-by-case analysis, privileging the closeness to release to less restrictive prison regimes through the granting of liberty until the occupation is adapted to the capacity of the local penal system. Thus, there would be no time limit defined a priori, but progressive releases would follow logic until the maximum occupation is reached.

On the other hand, the **fixed temporal proximity** is made objectively, with the determination of a specified time frame within which all those who fit will benefit from a non-custodial action.

In the state of **Michigan**, USA, the Prison Overcrowding Emergency Powers Act, approved in 1980, established as an extraordinary criterion to reduce prison overcrowding in the state that all convicted individuals **would have their sentences reduced to a fixed amount of 90 days**. If this process did not reduce the prison population to an occupancy of 95% or less, there would be a new wave of sentence reduction in another 90 days. This initiative considered the prison overcrowding situation equivalent to a state of emergency resulting from measures taken. It also provided that the prison administration authority must certify the overcrowding to the state governor, who would then declare a state of emergency within 15 days[255].

In the state of **Ohio**, in the United States, the state legislature amended in 2006 (Ohio Revised Code) provides sentence reduction or early release due to emergency overcrowding (§ 2,967.18). It pres-cribes that whenever it is determined that the total population of penal institutions exceeds their capacity, the prison facility director must notify state agencies so that the sentences of people in deprivation of liberty are reduced by 30, 60, or 90 days, depending on the different cases[256].

In **France**, the Legislative Branch has already conducted studies that estimated the impact of adopting the criterion of fixed proximity with the deadline of the imposed prison measure. Approximately 9% of convicted individuals were recorded with sentence terms under 30 days. Those inmates between 30 and 90 days of his/her prison term represented around 17% of convicts in the country[257].

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[253] BRAZIL. TJRS, Tribunal de Justiça do Estado do Rio Grande do Sul (Court of Justice of the State of Rio Grande do Sul). **Interdição da Penitenciária Estadual de Charqueadas, Penitenciária Modulada de Charqueadas e Penitenciária Estadual de Arroio dos Ratos**. 1º Juizado da 1ª Vara de Execuções Penais da Comarca de Porto Alegre, p. 43.

[254] Ibid., p. 44.

[255] PITTS, James M. A.; GRIFFIN III, O. Hayden; JOHNSON, W. Wesley. Contemporary prison overcrowding: short-term fixes to a perpetual problem. In: **Contemporary Justice Review**, v. 17, Nº 1, p. 135, 2014.

[256] UNITED STATES. Government of the State of Ohio. **Ohio Revised Code** – Sentence reduction or early release due to overcrowding emergency. Available at: https://law.justia.com/codes/ohio/2006/orc/jd_296718-9987.html

[257] FRANCE. Assemblée Nationale (National Assembly). **Rapport d'Information Nº 652:** deposé par la Commission des Lois Constitutionnelles, de la Législation et de l'Administration Générale de la République, en conclusion des travaux d'une mission d'information sur les moyens de lutte contre la surpopulation carcérale. Paris: Assemblée Nationale, 2013, p. 128. Available at: https://www.assemblee-nationale.fr/dyn/14/rapports/cion_lois/l14b0652_rapport-information

Percentage of time spent in prison

Starting from a logic temporal evaluation similar to the criterion described in the previous topic, the extraordinary criterion of time spent in prison **advocates proportionality in relation, not to the time in prison to be served, but to the time already served**. Therefore, the judicial analysis focuses on determining the percentage of time already spent in prison.

For example, consider a person who has been in pre-trial detention for 50 days. According to the criterion of temporal proximity with the limit of imposed prison term, this person would have 40 days pending for 90 days provided for the CPP. On the other hand, according to the criterion of time spent in prison, the person will have spent 55.5% of the maximum time foreseen for precautionary detention. From the judicial analysis, the result may be the same, but the decision-making method is based on different standards.

Criminal compensation

Criminal compensation stands out with greater depth by the doctrine and international jurisprudence. However, the notion of compensation is based on the assumption that prison time in overcrowded environments, or not attending with the minimum conditions required by the legal framework, cannot be considered fixedly or objectively.

The worse the conditions of detention, the more a given individual is punished by the State — since imprisonment is an archetypal form of State punishment — the time elapsed must be computed proportionally to the tribulations suffered, i.e., it must be calculated in excess. **In other words, spending a year in prison under normal occupancy conditions should not be equivalent to spending a year in an overcrowded and degrading facility**. Therefore, the time served must be considered differently in the light of proportionality[258].

Pablo Vacani points out that it is necessary to build a system that allows the assessment of the amount of punishment manifested in the time of deprivation of liberty connected to the functioning of the internal practices inside the prison. From this perspective, it is argued that the modification of the arithmetic paradigm of proportionality on prison time towards the real context experienced in prison and its effects on the imprisoned subject[259]. Penal compensation understands penitentiary treatment less based on isolated characteristics or related to the individual circumstances of the person in deprivation of liberty and more as a structure aimed at relationships configured in loco in each prison[260].

Far from being a marginal proposal, criminal compensation is a mechanism incorporated into the criminal legislation of several countries. For example, in Canada, the Criminal Code, since 1985,

[258] ROIG, Rodrigo Duque Estrada. **Compensação penal por penas ou prisões abusivas**. Revista dos Tribunais, 2017. Available at: https://bdjur.stj.jus.br/jspui/handle/2011/111168.
[259] VACANI, Pablo Andrés. **El tiempo de prisión y la dimensión existencial de su ejecución:** elación necesaria para una adecuada cuantificación penal, p. 3.
[260] Ibid

stipulates in art. 719.3 that, when determining a criminal sentence to be imposed on a person convicted of an offence, the judge may compute for each day inside prison with up to 1.5 (one and a half) days when circumstances justify it[261].

In **Italy**, Law Nº. 354 deals with criminal enforcement establishing within the powers of the criminal enforcement court (*magistrato di sorveglianza*) the possibility of penal compensation in the proportion of one day for every 10 days served in non-compliance with the rights of the imprisoned person, with the jurisprudence of the European Court of Human Rights[262].

PRACTICAL EXPERIENCE

ITALY: PENAL ENFORCEMENT LEGISLATION (LEGGE 354)

Art. 35. Treatments in case of violation of art. 3 in the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning detained or imprisoned persons.

1. When the prejudice as referred to in art. 69, § 6, letter b consists, in a period not less than fifteen days, in terms of detention such as a violation of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, ratified under Law Nº. 848 of August 4, 1955, and interpreted by the European Court of Human Rights, upon a previous request made by the individual (either in person or through a letter of attorney), **the supervising magistrate must order, regarding eventual prejudice restitution, a respective prison sentence reduction equal to one day for every ten days during which the claimant has suffered the damage.**

2. When the period of imprisonment still to be served does not allow the deduction of the total percentage referred to in § 1, the supervising magistrate must also pay the applicant, in respect of the remaining period and as compensation for damages, a sum of money equal to 8.00 euros for each day suffered the loss. The enforcement magistrate will proceed in the same way if the period of detention served under conditions that do not meet the criteria of art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms has been less than fifteen days.

3. Those who have suffered prejudice, as referred to in § 1, in a state of pre-trial detention that cannot be included in the determination of the sentence to be served, or those who have finished serving their sentence in prison: may bring an action, personally or through a lawyer with a letter of attorney, to the court of the district in whose territory they reside. The action must be brought, under penalty of the statute of limitations, within six months of the termination of detention or custody in prison. The court decides in monocratic composition in the forms provided by arts. 737 *et seq.* of the Civil Procedure Code. The decree defining the process is not subject to appeal. Compensation for damages must be paid following § 2 (free translation).

[261] CANADA. **Criminal Code.** 1985. Available at: https://laws-lois.justice.gc.ca/eng/acts/C-46/

[262] ITALY. **Law Nº 354** – Rules on the penitentiary system and on the execution of measures depriving and limiting liberty. Available at: https://www.altalex.com/documents/codici-altalex/2018/11/26/legge-sull-ordinamento-penitenziario#titolo2

At the international level, the Inter-American Court establishes the obligation of the Brazilian State to double the sentence served in an overcrowded correctional establishment, in the application of pre-trial measures in the case of the **Curado Penitentiary Complex**, in Pernambuco. The Court asserted that, in the context of overcrowding, "the unlawful infliction of the penalty executed" increases, characterizing the illegality of the time in prison or provisional measure served. Thus, it demands that this period of detention may be "calculated at the rate of two days of serving per day of effective deprivation of liberty in degrading conditions". It also highlights that this measure stems from the "inadmissibility of unlawful penalties in law"[263]. Finally, it also reinforces that correctional compensation must not exempt the State from responsibility for redoubling efforts to reduce the prison population and to arbitrate other means to replace prison, with a view to "contributing to solving overcrowding"[264].

In a similar sense, in the scope of the pre-trial measure about the **Plácido de Sá Carvalho Penal Institute (IPPSC)**, in the Bangu Prison Complex in Rio de Janeiro, the Inter-American Court also determined:

> *120. In principle, it is undeniable that persons deprived of their liberty in IPPSC may suffer an anti-juridical condition greater than their inherent sentence. Therefore, it is fair to reduce their period of imprisonment in a reasonable calculation, implying compensation regarding the penalty suffered. Nevertheless, illegal penalties are still penalties. Therefore, this circumstance cannot be denied and needs to be solved as rationally as possible, following the international legal landmark and under the mandate of the Supreme Court established in Binding Precedent 56*[265].

Following this understanding, the Court ordered the Brazilian authorities to establish **criminal compensation in the proportion of two days for each day spent in this prison**, which had occupancy of 200% and flagrantly degrading conditions[266]. It also proposed the expansion of compensations effects "to cases when the individual has been transferred to another establishment, stipulating a computation of criminal compensation for the days remaining in the IPPSC. The Court also highlighted the adoption of the Supreme Court Binding Precedent Nº. 56. Thus, in May 2021, the Superior Court of Justice (STJ) recognized the appropriateness of the criminal compensation established by the Inter-American Court in the case of the IPPSC prison in Rio de Janeiro, inaugurating precedents in the Superior Courts in the matter.

[263] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil.** Resolução da Corte IDH. Assunto do Complexo Penitenciário de Curado. 2018, par. 124-125. Available at: https://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf
[264] Ibid., par. 128-129.
[265] I/A COURT H.R, Inter-American Court of Human Rights. **Medidas Provisórias a Respeito do Brasil.** Resolução da Corte IDH. Assunto do Instituto Penal Plácido de Sá Carvalho. 2018. Available at: https://www.corteidh.or.cr/docs/medidas/placido_se_03_por.pdf
[266] Ibid., par. 121.

JURISPRUDENCE

STJ RECOGNIZES CRIMINAL COMPENSATION

In a recent decision, the Superior Court of Justice (STJ) granted an appeal in the *Habeas Corpus* Nº 136,961/RJ establishing a double sentence calculation on the days served by a person held in custody at the Plácido de Sá Carvalho Penal Institute, based on the Order of the Inter-American Court Resolution, issued on November 22nd, 2018. The decision considered the inadequacy of the respective correctional enforcement, mainly because the individuals were in a degrading and inhumane situation. Furthermore, the decision recognizes the duty of the judges to exercise conventional control, considering the effects of the San José of Costa Rica Pact provisions and adapting its internal structure with an interpretation favorable to the individual.

By subjecting itself to the Court's jurisdiction, Brazil enhances the people's rights and dialogue with the international community. Moreover, the judgments of the Inter-American Court produce international *res judicata*, having a binding effect on the parties and absorbing all domestic public bodies.

In the case judged by the STJ, the time elapsed between criminal compensation and its realization was questioned. The Court stated "it is not possible for the determination of double computation to have its effects modulated as if the appellant had served part of the sentence under acceptable conditions until notification and from then on such factual status had changed. As a result, the factual element that gave rise to recognizing the critical situation had already lasted. Therefore, it could be the object of recognition and should affect the entire serving period".

The interpretive principle that guides the internal application of state obligations arising from international human rights treaties is the pro personae principle, which determines the adoption of the norm most favorable to the victimized person and extends to the interpretation of the sentence of the Inter-American Court.

The monocratic decision handed down by Justice Reynaldo da Fonseca, in May 2021, was confirmed by the 5th Panel of the STJ the following month in respect of the effectiveness of the decisions of the Inter-American Court of Human Rights. With this decision, the compensation reached an important jurisprudential status in the country, which the Superior Courts mark. Therefore, its practical implementation within the Prison Capacity Regulation Center tools is welcome.

At the national level, among the requests made in **ADPF 347**, pending before the Supreme Court, recommendations were made for recognizing criminal compensation in the Brazilian legal system. The action requests the STF to "recognize that the criminal enforcement court has the power and the duty to reduce the prison term of the sentence when it **was evident that the conditions of effective observance of the sentence were significantly more severe than it provided by the juridical system and imposed by conviction**". The decision aims to preserve, as far as possible, the proportionality and humanity of the sanction"[267]. The request, however, was not granted in the Court's decision regarding the precautionary measure issued in 2015; the case has not had its merits judged yet.

Furthermore, the National Council of Justice promoted national debates about correctional compensation and contemplated its potential to face the unconstitutional state of affairs of the Brazilian prison system[268].

Groups susceptible to specific vulnerabilities

At the exit door, the national legislation also granted a different treatment to groups in vulnerable conditions amplified in the context of deprivation of liberty, resulting in correctional benefits, which involve precautionary detention replacement, electronic monitoring, and adoption of penal alternatives. For more information, it is recommended to read the topic in section 4.3.3 about regulation at the entrance door.

Penitentiary zoning

Finally, penitentiary zoning is the criterion per excellence in decision-making regarding the transfer tool between correctional establishments. The prison zoning rule aims to accommodate the person in a facility closest to his/her residence or his/her family, as discussed in greater depth in topic 4.1.2 of this Handbook.

[267] BRAZIL. STF, Supremo Tribunal Federal (Supreme Federal Court). **ADPF 347 MC/DF**. 2015. Available at: https://portal.stf.jus.br/processos/detalhe.asp?incidente=4783560.

[268] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Compensação penal pode responder a condições das prisões nas Américas.** Brasília: CNJ, 2020. Available at: https://www.cnj.jus.br/compensacao-penal-pode-responder-a-condicoes-das-prisoes-nas-americas/

ATTENTION POINT

CHRONOLOGY: PRISON CAPACITY REGULATION CENTER FUNDAMENTAL STANDARDS

In the Brazilian Criminal Code, the legislation plainly defines the sentences. The Judiciary follows a rule of dosimetry of the sentence composed of three stages: first, the establishment of the base sentence related to an imputed crime; second, the consideration of mitigating and aggravating circumstances; and third, the causes of decrease and increase for computing the sentence[269]. **Dosimetry guarantees that all variables legally suitable for applying the punitive sanction are already assumed in the conviction.** These variables include the gravity of the crime, including violence or severe threat through criminal classification; reoffending (art. 61, I of the Penal Code); the motivation or adoption of reprehensible methods (arts. 61, II, 62 and 65, III); the age of the accused person (art. 65, I); among others.

The guilty verdict considers all these elements and systematizes them in a sentence of deprivation of liberty with a fixed and predetermined period. Thus, **in criminal justice, time is the essential parameter.**

The regulation of prison capacity must not depart from the correctional legislation. The decision parameter for the action of the Prison Capacity Regulation Center is the period of deprivation of liberty provided in the court decision. For this reason, the extraordinary criteria for regulation at the exit door, provided in section 4.4.3, are based exclusively on chronology. Employing different standards for allocating accommodations violates the criminal procedural guarantees and individual rights assured in the legal system. Consequently, any assessment of the abstract gravity of the offenses or the defendant's conditions must only be carried out at the time of the conviction, in which the specific time of deprivation of liberty is defined. In other words, **the time of the sentence will guide the criteria for applying the prison capacity regulation tools.**

As amended by Law Nº. 13,964/2019, the Criminal Execution Law established different rules for release to less restrictive prison regimes based on reoffending and cases involving violence or severe threat. Therefore, the Prison Capacity Regulation Center must observe these different percentages of time served when adopting this Handbook's tools.

[269] GRECO, Rogério. **Curso de Direito Penal** – Parte Geral. v. 1. 22nd edition. Impetus, 2020.

Regarding the entrance door of the prison system, it is worth mentioning that criteria other than the chronology would not be adequate either. Pre-trial detention is subject to the presumption of innocence since it is based on precautionary procedures, focusing on asses-sing substantial risks to the procedural instruction or the application of criminal law[270]. In this way, it must be thought **that every provisional detention decision is sovereign**, regard-less of the type of conduct attributed by the police authority, the complaint presented by the Public Prosecutor's Office, or any other aspects. Due to this, the Prison Capacity Regulation Center must guarantee that pre-trial detention is exceptional and that the tools provided in section 4.3 are adopted. The objective criterion will be the length of stay in pre-trial detention, notably the maximum initial period of 90 days, as well as the total detention time in case the measure is maintained after periodic judicial review (art. 316 of the CPP).

4.5. Administrative action tools

The fourth and final list of tools focused on the organizational performance of the courts and the judges responsible for pre-procedural criminal jurisdiction, knowledge, and criminal enforcement. The support, qualification, and control of the administrative action of the Judiciary is a constitutional competence of the National Council of Justice (art. 103-B, § 4). Consequently, the tools indicated in this section are closely aligned with the activities of the CNJ and the capacity to improve criminal justice. Three tools are dealt with: (i) Carceral Task Forces, (ii) periodic review, and (iii) focused hearings.

It is recommended that the application of all available tools shown in this section be tied to the qualification strategies regarding the prison system exit door. These tools include releasing procedures and connecting links to the Social Office responsible for released people's care and the follow-up ser-vices for penal alternatives or electronic monitoring.

4.5.1. Carceral Task Force

As discussed in section 2.3, the **Carceral Task Forces** are one of the most traditionally used in-struments for dealing with acute overcrowding or penitentiary crises. They generally produce favorable results regarding granting release to less resctrictive prison regimes and other procedural benefits that are delayed or close to their vesting period. Thus, the task forces make decisions on non-custodial mea-

[270] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbooks on decision-making in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/651

sures and unburdens the penitentiary system. However, the **favorable effects are temporary**. Without the principle of carceral legality guiding the application of the prison measure by the Judiciary, the vented units will be overcrowded again quickly. The inhumane conditions are renewed, which will soon demand a new joint effort, and so on. There are no sustainable changes.

AN INDISPENSABLE TOOL?

Although the task forces — singly taken — cannot solve overcrowding problems, their adoption is highly welcome in emergencies or to verify procedural irregularities, grant legally guaranteed benefits, and facilitate the rapid assessment of a high volume of cases. Thus, their use is strongly recommended.

4.5.2. Periodic reviewing

Aside from Carceral Task Forces, this Handbook proposes periodic procedural reviewing for each Criminal Court for all individuals in deprivation of liberty under their purview. It is a fundamental transformation in the flows and procedures of the courts and the inclusion within the standard dynamics of work. **IT systems can considerably simplify this activity with imminent alerts of the imminent time limit of arrests**, both for the release to less restrictive prison regimes provided for in art. 112 of the LEP, and 90 days for pretrial detention, according to art. 316, sole paragraph of the CPP. For penal enforcement, these alerts are already included in the Unified Electronic Enforcement System, regulated by CNJ Resolution Nº. 280/2019[271].

The procedural review is not a prison capacity management tool in a strict sense but a customary practice inherent to the regular dynamics of the criminal jurisdiction. However, it has a fundamental role in prison capacity management centered on carceral legality. Thus, all the experiences explored in this Handbook apply to this tool.

This action **involves the entrance door as much as the exit door**. The GMF/PR Resolution Nº 1/17 from the Paraná Court of Justice points out these two moments. On the one hand, "having no additional accommodation available, the GMF/PR will report to the judge about the impossibility of detention requests due to the lack of floor space" (art 10, § 2), requiring an eventual case review from that particular individual or any other suitable case. On the other, "the GMF/PR may determine, exceptionally, a general reviewing of all prison facilities accommodations — in a given period — through specific and

[271] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 280**. Establishes guidelines and parameters for the processing of criminal enforcement in Brazilian courts through the Unified Electronic Execution System (SEEU) and provides for its governance. Brasília, 2019. Available at: https://atos.cnj.jus.br/atos/detalhar/2879

predetermined criteria to a 'special operating regime', by a special group of judges, prosecutors, and public defenders or appointed lawyers" (art. 10, § 3).

The CNJ Resolution Nº. 367/2021 advocates the overcrowding in the juvenile justice system system, explaining that "in order to ensure that the juvenile justice occupancy rate does not exceed 100%, the magistrate must [...] "prioritize the analysis of extinction requests, replacing ou suspending a given measure in overcrowded facilities and adopt other suitable arrangements"[272].

This tool is not opposed to task forces; on the contrary, it is a complementary tool. The periodic review founds itself in a little covered effect regarding the task forces could produce, notably its capacity "**to enhance notary routines**", according to the art. 1, § 1 of Law Nº. 12,106/2009. Thus, it is not about a focused and exceptional effort but a widespread and regular one within a renewed notary routine.

AN INDISPENSABLE TOOL?

Yes. The procedural review is essential for any overcrowding initiative control centered on the Judiciary.

4.5.3. Focused hearings

The third aspect discussed in this topic is what we call focused hearings. This type of hearing is conducted as judicial hearings performed periodically, with the individual presence, the representative of the Public Prosecutior's Office, and the defense, preferably in a correctional facility. The focused hearing aims to review the juridical situation of every citizen in a situation of deprivation of liberty.

This hearing in criminal justice is internationally praised as a promising practice for reducing prison overcrowding. In its ten-point plan to reduce prison overcrowding, **Prison Reform International (PRI)** points to the need to improve access to justice and matter management, especially pre-trial detention, and maintain camp courts inside prisons[273]. In the same sense, the **Inter-American Commission**, in its Report on measures to reduce the use of pre-trial detention in the Americas, supports hearings in prisons in countries such as Bolivia, Colombia, Panama, and Paraguay. The commission understands that these hearings can counteract many difficulties regarding the transportation of individuals to the courts, such as lack of necessary transport, insufficient fuel, insufficient security personnel and escort,

[272] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution N° 367**. Provides general guidelines and standards for the creation of the Prison Capacity Regulation Center in the state's juvenile justice services system, within the scope of the Judiciary. Brasília: CNJ, 2021. Available at: https://atos.cnj.jus.br/atos/detalhar/3679

[273] PRI, Penal Reform International. **Ten-Point Plan to Reduce Prison Overcrowding**. London: PRI, 2012. Available at: https://cdn.penalreform.org/wp-content/uploads/2013/05/10-pt-plan-overcrowding.pdf

and potential danger of escape. The IACHR points out that they favor a reduction in the cancellation or postponement of hearings. Also, "in addition to guaranteeing a more significant number of analyzed cases, maintaining hearings in prisons allows justice operators to be in direct contact with the reality of prisons in the region, which could lead to a greater understanding of the importance of applying alternative measures to the deprivation of liberty"[274].

Executing *in loco* hearings in prison facilities could bring benefits to the criminal justice administration, physically approaching the judges and other legal practitioners of the rights of arrested people and the conditions to which they are subjected. In this sense, the judges will have the job of making **regular visits to prison units**, which, regarding the Court of Criminal Enforcement, should be made at least monthly (art. 66, VII of LEP), and to those views led by GMFs in order to promote, through them, "awareness and knowledge expansion about the conditions of deprivation of liberty in those facilities" in the magistrature (art. 6, XVIII of CNJ Resolution Nº. 214/2015)[275].

In juvenile justice, focused hearings have already been regulated by CNJ in Resolution Nº. 367/2021, highlighting their role in the face of the overcrowding phenomena inside the units. The resolution also points out special attention to circumstances and specific groups, such as juveniles with disabilities, and serious illnesses, as well as pregnant women, mother's or responsible for child-care, and people with disabilities (art. 12, II).

Besides, the recent **CNJ Recommendation Nº 98/2021** regarding the juvenile justice system express that the focused hearings have the purpose of making the people deprived of liberty able "to petition directly to the judge" (art. 2, II) and "fortify the inspection of the units" (art. 2, IX). It also established its regulation character as an exit door regulation tool, stipulating the objective of "guaranteeing detention units operation and 'semi liberty' units with an occupancy rate within their designed capacities" (art. 2, X). Likewise, in the suggested regulation, the CNJ indicates a preferable periodicity — every three months — and a necessity of *in loco* hearings (art 3, I). Furthermore, the Recommendation also advocates the presence of Executive Branch officials assigned to make post-hearing measures (arts. 4, I and 10) equivalent to penal alternatives measures, electronic monitoring, or released people care, like the Social Office. Finally, the GMF could support the "focused hearings, mainly in logistics and procedural aspects" (art. 5)[276].

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[274] IACHR, Inter-American Commission on Human Rights. **Rapporteurship on the Rights of Persons Deprived of Liberty.** Washington: IACHR, 2016. Available at: https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/r/DPPL/default.asp

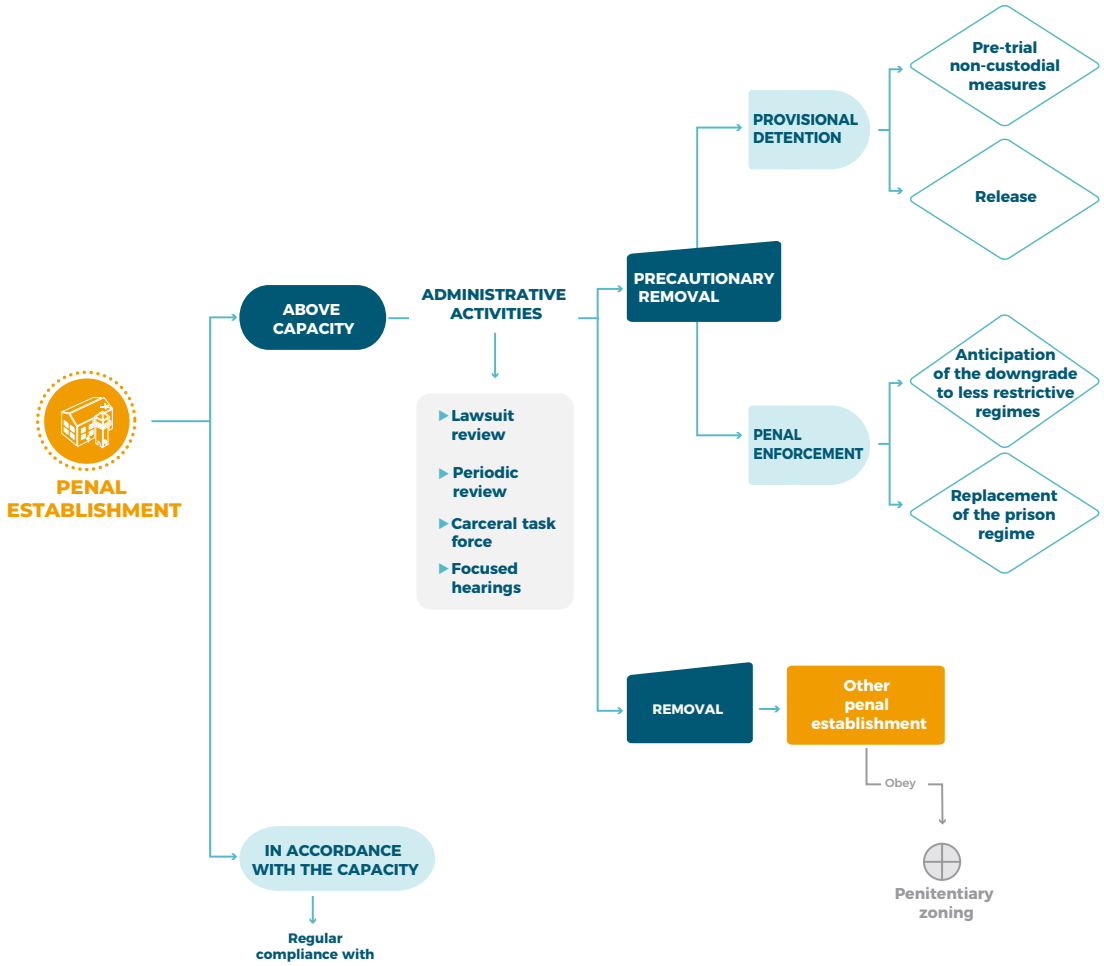
[275] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 214**. Provides for the organization and functioning of Monitoring and Supervision Groups (GMF) in the Courts of Justice of the States, the Federal District of Territories and the Federal Regional Courts. Brasília, CNJ, 2015. Available at: https://atos.cnj.jus.br/atos/detalhar/2237

[276] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Recommendation N° 98**. Recommend to Courts and judges the adoption of guidelines and procedures for holding concentrated hearings to reevaluate socio-educational measures of internment and semi-liberty. 2021. Available at: https://atos.cnj.jus.br/atos/detalhar/3949.

AN INDISPENSABLE TOOL?

The focused hearings show many benefits regarding prison capacity regulation and overcrowding control. However, their implementation could be complicated by many factors, such as the unavailability of hearing rooms with adequate space and lack of infrastructure (internet and computers), among others. Similarly, the hearing implementation could be complex in other spaces as well. Thus, despite being highly recommended, it is possible to implement the Prison Capacity Regulation Center without their adoption.

FLOWCHART OF THE PRISON CAPACITY REGULATION CENTER AT THE EXIT DOOR



WHO IS RESPONSIBLE FOR THE PRISON CAPACITY REGULATION CENTER?

5 Who is responsible for the Prison Capacity Regulation Center?

The management of public policies involves decision-making, which must be guided by the maximum effectiveness of fundamental rights and within the constitutional framework of the Democratic State of Law. These decisions must be prepared with evidence-based technical planning, joint responsibility, and coordination between the Public Power and society. About penal policies, decisions on deprivation of liberty require special attention since it is a public policy implemented by the Executive Branch but based, at the same time, arising from decisions of the Judiciary, both at the time of people's entry and exit.

This dynamic causes difficulties in flow management, even more so given the constant growth of imprisonment over the last few decades, as already mentioned. The problem of overcrowding sits on the inability of the Executive Branch to meet the high demand for imprisonment by the Judiciary.

Prison capacity regulation starts by recognizing the overlapping responsibilities of the different institutional actors. Therefore, it requires a form of management that can control the whole criminal cycle, from the entrance door to the exit door. That regulation includes assistance policies for people who leave de prison, penal alternatives, electronic monitoring, and involving critical actors in the deliberative process, guaranteeing regular enforcement of the penal policies.

Although the Criminal Execution Law proposes basic guidelines regarding penal policies (defining, for instance, the responsible judicial bodies and their attributions), there is still concurrent competence between the Union, states, and the Federal District regarding legislation actions towards the penitentiary laws (art. 24, I). There is also concurrent competence in the judiciary organization, confirming normative and institutional arrangements chosen by the states.

The control of prison overcrowding necessarily falls on the Judiciary, which determines arrests and releases, and the Executive Branch, which executes them. Although the Legislative Branch and other institutions of the justice system and civil society are also relevant actors, this Handbook addresses the responsibilities of the Judiciary and the Executive Branches and the actions shared between them.

5.1. Judiciary Branch

The Judiciary plays a vital role in controlling the demand for prison policy, taking into account its organizational division, delimited by the Constitution, federal laws, state laws, and court regulations. In implementing the Prison Capacity Regulation Center, these organizational arrangements must be considered in constructing a governance model suited to the specificities of each location. For the success of the Prison Capacity Regulation Center, close coordination capable of including the courts with criminal jurisdiction, the GMF, the court's corrective body, in addition to other actors in the criminal justice system is necessary.

The guidelines provided for in Law Nº. 12,106/2012, which create the DMF/CNJ, and in CNJ Resolution Nº. 214/2015, assigned to the GMFs: the supervision and monitoring of the entry and exit of people from the prison system; the follow-up and dissemination of the time duration of pre-trial detention; inspection of conditions for serving a sentence; adoption of measures to ensure that the number of people arrested does not exceed the capacity of occupation of correctional facilities; among others.

In the face of these specific attributions, it is recommended that the GMFs lead or collaborate intensively with the governance of the Prison Capacity Regulation Center.

Considering the active role of the GMF, it is essential to consider the regional diversity and the existence of different arrangements of judicial organization and prison administration in the country. As a result, there are at least two governance models — decentralized and centralized — for penal regulation, which must be implemented according to the guidelines of local reality and institutional possibilities.

ATTENTION POINT

DOES IT NECESSARILY HAVE TO BE THE GMF?

The GMF has attributions designated by CNJ Resolution Nº. 214/2015 that are very much related to penal regulation, from the monitoring and inspection of electronic systems, entrances and exits from the prison system, and on-site assessments, among others. However, it is not necessarily the only instance able to lead the Prison Capacity Regulation Center in court. The institutional governance arrangement must always be adapted to the local reality and the potential of organs and administrative bodies of the court, instances such as the Presidency, Vice-presidency, Internal Affairs, or even the creation of new instances through a Working Group or a Specialized Nucleus. Having an innovative composition, everyone can be a potential manager of the Center.

5.1.1. Decentralized model: division of prison capacity by its respective court jurisdiction

The first model is anchored in management through the division of prison accommodations between the courts with criminal jurisdiction, including those with attribution for the detention control hearing for *flagrante delicto* (criminal courts, court or specialized nucleus), phase of knowledge (criminal courts), and penal enforcement.

Some accommodations are designated for each court, which manages them within the principle of carceral legality, not allowing the use of previously established accommodations. In each court, the magistrate becomes responsible for an accommodation fraction (quota) within his/her jurisdiction, with no interference from another court. This governance model **is called the decentralized management model.**

The **distribution of fractions** must consider objective factors, notably the differentiation in the jurisdictional competence of the courts, the existence of specialized courts in certain criminal offenses, and the pattern of entry into the prison system, among others. Likewise, territorial delineation based on the penitentiary area is essential. Some other issues deserve to be emphasized. Considering the distribution of fractions, it should:

- Bee aligned with the maximum capacity of correctional facilities concerning the differentiation between accommodations for pretrial detention and sentence, as well as penitentiary zoning;
- Assign a high fraction of accommodations to the criminal enforcement court since the rule is to arrest convicted persons, with pretrial detention being exceptional;
- Consider other fractions between courts with different jurisdictions, particularly concerning specialized courts, for example, it is not reasonable that a court specializing in traffic crimes has a quota of accommodations like a jury court, a criminal court of ordinary jurisdiction, or even a specialized court in organized crime;
- Contemplate fractions for people subjected to civil and pretrial detentions decreed by the Federal Court, among other differentiated modalities.

The distribution of fractions must be adapted to the local reality, and no role model exists. It is recommended that its **definition is the result of collective deliberation** between magistrates, the GMF, the Public Prosecutor's Office, the Public Defender's Office, OAB, and the state Executive Branch — that manages prisons and other interested institutions, such as the Community Council and organizations of civil society. Once the division of prison spaces has been decided, **a period must be established for the periodic reassessment of the occupancy fractions** since objective conditions change over time and require adjustments to maintain an equitable division.

From a practical angle, once the limit of the fraction of accommodations in the court's jurisdiction has been reached, it is up to the judge to decide the priority for new detention charges. **When a detention order exceeds the jurisdictional quota established, the judge may:** (i) review other previously decreed arrests in which people are in detention control and determine non-custodial measures, thus opening new accommodations within its fraction. Alternatively, (ii) delay the prison order to include the individual on the waiting list, applying measures other than imprisonment until the release of new accommodations. The fractioning of prison accommodations applies to the courts that have jurisdiction over pretrial detention and to the courts of criminal enforcement. This model was adopted by the pilot project developed at the Paraná Court of Justice[277]. With each court in charge of its share of accommodations, the judge must use the appropriate regulatory tools provided in Chapter 4 of this document.

Operating regularly, the fraction of accommodations can potentially maintain the prison balance and stop overcrowding. There may be, however, **exceptional situations**. For instance, due to a large number of individuals being arrested simultaneously (as a result of police operations related to organized crime actions), co-authorship crime investigation, or due to an atypical upsurge in crimes (resulting in many flagrante delicto arrests), such as "trawlers", and significant seasonal events (e.g., carnival). Confronted with cases like these, a criminal court may have its fraction of prison accommodations significantly exceeded, especially if the seriousness of the context, due to the pressing need for imprisonment to preserve the process, evidence, and witnesses, among others, discourages the use of the waiting list. In this scenario, the exceeding accommodations tools may be helpful up to a limit of 10% above capacity for a maximum of 30 days. In the meantime, the judge may adopt a periodic review, carceral task force, or focused hearings to apply for the precautionary removal or transfer.

It is possible, however, that it is still not enough to return to the maximum occupation provided for in the fraction of that criminal court. For example, this can occur if the court has many cases requiring pre-trial detention. In this highly unusual scenario, another instance will have to intervene to deal with the local prison system integrally since decentralized governance was not enough to maintain the occupation balance. Therefore, defining a management branch within the court is recommended **to manage conflicts over the occupation of fractions of accommodations between different courts**, preferably the GMF or another instance with its participation.

This management body for conflicts between judicial decisions **can act in two formats**. The first would be managing a system where the judges divide all the accommodations fractions. In this scenario, the management body requests the courts involved and supervises the application of administrative action tools, demanding a review of other existing prison measures to result in precautionary removal or other criteria to reduce overcrowding.

The second format would be through the engagement of this higher level of regulation when the fractions of accommodations are distributed. In this case, a fraction, which may be 10% of the exist-

[277] BRAZIL. TJPR, Tribunal de Justiça do Paraná (Court of Justice of the State of Paraná); GMF/PR, Monitoring and Supervision Groups of the Paraná Court of Justice. **GMF/PR Resolution Nº 1**. 2017. Available at : https://www.tjpr.jus.br/documents/188253/6059935/Resoluc%CC%A7a%CC%83o+GMF-PR+01-17.pdf/7365538f-7424-9b6d-feac-c3df3cfd6c67

ing prison capacity, is assigned to the management body as **spare accommodation**, which is reserved precisely to accommodate any excesses of occupation by one or another court following the example already given. This measure allows management occupancy conflicts while keeping the system in occupancy balance, within maximum capacity. It is indicated that the spare spots must be occupied for a maximum period of 30 days, so measures are taken to ensure the temporary accommodation and the return to the previous status.

ATTENTION POINT

SPARE ACCOMODATION VS. EXCEEDING ACCOMODATION

The exceeding accommodations are a regulation tool at the entrance door to the prison system, which is activated when people enter a prison facility that is already at the limit of its capacity. In other words, it allows for temporary overcrowding in exceptional situations. On the other hand, spare accommodations result from the court management format, in which a management body has a fair share of accommodations to accommodate conflicts between different courts. The spare places make up the design of penal regulation within the context of respecting maximum capacity and the principle of carceral legality, not above it. While exceeding accommodations affect overcrowding, spare accommodations affect normality. Regarding similarities, both are temporary measures, with a fixed deadline to return to the situation before the one that motivated its use.

The decentralized model involves binary judicial governance and fractioned prison accommodations distributed among the courts. There is a regulatory role in case of conflict of occupation by a centralized administrative body of the court, to which it can be designated a specific fraction of accommodations, as mentioned. The court management body is recommended to coordinate the implementation of the Prison Capacity Regulation Center tools, through periodic disclosure of the actual capacity of correctional facilities, the number of accommodations occupied, and the establishment of a waiting list and/or precautionary removal list, among other tasks.

It would be up to the agency to publicize occupation alerts and issue guidelines urging the courts to respect the number of accommodations and to use the necessary tools to reduce overcrowding and maintain the principle of carceral legality. In addition, it would be responsible for overseeing the implementation of the regulation from an administrative aspect, as well as the **coordination between different courts and jurisdictions**. Especially involving civil individuals deprived of liberty and between the state and federal courts, which may combine the management or carry it out separately by dividing fractions.

WHAT WOULD IT BE LIKE IN PRACTICE?

EXAMPLE 1: NO SPARE ACCOMMODATIONS

In example 1, the fictitious "Regulantion County" is taken as an example, adopting the postulates described in this section. The prison system has 100 places and 4 courts with criminal jurisdiction, one for criminal enforcement and the others for knowledge. The fractions were distributed by reserving 30 accommodations for provisional detainees, divided between 3 courts; 60 places for convicted individuals, managed by the penal enforcement court; and 10 exceeding accommodations held by the management body. The division of the 30 accommodations among the criminal courts is equal because the three knowledge courts have similar competencies, and no specialized courts exist. Considering that the distribution of cases occurs randomly, it is assumed that the 3 courts will receive criminal cases equally.

Then the proportion will be as follows:

Court	1st Criminal Court	2nd Criminal Court	3rd Criminal Court	Criminal Enforcement Court	Management body (exceeding accommodations)	Total
Accommodations	10	10	10	60	10	100

EXAMPLE 2: WITH A SPECIALIZED COURT

In example 2, "Regulation County" follows the same number of prison accommodations and courts. However, one of the three courts assigned is specialized in crimes against life. Thus, the distribution of accommodations fractions accommodations was updated to adapt to the new judicial organization, considering that homicide, for example, may require a more significant number of pre-trial detentions. Thus, from the 30 accommodations designated for this purpose, 16 were fixed for the Jury Court and 7 for the two other criminal courts, keeping the global limit for pre-trial unaltered.

The new proportion will be as follows:

Court	1st Criminal Court	2nd Criminal Court	Jury Court	Criminal Enforcement Court	Main Judicial body (exceeding accommodations)	Total
Accommodations	7	7	16	60	10	100

5.1.2. Centralized model: central body

The second model is constituted by a centralized administration, in which the attributions of the Prison Capacity Regulation Center oversee the court. In this model, judges with criminal jurisdiction are not assigned fractions of prison accommodations. Instead, they follow their regular performance according to the current legislation and the premise of the exceptional use of prison. Following the regular decision flow, similar to current practice, is likely to result in prison occupancy exceeding maximum capacity. Thus, overcrowding begins.

Considering the situation, the central organ of prison accommodations intervenes differently. Therefore, it is recommended that its work is based on two administrative tools: real-time information on the capacity rate and the Critical Occupancy Alert System tool (SAOC). Based on these tools linked to technological solutions and data management, the administration develops the regular monitoring of flows. It can then affect both the exit door and the entrance door.

For the regulation of the **exit door**, the administration coordinates the activation of administrative action tools in the face of criminal courts concerning prisons already decreed and in compliance. It prescribes conducting carceral joint efforts, procedural reviews, and focused hearings. It is also respon-

sible for adopting extraordinary decision-making criteria oriented towards precautionary removal, as a rule, and transfer between units, exceptionally. These measures will be put into practice based on the administration's attributions within the administrative organization of the respective court. It means a central body associated with Internal Affairs, for example, can benefit from the celerity and engagement of judgments.

On the other hand, in regulating the **entrance door**, the administration can establish late compliance with prison decisions and temporary inclusion in the waiting list tool through administrative measures. This procedure is an atypical measure presented in item 4.3.1 of this Handbook. It is important to emphasize that this late compliance observes the legal deadlines for judicial review and does not involve excessive delay. The management body must endeavor to reassess existing detention measures and release new prison accommodations.

Although there is no distribution of fraction accommodations between different courts, it is possible to stipulate a restricted number of accommodations for the centralized management body as **spare accommodations**, as described in the previous item. In practice, its use implies reducing the nominal capacity of the local prison system to a lower limit, such as 10% less, for example. Once this new occupancy limit is reached, the management body anticipates applying the entrance and exit door regulation tools to prevent the maximum occupancy rate of 100%. Thus, spare accommodations avoid overcrowding and the consequent future use of exceeding accommodations. Therefore, they are used to accommodate excessive prison occupancy by criminal courts in extraordinary situations. Finally, as in the decentralized model, the management body must work in close coordination with other courts, particularly Federal Justice, to succeed in regulating accommodations.

WHAT WOULD IT BE LIKE IN PRACTICE?
EXAMPLE 1: WITHOUT A SPECIALIZED COURT

The example of the fictional region of "Regulation County" is taken up again, with a local prison system with 100 accommodations and 4 courts with criminal jurisdiction, one for criminal enforcement and the others for knowledge. In the centralized model, there will be no division of accommodations, and the centralized management will operate all of them, paying attention to the critical occupancy alert (90%) and other regulation tools.

The design will be as follows:

Court	1st Criminal court	2nd Criminal Court	Jury Court	Criminal Enforcement Court	Total	**Obs.:** The main judicial body has designated accommo-dations
Accommo-dations	100				100	

EXAMPLE 2: WITH SPARE ACCOMMODATIONS

In example 2, "Regulation County" continues with the same characteristics regarding the number of accommodations and composition of judgments. However, it adopts spare accommodations. The central administration designated 10 accommodations (10% of the total) to accommodate spaces above the total quota of those available, that is, 90 accommodations.

So, the drawing will be as follows:

Court	1st Criminal Court	2nd Criminal Court	Jury Court	Criminal Enforcement Court	Main judicial body (exceeding accommo-dations)	Total
Accommo-dations	90				10	100

ATTENTION POINT

WHAT TO DO IF THE GMF HAS A FRAGILE STRUCTURE?

Considering the great diversity of the structure of the GMFs in the country, these two governance models — decentralized and centralized — are especially relevant. The centralized model may be reasonable in states where the GMF has a robust structure, physical space, and adequate support from servers and administrative assistants. On the other hand, the decentralized model may be more appropriate in states where the GMF lacks institutional support and low operational capacity. Nevertheless, this institutional structure is not the only factor to be considered. In addition, it is essential to consider the engagement of the judges, the alignment with the management of the court, and the relations with the state government and other actors. Therefore, the governance model's formatting will invariably be designed and adapted based on local peculiarities.

5.1.3. Transition rules

Transition rules are an imperative imposed by the **Introduction to the rules of Brazilian Law (LINDB)** for any decision by public authorities that impose new rules of a normative nature. Thus, the Law provides: "The administrative, controlling or judicial decision that establishes a new interpretation or guidance on a rule of undetermined content, imposing a new duty or new conditioning of law, must provide for a transition regime when indispensable for the new duty or conditioning of law is fulfilled in a proportionate, equitable and efficient manner and without prejudice to general interests" (art. 23). Based on this determination, the institution of the Prison Capacity Regulation Center, stipulating new duties and prescriptions, also requires a "transition regime" so that observes the proportionality, equity, and efficiency, legally required.

In the current scenario, no Brazilian state is in a situation of balanced occupation. It means there is no equivalence between the entrance and exit doors, with a proportion of one person arrested for one accommodation. Overcrowding is ubiquitous. So, to put into practice a policy of penal regulation, it is necessary to establish transition rules that make it possible to start from the current state for the proportion equal to or less than 1 individual/accommodation.

For this purpose, it is necessary to design guidelines to get out of the current proportion, which can be 2 individuals/1 accommodation, 1.5 individuals/1 accommodation, or other variations, until the adequacy between occupation and capacity is reached. In order to achieve occupancy balance, it is necessary to think about how to maximize the use of the tools indicated in this Handbook and eventually adopt even more exceptional ones.

In changing an unbalanced system, it is recommended **to adopt the local overcrowding index as a parameter for managing the exit door, based on compensation for exits in the face of new admissions to the prison.** For example, if a local prison system has 200% occupancy, the proportion would be adopted that, for every 1 person who enters, another 2 would leave. Alternatively, if overcrowding corresponds to 150%, every 1 person entering the penal establishment would require 1.5 others to be absent. These examples should be adopted as proportions within a larger population. So, taking the last example, for every 100 people who enter a penitentiary, another 150 would leave.

Establishing semi-annual or annual goals is vital to amortize the disproportion between individuals in deprivation of liberty and existing accommodations. In addition, other tools can help considerably in the transition to a system with a balanced occupation, with emphasis on carrying out carceral task forces and periodically concentrated hearings until reaching the parameter 1 individual/1 accommodation. **The logic of leaving more people than entering the penal units will provide a balance of occupation, even in the medium or long term.** However, the details of the transition rules will depend on the governance model chosen.

Transition rules can establish a prioritization order to regulate prison accommodations by delimiting specific geographic regions (such as counties or penitentiary zones) or selecting subsystems (such as prison accommodations for women or according to procedural status — temporary, semi-open, etc.). For example, the Prison Capacity Regulation Center can be started in the capital district or a penitentiary area in the interior of the state. Once the occupation balance is reached according to the *numerus clausus* in this locality, one then moves on to other penitentiary zones until the entire state prison system is achieved. Alternatively, transition rules can guide initial work focused on semi-open correctional facilities. Another possibility is to start work in the prison facilities destined for pre-trial detention. The possibilities are multiple. How to begin regulating prison capacity is a decision that will be taken by local actors, considering state peculiarities and defined priorities.

COMPARISON OF ASSIGNMENTS BETWEEN CRIMINAL COURTS

Table 5: Duties of criminal courts – Regulation of prison vacancies

Courts	Entrance door	Exit door
Detention Control Hearing Court	Conversion from *flagrante delicto* detention to pre-trial detention	N/A
	Arrest warrant enforcement (in line with the local judicial organization)	N/A

Criminal Competence Court	Pre-trial detention warrant	Release by revocation of pre-trial detention, with or without replacement by another measure
	Temporary detention warrant	Release due to revocation of temporary detention; or as a result of the legal term, with or without replacement by another measure
	Detention warrants by *res judicata* arrest	N/A
Criminal Enforcement Court	Detention by revocation of benefit or regime regression	Releases for any circumstance within the scope of criminal enforcement

5.2. Executive Branch

It is postulated throughout this Handbook that the regulation of prison capacity is inscribed in the systemic perspective of the entire penal cycle, requiring, as already mentioned, a management model that integrates the institutional actors involved in different stages from the entrance door to the exit door. Accordingly, the Executive Branch has numerous points of interface with the management of the criminal cycle, from the coordination of police activity to the implementation of care services for the released person passing through the administration of correctional facilities.

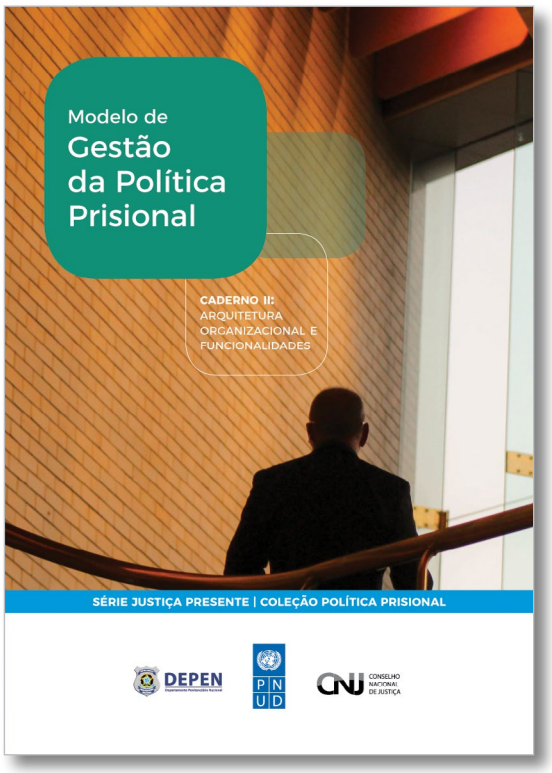
On the one hand, the **Executive Branch can establish itself as the management body** within the centralized or decentralized model. However, this arrangement will require proximity to the Judiciary and may facilitate day-to-day regulation as it is responsible for executing the arrest measure. The experiences of regulating occupancy levels in the juvenile justice system in the country adopt the state body of juvenile justice administration as a centralized management body, which operates under pre-defined criteria for entry and exit and from the distribution of the respective court orders.

On the other hand, since the Executive Branch does not have this direct regulatory role, it is a *sine-qua-non* condition for the Prison Capacity Regulation Center to fulfill its purpose adequately and sustainably. Therefore, close coordination between the judicial actors and those executives is essential. In particular, developing tools that allow the continuous flow of information between the Judiciary and the Executive is crucial for criminal regulation.

5.2.1. Prison management

In the past, it was common to assign the responsibility for managing prison occupancy exclusively to the direction of each prison unit. However, this restrictive perspective that saw overcrowding as an issue limited to a given facility is now overcoming from a systemic point of view. It is based on the realization that overcrowding is less a problem of the prison administration than the result of an accumulation of factors that also integrates judicial activity. Therefore, the responsibility of prison directors in correctional facilities must be re-signified in light of their concrete attributions in managing the prison capacity in each unit.

Initially, the implementation of the Prison Capacity Regulation Center is based on the definition of the actual maximum capacity of each prison, applying the standards detailed in topic 4.1.1. above. Updated information on the actual capacity of each prison facility will feed a database intended to compute information from all units to determine the occupancy capacity of the local prison system, defined by the prison zoning rules specified in section 4.1.2.



The management of correctional facilities is **primarily responsible for providing accurate data, a determining condition for functioning the Prison Capacity Regulation Center's tools.** As a result of the logic of regulation of the entrance and exit door, it is up to prison directors to feed existing systems with data not only on stock but also on flow. The purpose is, therefore, to adopt information technology tools that allow the registration, storage, and access to such data in a safe, auditable, and shareable way with the other institutional actors involved, such as the prison administration secretariat of the state or agents of the Judiciary. In this regard, the CNPCP Resolution Nº 5/2016 provides indicators for setting the maximum capacity in correctional facilities. It also assigns the director of the prison facility the responsibility of alerting the court responsible for criminal enforcement, the Community Council, the Public Defender's Office, the Public Prosecutor's Office, and the OAB when there is any extrapolation of the occupation capacity (art. 5, § 2). Furthermore, developing secure IT solutions enables real-time access to facility occupancy data, allowing the Judiciary to make decisions based on a reliable reality of the prison system under its jurisdiction.

The national standards for these attributions are in the Prison Policy Management Model, launched by Senappen and UNDP and republished by the CNJ[278]. Thus, the management of each penal establishment is the key factor that has the most significant knowledge of the conditions of compliance with the prison measure and can keep the data on the actual capacity of the unit, as in the case of supervening infrastructure failures that imply the deactivation of cells, for example. Constant monitoring of the occupancy volume is also crucial for prison capacity management tools, such as the waiting list, temporary use of exceeding accommodations, and even precautionary removal.

5.2.2. Integrated Center for Penal Alternatives (CIAP)

The local Executive Branch's responsibility is to implement and guarantee the necessary inputs for the proper functioning of the Integrated Center for Penal Alternatives (CIAP). CIAP is oriented to care for and monitor the person in compliance with alternatives to imprisonment, contributing to alleviating the social vulnerabilities that tend to favor criminal regression. In this sense, CIAP has the potential for the social inclusion of people facing re-entry into the prison system.

Internationally, the UN Standard Minimum Rules for Non-custodial Measures, known as the **Tokyo Rules**, establish guidelines for penal alternatives. Those measures aim to "reduce the use of imprisonment and to rationalize criminal justice policies, taking into account the observance of human rights, the requirement of social justice, and the rehabilitation needs of the offender" (Rule 1.5)[279]. In turn, CNJ Resolution Nº. 288/2019 defines the Judiciary institutional policy on promoting penal alternatives instead of deprivation of liberty. Furthermore, the regulation highlights the necessity of cooperation between the Judiciary and the Executive Branches "in structuring services for monitoring penal alternatives, in order to build fluxes and methodologies for the application and implementation of measures, contributing to their effectiveness and enabling the social inclusion of those affected, based on the specifics of each case" (art. 4)[280].

The CIAP is structured by a multidisciplinary team, acting within standards established by the **Handbook for the Management of Penal Alternatives**, a collaboration between Senappen and UNDP, republished in 2020 by the CNJ[281]. The teamwork on each CIAP must consider the numerical proportionality of the monitored contingent and their movement through the penal services. This action reinforces the need to regulate flows that should guide decision-making to benefit the adequate services and penal policies. Its work comprises four main lines associated with judicial measures: (i) social assistance

[278] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Modelo de gestão da política prisional:** caderno I: fundamentos conceituais e principiológicos. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/556

[279] OHCHR, United Nations Human Rights Office. **The Tokyo Rules**: United Nations Standard Minimum Rules for Non-custodial Measures. 1992. Available at: https://www.ohchr.org/sites/default/files/tokyorules.pdf

[280] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolution Nº 288.** Defines the institutional policy of the Judiciary to promote the application of criminal alternatives, with a restorative approach, to replace deprivation of liberty. Brasília: CNJ, 2019 Available at: https://atos.cnj.jus.br/atos/detalhar/2957

[281] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Manual de Gestão para as Alternativas Penais**. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/279

within the scope of the detention control hearing through the Service for Assistance to Persons in Custody (APEC); (ii) the non-custodial measures monitoring provided for in art. 319, First to VIII of the CPP; (iii) monitoring urgent protective measures arising from the Maria da Penha Law; and (iv) monitoring of the conditions imposed as a result of imprisonment and alternative measures involving the penal transactions, non-prosecution agreement, conditional suspension of the charges or the imprisonment sentence, and also right restricting sentences. Those measures must be interpreted as a broad method to evaluate necessities, identify vulnerabilities, and implement social protection.

On the one hand, the penal alternatives involve conditions and obligations subject to judicial monitoring; simultaneously, they promote the citizenship of people subjected to penal policies and promote reoffending reduction on the other. In order to subserve the CIAP's creation and support of its operation, the CNPCP Resolution Nº 5/2007 recommends that Senappen must foster the creation of those types of equipment. The support must be made by financial mechanisms and covering of costs in order to "guarantee the fulfillment of the general prevention objectives according to the Law that has to be suitable for the person's effective social reintegration" (art. 1). The Resolution also proposes that the states must provide financial aid for this policy. Notably, the CIAP can be instituted by state and municipal Executive Branches.

5.2.3. Electronic Monitoring Center

The electronic monitoring measure was introduced into Brazilian legislation through **Law Nº. 12,258/2010**, which incorporated it into the dynamics of criminal enforcement. Further on, **Law Nº. 12,403/2011** amended the CPP, admitting electronic monitoring as a precautionary measure different from prison, inserting it into the list of art. 319. Electronic monitoring significantly restricts the person's autonomy and liberty, so it configures the most serious hypothesis among the list of preventive measures. The measure is indicated only when "all other less serious measures are insufficient, as an alternative to pre-trial detention and not liberty"[282].

The electronic monitoring model adopted in Brazil combines technological solutions in hardware and software, consisting of the implantation of an electronic device in the person's body – the

[282] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbooks on decision-making in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/651

electronic anklet. The installation of the equipment and regulation of use according to the conditions imposed in court are attributions of the state Executive Branch by the **Electronic Monitoring Center (CME)** as prescribed in Decree Nº. 627/2011, of the Federal Executive.

It is exclusively dedicated to monitoring people, dissociated from the Integrated Center for Penal Alternatives (CIAP). It is based on the **Management Model for Electronic Monitoring of People**, published by Senappen in partnership with the UNDP and relaunched by the CNJ in collaboration with these same institutions in 2020[283]. The responsibilities of this Center include the verification of legal duties, enforcement, and conditions specified in the court decision, forwarding a detailed report to the competent judge whenever required, maintaining programs and multi-professional teams to monitor and support the person being monitored and guide the person to fulfill his/her obligations and reintegrate his/her back to society (art. 4). In addition, the CME must ensure the full range of services, such as the availability of technical and operational support via fixed or mobile phone, 24 hours a day, enabling the monitored person to communicate with the Center. It also can be used in case that needs handling of eventual incidents and the maintenance of the measure, according to the specific cases – to avoid worsening the criminal situation. Thus, the need for cooperation between the state Executive Branch and the Judiciary is underlined to follow electronic monitoring measures.

5.2.4. Service to the Person in Custody (APEC)

As mentioned, the **Service to the Person in Custody** (APEC) is linked to the Integrated Center for Penal Alternatives due to its attribution in art. 3, XII, of CNJ Resolution Nº. 288/2019. APEC contains a multidisciplinary team in detention control hearings resulting from arrests in flagrante delicto or court orders. The Service assists detainees in two moments: before and after the hearing.

Prior social care considers the personal and social conditions of the person in custody and indicates referrals for social protection in liberty. It prepares a report on the life situation of each person in custody that is made available to the judge, the Public Prosecutor's Office, and the defense, translating into a relevant subsidy for judicial decision-making. This report assesses in more detail the prac-

283 BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Management model for electronic monitoring of people**. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/679

tical implications of the decision and considers the need and adequacy of non-custodial measures for each case. Thus, it leans toward better-informed decisions and contributes to the exceptionality of pre-trial detention. **Social assistance after a detention control hearing** is intended for people who have benefited from a release permit, with or without precautionary measures, whether penal alternatives or electronic monitoring. It aims to ensure that the social protection network investigates social referrals in primary care. In addition, it guides the alternative penal measures to imprisonment that has been determined. APEC's work is based on the **Handbook of Social Protection in Detention Control Hearings** standards, prepared by the CNJ in 2020[284].

For these purposes, the institutional arrangement of APEC can have different conformations, including servants of the Executive Branch, partner institutions, universities, or the Judiciary Branch itself. However, regardless of the model adopted, the state Executive cooperation and engagement are crucial, whether in providing professionals in close coordination with the security agents involved in the detention control hearing to guarantee the attendance of the Service. In addition, the APEC team is also responsible for developing strategies for continuous coordination with the social protection network. These teams will be qualified to inform the judge about possible referrals to the network, which equally requires close collaboration with the Executive Branch. Thus, the proper functioning of an APEC service collaborates with the judge, with the subsequent follow-up of measures other than imprisonment, and affects criminal regulation.

5.2.5. Social Office: people released from the prison system

In the final stage of the penal cycle there are people released from the prison system. The systemic perspective that guides the Prison Capacity Regulation Center takes into account the released people to the extent in which it exercises an attentive and specialized look at the exit door to facilitate a qualified return to life in liberty. CNJ Resolution Nº. 307/2019 establishes the Policy for Attention to Persons Released from the Prison System within the Judiciary Branch and demonstrates the role of the Judiciary, in close articulation with the Executive Branch, in creating **Social Offices**[285].

[284] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Executive summary: handbook of social protection in detention control hearings**. Brasília: CNJ, 2021. Available at: https://bibliotecadigital.cnj.jus.br/jspui/handle/123456789/654

[285] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Resolução N° 307**. Establishes the Care Policy for People Leaving the Prison System within the scope of the Judiciary, providing for the procedures, guidelines, institutional model and work methodology for its implementation. Brasília: CNJ, 2019. Available at: https://atos.cnj.jus.br/atos/detalhar/3147

The Social Office considers as released "the person who, after any period in the penitentiary system, even on provisional detention, needs the assistance of public policies due to its institutionalization" (art. 3, II). Accordingly, the Social Office is dedicated to receiving and referring former inmates and their families to the public policies they need. In addition, it seeks to contribute to meeting demands and ensuring rights during the difficult period of leaving the prison unit. Its work finds support in the **Notes on the Management and Operation of Social Offices**, published by the CNJ in 2020[286].

The policy for released individuals is based on the continuous exchange and quality of information between the Judiciary and Executive Branches. In particular, the regulation predicts the inclusion of alert tools in the SEEU. That measure allows the criminal enforcement courts to inform prison managers monthly about the list of persons deprived of their liberty who have reached the lapse of the pre-release stage and can be directed to the Social Offices. In addition, the Social Office's methodologies provide the qualification of the exit door of the correctional facilities, working with pre-released people to organize an "exit map" that allows them to identify the public services necessary to meet their demands at the moment after the deprivation of liberty.

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[286] BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Caderno de gestão dos escritórios sociais I:** Guia para aplicação da metodologia de mobilização de pessoas pré-egressas. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/503.

BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Caderno de gestão dos escritórios sociais II:** Metodologia para a singularização do atendimento a pessoas em privação de liberdade e egressas do sistema prisional. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/523

BRAZIL. CNJ, Conselho Nacional de Justiça (National Council of Justice). **Caderno de gestão dos escritórios sociais III:** Manual de gestão e funcionamento dos escritórios. Brasília: CNJ, 2020. Available at: https://bibliotecadigital.cnj.jus.br/handle/123456789/526

5.3. Shared assignments

In addition to the attributions already mentioned, some others are shared between the Judiciary, the Executive Branch, and other institutions from the criminal justice system and civil society. They are collegiate governance, monitoring, evaluation, and social communication actions.

5.3.1. Collegiate governance

The Prison Capacity Regulation Center is an initiative that involves several actors, so it is recommended the establishment of collegiate management composed of at least representatives of the: Court of Justice; Public Prosecutor's Office; Public Defender's Office; Section of the OAB; state secretariat responsible for penitentiary administration, including managers of penal alternatives, electronic monitoring and attention to released people; institutions of the National System for the Prevention and Combat of Torture (SNPCT), provided for in Law Nº. 12,847/2013; universities; and civil society.

The GMF stands out in criminal regulation because its attributions were recently consolidated in January 2021 with changes to CNJ Resolution Nº. 214/2015. The purpose of this collegiate is to support the GMF, strengthen the structures for monitoring penal policies and qualify the cycle of the penal system by reducing criminal reoffending and creating possibilities for citizenship. Furthermore, it will serve for greater integration and exchange between the Judiciary and other actors in the criminal justice system.

5.3.2. Monitoring and evaluation

Monitoring is a continuous function that uses the systematic collection of data on specific indicators to provide management and key stakeholders of an ongoing intervention with indicators on the extent of progress and achievement of objectives in the use of resources. In addition, **evaluation** can be understood as determining the meaning of a policy or program that aims to assess the relevance of objectives, the effectiveness of design and implementation, the efficiency or use of resources, and the sustainability of the results. Finally, an evaluation is intended to incorporate lessons learned into the decision-making process of the actors involved[287]. Monitoring and evaluation, therefore, complement each other as valued tools in the public policy cycle, a paradigm within which the Prison Capacity Regulation Center is inserted.

The **Council of Europe** advocates the relevance of research and data in its recommendations on modalities of parole. It emphasizes that statistical evaluation and systematization must be carried out to provide information on the functioning of these systems and their effectiveness in achieving

[287] WORLD BANK. **What is Monitoring and Evaluation?** Independent Evaluation Group (IEG). Available at: https://ieg.worldbankgroup.org/what-monitoring-and-evaluation

the primary objectives of prison release[288]. The Council further recommends that surveys include the views, attitudes, and perceptions of judges, enforcement authorities, victims, public members, and people in deprivation of liberty.. It also guides the consideration of economic aspects, effects on criminal reoffending rates, and adjustment to return to life in the community, in addition to sociodemographic information and information on crimes and duration of sentences served[289].

These instruments were recently raised to constitutional status through **Constitutional Amendment Nº. 109/2021**, which includes art. 37, the provision: "§ 16. Public administration and entities, individually or jointly, must evaluate public policies, including disclosure of the object to be evaluated and the results achieved, following the law" (art. 37). Additionally, the Amendment establishes that budget laws must observe "where applicable, the results of monitoring and evaluation of public policies provided for in § 16 of art. 37 of this Constitution" (art. 165, § 16).

The Prison Capacity Regulation Center's proper functioning and continuous improvement depend on a robust policy for monitoring and evaluating the data produced in the justice system and the Executive Branch. All the institutions involved can collaborate to collect and analyze data, preferably in a collegiate space, to design and redesign strategies for regulating current accommodations. In addition, it is highly recommended the involvement of external institutions, such as universities, research centers, and civil society organizations, to carry out impartial assessments, bringing more reliability to the evidence produced. This step is essential for criminal regulation based on evidence, not individual or subjective perceptions.

5.3.3. Communication actions

The procedures and, above all, the effects of the criminal justice system are the subject of intense discussion in society, often present in the media, social networks, and public debate. Therefore, it is advisable to plan and implement communication actions based on transparency, aiming to increase knowledge and awareness of the methods used and the results achieved by the work of the Prison Capacity Regulation Center.

The **Council of Europe's** recommendations in this field reinforce the need to be increasingly concerned about how well-informed people are, especially considering that public perceptions are heavily influenced by small parts of information about the criminal justice reality offered by the media. As such, additional efforts to raise public awareness of basic evidence-based facts about crime, the functioning of criminal justice, and the existence and content of different crime prevention strategies are welcome[290].

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[288] COE, Council of Europe. **Recommendation Nº 2003/22.** Committee of Ministers to member States on conditional release (parole). 2003, par. 43. Available at: https://rm.coe.int/16800ccb5d

[289] COE, Council of Europe. **Recommendation Nº 2003/22**. Committee of Ministers to member States on conditional release (parole). 2003. Available at: https://rm.coe.int/16800ccb5d

[290] Ibid. COE, Council of Europe. **Recommendation Nº 99/22**. Committee of Ministers to member States on concerning Prison Overcrowding and Prison Population Inflation. 1999. Available at: https://rm.coe.int/168070c8ad

Organizing **communication campaigns** to inform the public about the functioning and new results of using non-custodial measures and their role in criminal justice is recommended. Attention should also be paid to incidents related to failures or violations of judicially imposed conditions during the period the person is released, as such events tend to capture the media's interest. Thus, the purpose and positive effects of the various prison measures must be disseminated[291]. The positive effects of crowding management can be approached positively, contributing to dedication to the theme, as already observed in the media[292]. In addition, the planned communication strategy can also have positive implications concerning the visibility of different penal services, such as penal alternatives and care to released people. Greater visibility tends to provide greater support from society, political support, and financial resources. Although prison overcrowding is effectively demonstrated with increasing numbers of people incarcerated, the link between the decrease in the incarcerated population and the strengthening of different prison programs is a relationship that is more difficult to portray and requires efforts to do so.

The CNJ, in its recent survey "**Media, Criminal Justice System and Imprisonment: shared narratives and reciprocal influences**", identified the centrality that communication and the media have for criminal jurisdiction. It points out a perception of judges that the press would appeal to punitive narratives and repeatedly criticize the Judiciary for its decisions. These elements reverberate in diverse ways in judicial action and may affect decisions involving deprivation of liberty. The research indicates "a low production of materials prepared by the Communications Offices of the Courts of Justice on imprisonment/exertion in the country, capable of influencing the public debate or even the magistrates themselves". The court media rarely addresses relevant topics such as the nullity of evidence, the clemency of defendants, and good practices in the prison system. Therefore, a communication strategy "centered on the modernization of the activities of the Judiciary's press offices, debates and training events focused on the reality of the prison situation" is relevant, through new formats such as webinars and podcasts, with an emphasis on themes related to the dynamics of imprisonment, racial perspective, relations between media and criminal justice and their reciprocal influences on deprivation of liberty.

Consequently, communication actions can be developed by all public actors engaged with the Prison Capacity Regulation Center, involving the communication advisors of the court, the prison administration secretariat, the Public Prosecutor's Office, and the Public Defender's Office, among others. In addition, these advisory bodies can play a significant role in building narratives in line with the objectives of the Prison Capacity Regulation Center.

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[291] COE, Council of Europe. **Recommendation Nº 2003/22**. Committee of Ministers to member States on conditional release (parole). 2003, par. 42. Available at: https://rm.coe.int/16800ccb5d

[292] G1. **Projetos são retomados em unidade do Degase na Zona Norte do Rio depois de fim de superlotação. 2019**. Available at: https://g1.globo.com/rj/rio-de-janeiro/noticia/2019/10/30/projetos-sao-retomados-em-unidade-do-degase-na-zona-norte-do-rio-depois-de-fim-de-superlotacao.ghtml

STEP BY STEP: IMPLEMENTATION OF A PRISON CAPACITY REGULATION CENTER

1

SURVEY OF DATA ON THE PENAL SYSTEM OF THE FEDERATION UNIT

a. Structure of the Judiciary: GMF, Internal Affairs, Criminal Courts;

b. Status of existing electronic systems;

c. Context of prison policy, penal alternatives, electronic monitoring and care for released people from the prison system;

d. Official information on the number of prison vacancies; and

e. Survey of procedural information: pre-trial detention and different penal regimes.

2

DESIGN OF THE PRISON CAPACITY REGULATION CENTER

a. Definition of the tools to be used;

b. Definition of the governance model; and

c. Definition of transition rules.

3

APPROVAL OF A REGULATORY NORMATIVE ACT

4

LIAISING WITH THE PLAYERS INVOLVED AND PLANNING THE IMPLEMENTATION PROCESS

a. Criminal judges;
b. Public Prosecutor's Office;
c. Public Defender's Office and OAB;
d. Executive Branch; and
e. Other penal enforcement bodies and civil society.

5

TRAINING OF THE PLAYERS INVOLVED

6

PRACTICAL IMPLEMENTATION OF THE PRISON CAPACITY REGULATION CENTER

7

MONITORING AND EVALUATION OF THE IMPLEMENTATION PROCESS AND IMPACTS

FINAL CONSIDERATIONS

6 Final Considerations

The Judiciary can hold a leadership position in the fight against prison overcrowding. Therefore, from this Handbook's perspective, it is responsibility of the judges to lead the implementation of a Prison Capacity Regulation Center, considering the prisons as part of a broader penal system and interconnected with other non-custodial policies and measures.

Adding to the detention control hearing courts, the criminal courts, and the criminal enforcement courts, the Judiciary controls the flux between the entry and exits of the penal system. This measure puts the Prison Capacity Regulation Center Handbook in a unique position to innovate, act and potentially reverse the unconstitutional state of affairs that characterizes the Brazilian prison system at the moment.

To help the Brazilian Judiciary implement a Prison Capacity Regulation Center, this Handbook offers structuring concepts and principles working as a toolbox to present the possible uses of each of those concepts, using examples and empirical experiences in Brazil and several other countries.

It is not, therefore, a question of outlining a single and closed model of the Prison Capacity Regulation Center. On the contrary, this Handbook proposes practical guidelines, which must be analyzed and experimented, according to the modulation that best corresponds to local peculiarities.

For this reason, the tools allow different combinations and provide valuable references to deepen the study of each experience.

Aligned with the National Strategy of the Judiciary for 2021-2026, which encourages the Judiciary to join efforts with other branches to remedy irregularities and improve administrative routines, this Handbook presents a possible and consistent solution for the management of prison capacity as a systemic issue shared with the various actors of criminal justice. This is perhaps the key to the innovation proposed here, raising the judge to the role of inducing and coordinating continuous and sustainable inter-institutional efforts. No reality is impossible to change.

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