

PART IV
Transnational Solidarity in the Covid-19 Crisis

Chapter 12 Covid-19, social marginalization, and the Supreme Federal Court of Brazil

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1 Introduction

This volume has put significant effort into conceptualizing solidarity and analyzing its many dimensions and manifestations. This chapter offers a different approach to understanding solidarity by focusing on its antithesis – social marginalization – and the possibilities of addressing marginalization and its direct consequences via courts.

Solidarity designates an idea commonly understood as manifesting itself in the identification with others, in recognising interdependency and mutual obligations between equals, in the joint responsibility and cooperation to realize common goals, and in the effort to approximate, protect and integrate others.² Marginalization is the negation of solidarity. It is the lack of identification of the community with those perceived as outsiders or belonging to the bottom of society; a diminished sense of empathy, obligation, and responsibility towards them; the refusal to cooperate with them as equals; and an effort to exclude them. Solidarity is a centripetal force that promotes integration, whereas marginalization is a centrifugal force that alienates parts of society.

The perception that the marginalized are not equal parties in the social contract reduces the weight society gives to their interests and needs. Moreover, the stigmatization that accompanies marginalization can make a community numb or even hostile to their demands when the marginalized are seen as guilty for their own condition, a burden, or even a threat. This results in the normalization of levels of deprivation and violence that a community would deem unacceptable if suffered by the non-marginalized.

1 The author is grateful to Jacqueline Leite for her invaluable research assistance.

2 For a comprehensive analysis of the concept of ‘solidarity’, see the Introduction in this volume. See also, Kristi Olson, *The Solidarity Solution: Principles for a Fair Income Distribution* (Oxford University Press 2020); Alain Supiot (ed), *La Solidarité. Enquête sur un Principe Juridique* (Odile Jacob 2015).

Latin America is a continent known for its high levels of socioeconomic and racial marginalization. Yet, marginalization there coexists with transformative constitutions that express a comprehensive view of social justice that has the idea of solidarity at its core. These constitutions establish progressive agendas committed to reducing social exclusion and inequalities, recognize a long list of human rights (including socio-economic rights), and empower independent courts to protect these rights. In many countries, this is accompanied by procedural rules that facilitate access to Justice and judicial practices that blur the distinction between law, policy, and politics to allow more incisive judicial control over governments.³

This context offers the conditions for fighting social marginalization through courts. This has taken the form of individual claims and structural cases aiming to improve the material conditions for entire groups. This chapter will focus on the latter. In structural cases, claimants seek to compel governments to change the rights breaching status quo of a given group through the enactment or improvement of policies and the reform of public institutions.

Structural litigation has been the topic of much debate in the literature. It is arguably the form of judicial intervention more likely to promote significant and enduring social change.⁴ However, it forces courts to engage in issues of policy that test the limits of their capacity and legitimacy to interfere with the government's discretionary decisions.⁵ Covid-19 intensified this dilemma.

Despite the heated controversies around the responses to the pandemic, solidarity (at least at the national level) was strengthened during this

3 Armin von Bogdandy and others, *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune* (Oxford University Press 2017); Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi, 'Introduction' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds) *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022); Ezequiel Gonzalez-Ocantos, 'Courts in Latin American Politics', *Oxford Research Encyclopedia of Politics* (26 April 2019).

4 David Landau, 'The Reality of Social Rights Enforcement' (2012) 53 *Harvard International Law Journal* 60; Charles Sabel and William Simon, 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1016; Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 385.

5 Daniel Wei L Wang, 'Social Rights Adjudication and the Nirvana Fallacy' [2018] *Public Law* 29.

period as Covid-19 provoked an “unparalleled” social protection response globally.⁶ However, governments have not always considered the pandemic’s disproportionate health and social impact on the socially vulnerable.⁷ Marginalized groups, in particular, are more likely to need special social protection during the pandemic, but their needs and interests are at greater risk of being neglected.

Legal action may be the only institutional option for these groups to challenge the neglect suffered in desperate circumstances. It is, therefore, important to understand (1) how courts have responded to structural claims aimed at protecting marginalized groups during the Covid-19 pandemic and (2) if (or to which extent) their response has been effective in promoting timely material change for marginalized groups.

To address these issues, this chapter will analyse structural litigation at the Brazilian Federal Supreme Court (STF) for the protection of three of the most marginalized groups in the country: indigenous peoples, the *favela* communities, and the prison population. There are three reasons for focusing on these groups. The human rights violations against them have been the object of litigation at the STF before Covid-19, but further claims were made during the pandemic, which allows a clearer understanding of the impact Covid-19 had on its decisions. Moreover, the violations of their rights have been documented by human rights organizations and resulted in rulings against Brazil in the Inter-American Court of Human Rights,⁸ reducing the room for factual disagreement about the violence and neglect they suffer. Lastly, the President of Brazil during the pandemic, Jair Bolsonaro, expressed open disregard for the rights of these groups.

Bolsonaro praised the American cavalry for “decimating” the indigenous population there and regretted that the same did not happen in Brazil. He called indigenous groups unproductive, lazy, and an obstacle to economic development. He promised not to recognize indigenous land during

6 International Labour Organization, ‘World Social Protection Report 2020–22’ (International Labour Organization 2022) ch 3 Social Protection During the COVID-19 Crisis and Recovery, 63–80.

7 Jeffrey D Sachs and others, ‘The Lancet Commission on Lessons for the Future from the COVID-19 Pandemic’ (2022) 400 *The Lancet* 1224; International Labour Organization (n 6).

8 Inter-American Court of Human Rights *Favela Nova Brasília v. Brazil* (2017); Inter-American Court of Human Rights *Xukuru Indigenous People v. Brazil* (2018); Inter-American Court of Human Rights *Instituto Penal Plácido de Sá Carvalho v. Brazil* (2018); Inter-American Court of Human Rights *Presídio Urso Branco v. Brazil* (2011).

his government and to dismantle policies that protect indigenous populations. He also pledged to arm farmers disputing territory with indigenous groups.⁹ To fight criminality, Bolsonaro proposed more incarceration and police violence. He celebrated the increase in the prison population as an achievement of his government.¹⁰ He also affirmed that “a police officer who kills should not be investigated but decorated” and that “the Brazilian police should kill more”.¹¹ Bolsonaro often sides with officers accused or convicted of unlawful killing and pardoned the officers convicted for executing 111 prisoners during a prison riot.¹²

Bolsonaro’s stances on the Covid-19 pandemic were also controversial. He minimized the threat to public health, opposed social distancing, spread misinformation, and promoted vaccine scepticism.¹³ One institution that stood up to Bolsonaro was the STF, which openly criticized Bolsonaro’s management of the crisis and often showed independence, disposition, and strength to challenge the federal government on key issues related to the

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- 9 For a list of Bolsonaro’s declarations on indigenous groups, see Survival International, ‘What Brazil’s President, Jair Bolsonaro, has said about Brazil’s Indigenous Peoples’ ([survivalinternational.org](https://www.survivalinternational.org/articles/3540-Bolsonaro), 2020) <https://www.survivalinternational.org/articles/3540-Bolsonaro> accessed 7 March 2024; see, also Congresso em Foco, ‘Bolsonaro: “Quilombola não serve nem para procriar”’ (congressoemfoco.uol.com.br, 5 April 2017) <https://congressoemfoco.uol.com.br/projeto-bula/reportagem/bolsonaro-quilombola-nao-serve-nem-para-procriar/> accessed 7 March 2024; Salo de Carvalho, David R Goyes and Valeria Vegh Weis, ‘Politics and Indigenous Victimization: The Case of Brazil’ (2021) 61 *The British Journal of Criminology* 251.
 - 10 Jair Bolsonaro, ‘Significa 3,89 % a menos de bandidos levando terror à população’ (X, 15 February 2020) <https://twitter.com/jairbolsonaro/status/1228660825273049089> accessed 7 March 2024; Fernanda Trisotto, ‘Qual é o Custo de Prender e Deixar Na Cadeia No Brasil?’ *Gazeta do Povo* (25 November 2018) <https://www.gazetadopovo.com.br/politica/republica/prender-mais-e-manter-presos-o-custo-da-proposta-de-bolsonaro-para-a-seguranca-e489eq94tc3iujetcxd8z937/> accessed 7 March 2024.
 - 11 Carta Capital, ‘Bolsonaro em 25 Frases Polêmicas’ *Carta Capital* (29 October 2018) <http://www.cartacapital.com.br/politica/bolsonaro-em-25-frases-polemicas/> accessed 7 March 2024; Guilherme Mazui, ‘Bolsonaro diz que é um ‘absurdo’ condenação de policiais por ‘excesso’ (globo.com, 3 October 2019) <https://g1.globo.com/politica/noticia/2019/10/03/bolsonaro-diz-que-e-um-absurdo-condenacao-de-policiais-por-excesso.ghtml> accessed 7 March 2024.
 - 12 Conectas, ‘Bolsonaro’s Pardon Benefits Police Officers Involved in Carandiru Massacre’ ([conectas.org](https://www.conectas.org/en/noticias/bolsonaros-pardon-benefits-police-officers-involved-in-carandiru-massacre/), 2019) <https://www.conectas.org/en/noticias/bolsonaros-pardon-benefits-police-officers-involved-in-carandiru-massacre/> accessed 7 March 2024.
 - 13 Elize Massard da Fonseca and others, ‘Political Discourse, Denialism and Leadership Failure in Brazil’s Response to COVID-19’ (2021) 16 *Global Public Health* 1251.

pandemic.¹⁴ This raised expectations that the STF could do the same to protect marginalized groups.

In sum, due to structural factors (social marginalization, transformative constitution, and accessible and strong courts) and circumstantial elements (Covid-19, a government hostile to marginalized groups, and the critical stance of the STF in relation to the government), Brazil reunites all the favourable conditions for the observation of strong court interventions to protect marginalized groups. In this sense, it is a *most-likely* case.

Building on the work of Rodríguez-Franco and Rodríguez-Garavito,¹⁵ the analysis will focus on three dimensions of the STF decisions: the strength of the rights involved, the remedies ordered, and the court monitoring of compliance. Weak rights are declaratory, non-justiciable, or create target duties only; strong rights create immediately enforceable duties to provide services or to achieve outcomes. Weak remedies allow governments wider discretion to decide how and when to redress a rights violation; strong remedies represent a “command-and-control” approach with preemptory and detailed orders. Monitoring is weak when the court does not closely follow compliance with its orders or is unwilling to enforce them through sanctions; it is strong when the court requests continuous reports on the implementation of its decisions, elaborates on previous rulings, and threatens to sanction those unwilling to comply. “Weak” and “strong” are opposite poles in a continuum, and rights, remedies, and monitoring can have various levels of strength.

Apart from the doctrinal analysis of the decisions, this chapter will also assess how the government complied with the rulings and if there were concrete changes in policy and in the status quo that can be linked to the court interventions. This will be done using information from three sources: the briefs provided by litigants, public bodies, and stakeholders during the proceedings; policy papers and the scholarly literature; and the data on variables that can capture changes in the key issues that motivated the structural claims. For reasons of scope, this chapter will focus mainly on the period between 2020 and 2022, when the Covid-19 pandemic coexisted with the Bolsonaro government.

14 Daniel Wang and others, ‘STF and the public measures for COVID-19 prevention and treatment’ (2023) 19 Revista Direito GV 2336.

15 Diana Rodríguez-Franco and César Rodríguez-Garavito, ‘Courts, Strategic Litigation, and Social Change’ in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022).

2 Indigenous populations

The indigenous populations are under the constant threat of cultural and physical annihilation in Brazil.¹⁶ A key milestone for the recognition of their rights is the 1988 Federal Constitution, which recognizes their rights to maintain their social organization, customs, languages, creeds, and traditions. It also recognizes their right to permanently remain in the “lands they traditionally occupy”, which shall be demarcated by the Federal government.

Despite their right to remain in the “lands they traditionally occupy”, this is still an unresolved legal and political issue. The demarcation of indigenous lands depends on the Federal government, and not all governments are committed to protecting this right. Bolsonaro, for instance, bragged about the fact that no indigenous land was demarcated during his government.¹⁷ Moreover, there are legal disputes about the meaning of “traditionally occupy”. In 2009, the STF applied a temporal threshold to determine traditional occupation, which required indigenous peoples to have been in possession of their lands when the Constitution was enacted (Pet 3388/09). This ruling was very controversial, and some saw the temporal threshold as an undue obstacle to the legal recognition and protection of indigenous lands.¹⁸ In 2023, the STF overturned its own precedent to eliminate the temporal threshold as a requirement for demarcating indigenous lands (RE 1017365). Representatives of the indigenous population celebrated this as a victory. However, legal uncertainty persists as Congress soon reinstated the temporal threshold through legislation, and a STF ruling on the constitutionality of this new law is pending.

Connected to the legal uncertainty is the violence against indigenous populations due to territorial disputes. In recent years, there has been an increase in the number of invasions in indigenous lands for the exploitation

16 United Nations General Assembly, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to Brazil’ (8 August 2016) Human Rights Council 33rd Session UN Doc A/HRC/33/42/Add.1.

17 Sarah Teófilo, “No meu governo, não foi demarcada terra indígena”, comemora Bolsonaro’ (*noticias.r7.com*, 29 June 2022) <https://noticias.r7.com/brasil/no-meu-governo-nao-foi-demarcada-terra-indigena-comemora-bolsonaro-29062022> accessed 7 March 2024.

18 Dailor Sartori Junior and Carolina A Vestena, ‘Indigenous Rights and the “Marco Temporal”’ (*Verfassungsblog. On Matters Constitutional*, 4 October 2021) <https://verfassungsblog.de/indigenous-rights-and-the-marco-temporal/> accessed 7 March 2024.

of natural resources (eg, farming, mining, and logging) and of violence perpetrated by invaders against indigenous people.¹⁹ Some claim that Bolsonaro's views and declarations have encouraged physical violence against indigenous populations.²⁰

In this context of high vulnerability, which was aggravated by Covid-19, APIB (an NGO that represents indigenous groups) and then opposition political parties filed ADPF 709 in July 2020 against the Federal government. ADPF is an action filed directly with the STF in response to the state's failure to comply with a fundamental constitutional precept.

The claim was grounded on three main arguments. First, Covid-19 will be more lethal in indigenous communities due to their lower immunity, social vulnerability, and restricted access to public services. If not contained, it may cause the "extinction" or "genocide" of indigenous groups. Second, invasions and the presence of outsiders in indigenous land are one of the main causes of contagion. Yet, instead of repressing invasions, Bolsonaro's rhetoric and his refusal to demarcate and protect indigenous lands encourage invasions. Third, the then-existing federal policy for the protection of indigenous populations against Covid-19 was vague, not fully implemented, and formulated without the involvement of indigenous groups.

In terms of remedies, the claimants sought, among other things: (i) the immediate imposition of sanitary barriers to protect isolated groups or those with occasional contact with outsiders, (ii) the immediate removal of invaders from indigenous lands, (iii) the creation (with the participation of indigenous groups) of a comprehensive plan to protect indigenous populations against covid-19, the implementation of which shall be monitored by the STF.

Acknowledging the gravity and urgency of the situation, the case rapporteur made a preliminary decision one week after the case was filed, which was confirmed by the full Court weeks later. The decision recognized the "risk of imminent mass extermination of indigenous people" due to the

19 Conselho Indigenista Missionário, 'Violência Contra os Povos Indígenas no Brasil. Dados de 2019' (Conselho Indigenista Missionário 2020) <https://cimi.org.br/wp-content/uploads/2020/10/relatorio-violencia-contra-os-povos-indigenas-brasil-2019-cimi.pdf> accessed 7 March 2024; Conselho Indigenista Missionário, 'Violência Contra os Povos Indígenas no Brasil. Dados de 2021' (Conselho Indigenista Missionário 2022) <https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf> accessed 7 March 2024.

20 Salo de Carvalho, David R Goyes and Valeria Vegh Weis, 'Politics and Indigenous Victimization. The Case of Brazil' (2021) 61 *The British Journal of Criminology* 251.

pandemic and mentioned Bolsonaro's declarations as evidence of the government's lack of commitment to protecting them. The STF ordered the government to create a "situation room" with representatives of indigenous groups and to formulate a comprehensive plan including health care, social care, and preventive health measures to protect them against Covid-19.

Yet, the STF judged that imposing the concrete measures requested – the immediate imposition of sanitary barriers and the expulsion of invaders – was beyond its institutional capacity. The STF considered that it did not have enough expertise and information to determine how these measures should be implemented or allocate the resources necessary to implement them. The STF also acknowledged the challenge of removing and relocating tens of thousands of people (many armed and willing to resist). Therefore, instead of ordering the government to implement these measures immediately, the STF required the government to include the expulsion of invaders as a goal in the comprehensive plan to protect indigenous people against Covid-19. Additionally, the court mandated the government to formulate a separate plan to implement sanitary barriers. Both plans had to be approved and their implementation monitored by the STF.

In sum, the STF opted for a weak remedy and a dialogical approach instead of ordering a detailed and concrete policy to be implemented. Even so, forcing the government to comply with the decision was very challenging. The government presented two versions of the plan for installing sanitary barriers, which the claimants and other NGOs considered insufficient, lacking concrete measures and details, and failing to consider the inputs offered by stakeholders. The STF conceded that the plan was not ideal but approved it in August 2020, given the urgent moment.²¹

The execution of this plan was also complicated. Indigenous groups have complained that there was insufficient information provided by the government about the installation of barriers, that not all barriers installed were in operation, and that those in operation were insufficient and inadequate. APIB also expressed frustration that the plan was limited to what the government itself considered feasible.²² According to observers, after one

21 STF, 'Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709' (31 August 2020) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 March 2024.

22 APIB, 'Manifestação no "Relatório do Governo Federal: Atualização do Plano de Barreiras Sanitárias para os Povos Indígenas Isolados e de Recente Contato". Ação de Descumprimento de Preceito Fundamental 709' (2020) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 March 2024.

year of the STF decision, there was still no evidence that the government installed permanent and adequate sanitary barriers.²³ Two years into the pandemic, there was still no agreement on the criteria to evaluate the implementation of sanitary barriers.²⁴

Regarding the comprehensive plan for protecting the indigenous population, several versions were presented and refused by the STF because they were vague, insufficient, and failed to consider the suggestions made by experts and stakeholders. A plan was eventually and half-heartedly approved in March 2021, with the case rapporteur lamenting the government's "managerial collapse" and "precarity" that made it incapable of formulating a detailed plan. Indigenous groups were also unsatisfied with the approved plan. They expressed frustration with the fact that almost one year into the pandemic and eight months since the STF's decision, the government had not yet presented a detailed plan and kept "dressing up" a deteriorating situation as more invasions were occurring and the conditions of the indigenous population were worsening.²⁵

The execution of this plan was also challenging. Claimants constantly informed the Court about the inaccurate data provided by the government to prove compliance, the increase in violence and invasions in indigenous lands, and the social problems within the communities (including disease, malnutrition, and the lack of health and social care services).²⁶ The STF's reaction to these complaints was to order the government to address the issues raised, to which the government acquiesced and responded by listing the existing and planned measures, only for a few months later, the litigants

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- 23 Miguel Gualano de Godoy, Carolina Ribeiro Santana and Lucas Cravo de Oliveira, 'STF, Povos Indígenas e Sala de Situação. Diálogo Ilusório' (2021) 12 Revista Direito e Práxis 2174.
 - 24 STF, 'Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709' (31 March 2022) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 March 2024.
 - 25 APIB, 'Manifestação no "Plano Geral de Enfrentamento e Monitoramento da Covid – 19 para os Povos Indígenas Brasileiros – 4º Versão". Ação de Descumprimento de Preceito Fundamental 709'. (2020) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 March 2024.
 - 26 See, for instance, APIB communications to the STF on 22 February 2022, 09 March 2022 and 24 May 2022 available at https://redir.stf.jus.br/estfvisualizadordpub/jsp/con_sultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5952986 accessed 15 April 2024.

to inform the court that the problems persisted or worsened, continuing a cycle that frustrated experts and stakeholders observing this case.²⁷

From the perspective of analysts involved in the case, this structural litigation became too big, bureaucratic, sluggish, and inefficient, producing more documents than results.²⁸ The general frustration is supported by the data as land invasions and killings of indigenous people increased during the pandemic (see Graph 1). In 2023, soon after Luiz Inácio Lula da Silva took office having defeated Bolsonaro in the presidential election, a task force was sent to the State of Roraima and found the indigenous population there suffering from malnutrition and disease to the extent that a genocide probe was opened.²⁹

Graph 1 – Killings of Indigenous people and invasions of Indigenous land

Own creation. Source – **2017**: Conselho Indigenista Missionário, ‘Violência contra os povos indígenas no Brasil. Dados de 2017.’ (Conselho Indigenista Missionário 2018) https://cimi.org.br/wp-content/uploads/2018/09/Relatorio-violencia-contra-povos-indigenas_2017-Cimi.pdf 68, 82, 116; **2018**: Conselho Indigenista Missionário, ‘Violência contra os povos indígenas no Brasil. Dados de 2018.’ (Conselho Indigenista Missionário 2019) <https://cimi.org.br/wp-content/uploads/2019/09/relatorio-violencia-contra-os-povos-indigenas-brasil-2018.pdf> 56, 81, 127; **2019**: Conselho Indigenista Missionário, ‘Violência contra os povos indígenas no Brasil. Dados de 2019.’ (Conselho Indigenista Missionário 2020) <https://cimi.org.br/wp-content/uploads/2020/10/relatorio-violencia-contra-os-povos-indigenas-brasil-2019-cimi.pdf> 78, 124, 191; **2020**: Conselho Indigenista Missionário, ‘Violência contra os povos indígenas no Brasil. Dados de 2020.’ (Conselho Indigenista Missionário 2021) <https://cimi.org.br/wp-content/uploads/2021/11/relatorio-violencia-povos-indigenas-2020-cimi.pdf> 99, 156, 217; **2021**: Conselho Indigenista Missionário, ‘Violência contra os povos indígenas no Brasil.

27 STF, ‘Medida Cautelar na Arguição de Descumprimento de Preceito Fundamental 709’ (31 March 2022) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986> accessed 7 March 2024.

28 Miguel Gualano de Godoy, Carolina Ribeiro Santana and Lucas Cravo de Oliveira, ‘STF, Povos Indígenas e Sala de Situação: Diálogo Ilusório’ (2021) 12 *Revista Direito e Práxis* 2174–2205.

29 Victoria Bisset, ‘Lula Blames Bolsonaro for Yanomami Hunger, Opens “Genocide” Probe’ *Washington Post* (24 January 2023) <https://www.washingtonpost.com/world/2023/01/24/brazil-yanomami-indigenous-malnutrition-emergency/> accessed 7 March 2024.

Dados de 2021.’ (Conselho Indigenista Missionário 2022) <https://cimi.org.br/wp-content/uploads/2022/08/relatorio-violencia-povos-indigenas-2021-cimi.pdf> 93, 167, 248.

3 Prison population

Brazil has the third largest prison population in the world, behind China and the United States only.³⁰ Associated with mass incarceration is the problem of overcrowding. In 2020, over 668 thousand people were detained in a system with a capacity of 455 thousand. As a result, 72 % of the prison units held more prisoners than their maximum capacity, and 20 % had an occupation rate of 200 % above their capacity.³¹

Reports of torture, ill-treatment, and homicides are common.³² Mass incarceration also contributes to unsanitary living conditions in prison facilities, where running water, adequate nutrition, sunlight, ventilation, and hygiene items are often in short supply. Moreover, health facilities in prisons are generally understaffed.³³ Unsurprisingly, there is a strong connection between overcrowding and poor health in the prison population, especially caused by infectious diseases such as tuberculosis, hepatitis, and STDs. In the State of Rio de Janeiro, mortality from infectious diseases was five times higher in the incarcerated population than in the general population (and 15 times higher from tuberculosis).³⁴ Prisons are reservoirs for diseases and a source of dissemination to the broader community.³⁵

30 World Prison Brief, ‘Highest to Lowest. Prison Population Total’ (*PrisonStudies.org*, 2022) https://www.prisonstudies.org/highest-to-lowest/prisonpopulationtotal?field_region_taxonomy_tid=All accessed 7 March 2024.

31 Câmara dos Deputados, ‘ONU Vê Tortura em Presídios como Problema Estrutural do Brasil’ (*Câmara dos Deputados*, 22 September 2021) <https://www.camara.leg.br/noticias/809067-onu-ve-tortura-em-presidios-como-problema-estrutural-do-brasil/> accessed 7 March 2024.

32 United Nations General Assembly, ‘Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Brazil’ (29 January 2016) Human Rights Council 33rd Session UN Doc A/HRC/31/57/Add.4.

33 *ibid.*

34 Alexandra Sánchez and others, ‘Mortality and Causes of Deaths in Prisons in Rio de Janeiro, Brazil’ (2021) 37 *Cadernos de Saúde Pública* e00224920.

35 Francisco Job Neto and others, ‘Health Morbidity in Brazilian Prisons. A Time Trends Study from National Databases’ (2019) 9 *BMJ Open* e026853; Katharine S Walter and others, ‘The Role of Prisons in Disseminating Tuberculosis in Brazil.

One attempt to address the conditions of the prison population through structural litigation at the STF was the case ADPF 347, filed by a political party in May 2015. The claimant argued that the state has completely neglected the prison population, which suffers from “hellish” forms of violence and deprivation, in complete contradiction with the civil and social rights in the Constitution. It also claimed that this situation is caused by mass incarceration, which results from, among other things, the excessive use of pretrial detentions, the courts’ resistance to disposing of the wide range of alternatives to imprisonment provided by the legislation, and the insufficient funding for the prison system.

Building on a doctrine created by the Colombian Constitutional Court, the claimant sought a declaration that there is an “unconstitutional state of affairs” in the Brazilian prison system. This implies the recognition that the prolonged omissions of the state have led to structural problems that cause massive and generalized violations of constitutional rights. It would also allow the Court broad powers to impose multiple measures on executive agencies to address a structural problem and to supervise their implementation.

The claimant also sought injunctions ordering (i) the Federal and State governments to elaborate plans to address this “unconstitutional state of affairs” to be approved and monitored by the STF in collaboration with civil society and (ii) the Federal government to disburse the funds reserved by law, but not always used, for the maintenance and improvement of the prison system. To reduce incarceration, it sought orders for the courts to, among other things, (iii) guarantee the right to a hearing before a judge for those in pre-trial detention within 24 hours of their detention; (iv) give reasons in their decisions for not choosing precautionary measures other than pre-trial detention; and (v) consider the inhumane conditions in prison when sentencing and deciding requests for conditional release and regime progression.

The STF made a preliminary decision in September 2015. The STF agreed that the “inhumane” and “degrading” situation of the prison population caused by mass incarceration constituted an “unconstitutional state of affairs” for which the Brazilian state is responsible (Judiciary, Legislative and Executive branches included). The STF also emphasized its counter-

A Genomic Epidemiology Study’ (2022) 9 The Lancet Regional Health – Americas 100186.

majoritarian role of protecting the rights of such a marginalized and unpopular minority.

Nevertheless, concerning the concrete measures requested, the preliminary decision did not match its heightened rhetoric.³⁶ The STF guaranteed the right to a hearing within 24 hours of pre-trial detention (which was already starting to take place at the time) and ordered the disbursement of federal funds. Yet, it did not grant the injunctions that could interfere with the discretion of lower courts.

When Covid-19 emerged, there was still no final decision on the merits of the case. Yet, the emergence of the pandemic at the beginning of 2020 could have been a critical juncture for the STF on this issue. Many feared the impact of a highly contagious disease in overpopulated prisons and recommended the de-incarceration of low-risk offenders and vulnerable groups.³⁷ The pandemic made the problem of mass incarceration in Brazil more urgent and dramatic. If the STF does not act now, then when?

In March 2020, a petition was made within ADPF 347 seeking an order from the STF for criminal courts to consider conditional release, house arrest or alternative measures to imprisonment for inmates above the age of sixty with comorbidities that increase the risk of serious disease in case of Covid-19 infection, pregnant and nursing women, or whose offences do not involve violence or serious threat of violence. One day after the filing of the petition, a preliminary decision by the case rapporteur granted the request.

However, the preliminary decision was overturned by the full Court one day later based on procedural reasons and concerns about the breadth and over-intrusiveness of the preliminary injunction. Although the court recognized the threat to the prison population, it considered that Recommendation 62, issued by the National Council of Justice (the body responsible for making policies and recommendations to improve the functioning of the Judiciary), offered a better approach for courts to deal with the risk

36 Breno Baía Magalhães, 'O Estado de Coisas Inconstitucional Na ADPF 347 e a Sedução Do Direito. O Impacto Da Medida Cautelar e a Resposta Dos Poderes Políticos' (2019) 15 *Revista Direito GV*.

37 Sérgio Garófalo de Carvalho, Andreia Beatriz Silva dos Santos and Ivete Maria Santos, 'A Pandemia No Cárcere. Intervenções No Superisolamento' (2020) 25 *Ciência & Saúde Coletiva* 3493; National Academies of Sciences, Engineering, and Medicine, *Decarcerating Correctional Facilities during COVID-19. Advancing Health, Equity, and Safety* (Emily A Wang and others eds, National Academies Press 2020); Alexandra Sánchez and others, 'COVID-19 Nas Prisões: Um Desafio Impossível Para a Saúde Pública?' (2020) 36 *Cadernos de Saúde Pública* e00083520.

of Covid-19 in the prison system. The content in Recommendation 62 is similar to what was requested in the petition (ie., the de-incarceration of vulnerable groups), but unlike an STF decision, it was not binding on judges.³⁸ In sum, the STF admitted the risks for the prison population but did not order lower courts to consider these risks when deciding. Once again, the STF refused to make a decision that could be read as restricting the discretion of lower courts.

Ironically, the full Court decision overturning the rapporteur's preliminary injunction has often been mentioned as an argument by lower courts to deny *habeas corpus* petitions filed by inmates grounded on the increased risk to their health and life due to Covid-19. Judges often argued that, according to the STF, they were recommended but not obliged to consider the risks of the pandemic for inmates when deciding.³⁹

Apart from refusing to make a structural order to mitigate the impact of mass incarceration on vulnerable inmates during the pandemic, the STF did not give much weight to the risks of the pandemic when deciding *habeas corpus* petitions either. Despite the increase in the number of *habeas corpus* filed at the STF during the pandemic, the claimants' rate of success remained the same as before the pandemic.⁴⁰ Moreover, the STF has rarely engaged with arguments related to the pandemic in the reasoning of its *habeas corpus* decisions.⁴¹

The prison population in Brazil actually increased significantly during the pandemic, although the proportion of those serving sentences in closed prisons has slightly reduced (Graph 2). This reduction may be associated with the recommendations to avoid sentencing to closed prisons during

38 Daniel Wei Liang Wang and others, 'Why Has a Progressive Court Failed to Protect the Prison Population? Mass Incarceration and Brazil's Supreme Court' (2023) 25 Health and Human Rights 67.

39 Natalia Pires de Vasconcelos, Maíra Rocha Machado and Daniel Wei Liang Wang, 'COVID-19 in Prisons. A Study of Habeas Corpus Decisions by the São Paulo Court of Justice' (2020) 54 Revista de Administração Pública 1472.

40 Ivar A Hartmann and others, 'Como STF e STJ Decidem Habeas Corpus Durante a Pandemia Do COVID-19? Uma Análise Censitária e Amostral (How Do the Brazilian Supreme Court and Superior Court of Justice Decide Habeas Corpus Writs during the COVID-19 Pandemic? A Census and Sample Based Analysis)' [2020] SSRN Electronic Journal <https://www.ssrn.com/abstract=3659624> accessed 7 March 2024.

41 Daniel Wei Liang Wang and others (n 38).

the pandemic.⁴² Still, it is unlikely that the very light approach by the STF directly contributed to this result.

In 2023, one year after the pandemic ended in Brazil and eight years after the case was filed, the STF finally ruled on the merits of the case. The Court confirmed the 2015 provisional ruling and ordered the Federal and state governments to devise plans to address the human rights violations within the prison system. Furthermore, it instructed lower courts to give justification for not opting for alternative measures when deciding to imprison someone. It remains to be seen whether and to what extent governments and courts will comply with this decision.

Graph 2. Prison population and prison regime

Source: Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022', (Fórum Brasileiro de Segurança Pública 2022) available at: <https://forumseguranca.org.br/wp-content/uploads/2022/06/anuario-2022.pdf?v=5> accessed 7 March 2024.

4 Police killings in the favelas

Brazil has the second-highest number of killings by law enforcement agents in the world.⁴³ Between 2018 and 2021, 25 thousand people were killed by the police in Brazil.⁴⁴ Police killings are not evenly distributed socially (young, black, and poor men are more likely to be killed by the police) nor geographically. During this period, nearly six thousand people were killed by the police in the State of Rio de Janeiro, the highest number in the country.⁴⁵

42 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022' (Fórum Brasileiro de Segurança Pública 2022) <https://forumseguranca.org.br/wp-content/uploads/2022/06/anuario-2022.pdf?v=5> accessed 7 March 2024.

43 World Population Review, 'Police Killings by Country' (*worldpopulationreview.com*, 2022) <https://worldpopulationreview.com/country-rankings/police-killings-by-country> accessed 7 March 2024.

44 Statista Research Department, 'Number of People Killed by Police Officers in Brazil in 2015 to 2021' (*statista.com*, 3 November 2022) <https://www.statista.com/statistics/1181640/number-deaths-police-intervention-brazil/> accessed 7 March 2024.

45 Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2022' (n 42); Fórum Brasileiro de Segurança Pública, 'Anuário Brasileiro de Segurança Pública 2021' (Fórum Brasileiro de Segurança Pública 2021) <https://forumseguranca.org.br/wp-content/uploads/2021/06/anuario-2021.pdf?v=5> accessed 7 March 2024.

Within Rio de Janeiro, a large proportion of these deaths occur in the *favelas*, the densely populated slums severely deprived of public services, and where the poorest and most marginalized urban populations live. *Favelas* are also territories where drug dealers, paramilitary groups (*milícias*) and the police fight for control. Police raids (*operações*) in the *favelas*, when heavily armed police officers (with the support of armoured vehicles and helicopters) enter these areas to confront the also heavily armed local gangs, are particularly deadly. Death tolls are high on both sides, and stray bullets often cost the lives of innocent people. Accusations of arbitrary use of force by the police during these raids are common, including executions of surrendered suspects.⁴⁶

In 2019, the number of people killed by the Rio de Janeiro police peaked at 1.8 thousand. For comparison, in 2019, the police killed a thousand people in the United States,⁴⁷ which has a population twenty times bigger than Rio de Janeiro. Wilson Witzel, then governor of Rio de Janeiro who (like Bolsonaro) had started his mandate that year after winning the election with a “tough-on-crime” campaign, publicly defended a “shoot-to-kill” approach by the police.⁴⁸

In this context, ADPF 635 was filed in November 2019 by a political party, with the support of civil society organizations, seeking an order for the State government to formulate a plan to reduce police lethality. This plan, to be devised with the participation of civil society and approved and

seguranca.org.br/wp-content/uploads/2021/10/anuario-15-completo-v7-251021.pdf accessed 7 March 2024; Fórum Brasileiro de Segurança Pública, ‘Anuário Brasileiro de Segurança Pública 2020’ (Fórum Brasileiro de Segurança Pública 2020) <https://forumseguranca.org.br/wp-content/uploads/2021/02/anuario-2020-final-100221.pdf> accessed 7 March 2024; Fórum Brasileiro de Segurança Pública, ‘Anuário Brasileiro de Segurança Pública 2019’ (Fórum Brasileiro de Segurança Pública 2019) https://forumseguranca.org.br/wp-content/uploads/2019/10/Anuario-2019-FINAL_21.10.19.pdf accessed 7 March 2024.

46 Amnesty International, ‘Brazil: Police Killings, Impunity and Attacks on Defenders: Amnesty International Submission for the UN Universal Periodic Review – 27th session of the UPR Working Group, May 2017’ (*amnesty.org*, 1 September 2016) <https://www.amnesty.org/en/documents/amr19/5467/2016/en/> accessed 7 March 2024.

47 Statista Research Department, ‘Number of People Shot to Death by the Police in the United States from 2017 to 2022, by race’ (*statsita.com*, 29 January 2022) <https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/> accessed 7 March 2024.

48 Anna Jean Kaiser, ‘Rio Governor Confirms Plans for Shoot-to-Kill Policing Policy’ *The Guardian* (4 January 2019) www.theguardian.com/world/2019/jan/04/wilson-witzel-rio-police-security-shoot-to-kill accessed 7 March 2024.

monitored by the STF, should include measures such as the strict regulation of police raids, including the prohibition of the use of helicopters with snipers, limitations to police raids taking place near schools and healthcare facilities, the publicization of detailed reports following each raid to allow public accountability, and the thorough investigation of all killings.

Before the case was decided, and due to the emergence of Covid-19 in 2020, the claimant sought a preliminary injunction to forbid police raids in *favelas* during the pandemic except in “absolutely exceptional circumstances”. It also requested an order for the police to notify the Public Prosecutor’s Office of any planned raid, informing the details of the raid, the “absolutely exceptional circumstances” that justified it, and the precautionary measures taken to minimize the risks for the population. The claimant argued that police raids had become deadlier during the pandemic, that there was a higher risk of fatal victims as more people stayed at home and thus the population density increased, and that the raids interrupted the provision of health care and the distribution of essential goods such as food and hygiene items for the population. A few days later, in June 2020, the case rapporteur granted the injunction requested, which the full court confirmed in August 2020.

In the first months following the preliminary decision, there was a significant decrease in the number of police raids and police killings compared to previous periods, which many saw as a concrete result of the court ruling.⁴⁹ However, the fact that the significant reduction in the number of raids coincided with the period when more stringent social distancing measures started to be imposed in Rio (March 2020),⁵⁰ which was before the preliminary decision (June 2020), makes a causal relationship between this decision and the number of raids difficult to establish (see Graph 3).

49 Daniel Hirata and others, ‘Efeitos da Medida Cautelar na ADPF 635 sobre as Operações Policiais na Região Metropolitana do Rio de Janeiro’ (Grupo de Estudos dos Novos Ilegalismo 2020) https://geni.uff.br/wp-content/uploads/sites/357/2021/02/2020_Relatorio-efeitos-da-Liminar.pdf accessed 7 March 2024; Carla Osmo and Fabiola Fanti, ‘ADPF Das Favelas: Mobilização Do Direito No Encontro Da Pandemia Com a Violência Policial e o Racismo’ (2021) 12 *Revista Direito e Práxis* 2102.

50 Rodrigo Fracalossi de Moraes, ‘Nota Técnica. COVID-19 e Medidas Legais de Distanciamento Social: Isolamento Social, Gravidade da Epidemia e Análise do Período de 25 de Maio a 7 de Junho de 2020’ (Instituto de Pesquisa Econômica Aplicada 2020) https://repositorio.ipea.gov.br/bitstream/11058/110073/1/NT_22_Dinte_Covid_19%20e%20medidas%20legais%20de%20distanciamento%20-social_bolet%205.pdf accessed 7 March 2024.

In any case, soon after the preliminary decision and throughout the proceeding, the litigant and NGOs constantly complained to the STF about the lack of compliance with the decision. They argued that police raids were taking place in circumstances that were far from “absolutely exceptional” (eg, to interrupt the party of an alleged drug dealer) and that the police were testing the authority of the STF and trying to mock and demoralize the court.⁵¹

The responses of the Rio de Janeiro authorities to the decision show their defiance. The then police chief and the governor of the State argued that the whole situation in Rio de Janeiro is “absolutely exceptional” and, therefore, any action taken by the police to fight organized crime is compliant with the STF decision.⁵² The Public Prosecutor’s Office, which was supposed to hold the police accountable, affirmed to the Court that it is in the discretionary power of the police to decide when a situation is “absolutely exceptional”.⁵³ In summary, the authorities made it clear that the decision would not change institutional practices.

Indeed, from October 2020, the policy lethality and the number of raids started to increase and soon went back to the level before the STF preliminary decision was made and the social distancing measures started to be imposed in Rio de Janeiro (see Graph 3). In May 2021, the deadliest police raid in the history of Rio de Janeiro occurred when 28 people were killed

51 STF, Informações ASSEP-CRIM/PGR 173300/2021 in Arguição de Descumprimento de Preceito Fundamental 635/RJ (2020) <https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=5816502> accessed 15 April 2024; Luiz Eduardo Soares, ‘Por que a Resposta ao Massacre do Jacarezinho é Essencial?’, *Jornal GGN*, (9 May 2021) <https://jornalgggn.com.br/politica/por-que-a-resposta-ao-massacre-do-jacarezinho-e-essencial-por-luiz-eduardo-soares/> accessed 7 March 2024.

52 Vera Araújo, ‘Novo Secretário de Polícia Civil Quer Tanques em Favelas’, *O Globo* (27 September 2020) <https://oglobo.globo.com/rio/novo-secretario-de-policia-civil-quer-tanques-em-favelas-rolo-compressor-no-caso-marielle-24663149>; Lucas Altino, ‘Cláudio Castro diz que segurança no Rio é situação extraordinária, em referência a protocolo do STF sobre ações policiais’, *O Globo* (7 October 2020) <https://oglobo.globo.com/rio/claudio-castro-diz-que-seguranca-no-rio-situacao-extraordinaria-em-referencia-protocolo-do-stf-sobre-acoes-policiais-24681625> accessed 7 March 2024.

53 See also, STF, ‘Ofício eletrônico nº 18248/2020/STF’ in Arguição de Descumprimento de Preceito Fundamental 635/RJ (2020) <https://portal.stf.jus.br/processos/detalhe.asp?incidente=5816502> accessed 16 April 2022.

by the police in *Jacarezinho*.⁵⁴ Many feared that the STF intervention would become ineffective if the Court did not react to the lack of compliance.⁵⁵

Graph 3 – Police killing and police raids in the State of Rio de Janeiro

Source: Daniel Hirata and others, '11 Meses de restrição às operações policiais no Rio de Janeiro' (Grupo de Estudos dos Novos Ilegalismos 2022) available at: https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2021_Um-ano-de-ADPF-das-favelas_GENI.pdf accessed 7 March 2024, pp. 6 and 8.

Given the challenges in guaranteeing compliance and the disagreements between the parties involved, in April 2021, the STF held a public hearing with the litigants, civil society and experts for a thorough discussion about the situation and the solutions for the increase in police raids and killings. In February 2022 (two years into the pandemic), the STF finally ordered the government to present a plan to reduce police lethality, devised with civil society's involvement and approved and monitored by the STF. The decision reaffirmed that only in exceptional circumstances can police raids take place but accepted that the police should be granted discretion to evaluate the exceptionality and the proportionality in the use of force, which can only be controlled *a posteriori* by the Judiciary.

The claimants and NGOs complained to the STF that the plan presented by the government was vague, insufficient and did not involve civil society. In May 2022, the STF ordered the government to hold a public hearing to collect suggestions from civil society and experts to improve the plan. However, the complaints to the STF about the deadly police raids continued and the number of raids increased from 2020 to 2022 in Rio de Janeiro, while decreasing in other states.⁵⁶ Moreover, two of the five deadliest raids in Rio de Janeiro took place after the February 2022 decision. Therefore, three out

54 Daniel Hirata and others, '11 Meses de Restrição às Operações Policiais no Rio de Janeiro' (Grupo de Estudos dos Novos Ilegalismos 2022) https://geni.uff.br/wp-content/uploads/sites/357/2022/05/2021_Um-ano-de-ADPF-das-favelas_GENI.pdf accessed 7 March 2024.

55 Osmo and Fanti (n 49).

56 Centro de Estudos de Segurança e Cidadania, 'Raio X das Ações de Policiamento' (2022) https://observatorioseguranca.com.br/wordpress/wp-content/uploads/2022/08/2022_raioxdasoperacoes4.pdf accessed 15 April 2024.

of the five deadliest police raids happened after ADPF 635 was filed (as mentioned, the deadliest one was in May 2021).⁵⁷

The STF intervention was unable to change institutional practices and political incentives. According to the Rio de Janeiro governor, police raids have popular support and “was he concerned about opinion polls, he would order a raid every week”⁵⁸. Unsurprisingly, there was a 240 % increase in police raids in the months before the 2022 election.⁵⁹ Moreover, in a show of defiance to the STF, the then commander of the Rio de Janeiro police blamed the court for the increase in police raids and violence. He publicly said that the STF decisions created a haven for criminals in Rio de Janeiro and encouraged them to come.⁶⁰

5 Strong rights, weak remedies, strong monitoring, and the hollow hope

In the three case studies analysed in this chapter, the STF interpreted the constitutional rights involved as “strong” rights. This means they are justiciable and have wide substantive content: they protect not only individuals but entire groups and create positive and negative duties for authorities. Moreover, these rights can be breached by the mere existence of a particular state of affairs, without the need to discriminate and prove the illegality of specific acts/omissions, and create duties for the State to develop and implement agendas of wide social transformation. The recognition that the violence and deprivation suffered by these marginalized groups breach

57 Igor Mello ‘Governo Castro Tem 3 das 5 Chacinas Policiais Mais Letais da História do RJ’, (*UOL Notícias*, 22 July 2022) <https://noticias.uol.com.br/cotidiano/ultimas-noticias/2022/07/22/com-castro-rj-tem-3-das-5-chacinas-policiais-mais-letais-da-historia.htm> accessed 7 March 2024.

58 Octavio Guedes and Mariana Queiroz, “Se eu me Baseasse por Pesquisa, Faria uma Operação Policial por Semana”, *Afirma Claudio Castro*’ (*g1.globo.com*, 8 June 2022) <https://g1.globo.com/politica/blog/octavio-guedes/post/2022/06/08/se-eu-me-baseasse-por-pesquisa-faria-uma-operacao-policial-por-semana-afirma-claudio-castro.ghtml> accessed 7 March 2024.

59 Bruna Fantti, ‘Operações Policiais no Rio Aumentam 240 % às Vésperas da Eleição’ *Folha de São Paulo* (29 September 2022) <https://www1.folha.uol.com.br/cotidiano/2022/09/operacoes-policiais-no-rio-aumentam-240-as-vesperas-da-eleicao.shtml> accessed 7 March 2024.

60 Luana Patriolino, “Violência Policial Lamentável”, diz Gilmar Mendes sobre Operação na Vila Cruzeiro’ *Correio Braziliense* (26 May 2022) <http://www.correio.braziliense.com.br/politica/2022/05/5010889-violencia-policial-lamentavel-diz-gilmar-r-mendes-sobre-operacao-na-vila-cruzeiro.html> accessed 7 March 2024.

justiciable constitutional rights is very meaningful, given the decades of neglect and brutality that led to this situation. The STF also recognized that Covid-19 posed an unprecedented risk for these groups and that actions had to be taken to protect them.

Nevertheless, the STF did not make any order targeting the discretion of judges in the case of the prison population (ADPF 347) and opted for “weak” remedies to protect the rights of the indigenous populations (ADPF 709) and the *favela* dwellers (ADPF 635). Instead of making peremptory and detailed orders determining outcomes to be achieved or concrete measures to be taken within a fixed timeframe, the STF opted for approaches that allowed significant discretion for the government to determine how and when to redress the rights violations it found.

In ADPF 709, the STF opted for an experimentalist/dialogic approach⁶¹, in which the court makes weak structural remedies setting the goals for governments to achieve, orders the formulation of plans, forces the government to engage with stakeholders, but gives authorities discretion to design the policy and decide how and when to implement it. In ADPF 635, the court prohibited police raids but in “absolutely exceptional” circumstances. Still, the strength of the order was diluted by the vaguely worded exception, which allowed authorities to interpret the ruling according to their convenience. Subsequently, when it became clear that authorities were unwilling to comply, the STF adopted an experimentalist/dialogic approach in this case and granted the police discretion to determine when circumstances are “absolutely exceptional”.

In both ADPF 709 and ADPF 635, the STF exercised “strong” supervisory jurisdiction over the implementation of its decision. The STF welcomed submissions from claimants, NGOs, and grassroots organizations; ordered the creation of a situation room to oversee the policies related to indigenous groups, and held a public hearing to understand the situation in the *favelas* and the challenges for the implementation of the court decisions; requested continuous reports from the authorities and ordered them to elaborate on or implement the plans proposed.

Some argue that the combination of “strong rights, weak or moderate structural remedies, and strong supervision” is the most likely to achieve social change.⁶² Accordingly, this approach allows courts to intervene in

61 Sabel and Simon (n 4).

62 *ibid*; Rodríguez-Franco and Rodríguez-Garavito (n 15); César Rodríguez-Garavito, ‘Empowered Participatory Jurisprudence: Experimentation, Deliberation and Norms

complex policy issues without having to craft solutions or choose between policy alternatives in a context of uncertainty and disputes about each alternative's facts and consequences. Courts will neither have to participate in micromanaging policies that involve numerous decisions and actions by a plurality of authorities and bureaucrats. Moreover, it allows the participation of the affected marginalized groups, civil society, and experts in policy development and implementation. This will arguably lead to more democratic and epistemically superior decisions as the inputs offered by the broad participation are added to the expertise of public agencies. Lastly, it avoids the intrusiveness of strong remedies on legislation and administration, which can increase the risk of non-compliance and political backlash.

However, the findings in this chapter show the limitations of this approach. It is true that, without some form of counterfactual analysis, one cannot safely affirm that the court decisions had no impact. Despite the frustration expressed by those involved in the cases and the worsening in key variables following the decisions, it is theoretically possible that the situation could have been worse had the STF not intervened. Moreover, the legal precedents framing the condition of these marginalized groups as constitutional rights issues, the visibility the court cases gave to these issues, and the mobilization of grassroots organizations in collaboration with political parties and the legal profession should not be underestimated. They are valuable in themselves, especially for highly marginalized groups for whom solidarity is often lacking. The possibility that these indirect and symbolic effects of litigation will lead to material change in the future cannot be ruled out either. It is noteworthy that the STF continues to monitor compliance with its rulings in ADPF 347, ADPF 709 and ADPF 635, and maintains the power to make further decisions within these cases. Consequently, there is the possibility that the court intervention will be more consequential after Covid-19 and the Bolsonaro government.

Nonetheless, the timely material changes to protect these marginalized groups during the pandemic, which motivated the legal actions, have not occurred following the STF intervention. The claims and the STF decisions were grounded on the urgency of the situation and the expectation that structural litigation could impel governments to offer immediate or rapid protection against imminent threats to health and life. Yet, the situation seems to have worsened under the eyes of the STF. Improvements such

in Socioeconomic Rights Adjudication' in Katharine G Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019).

as the reduction in the number of prisoners serving sentences in closed prisons can hardly be attributed to STF rulings during the pandemic. Furthermore, the STF decisions do not seem to have been able to address the root causes of marginalization and human rights violations. Analysts, claimants, and stakeholders have pointed to the continuation of the institutional practices that led to the vulnerability suffered by these marginalized groups, which was further accentuated by the emergence of Covid-19.

The findings in this chapter also challenge the idea that courts will convert weak remedies into strong ones as they become frustrated with the limits of the former to bring about concrete results.⁶³ They also contradict the theory that courts will resort to stronger forms of intervention if the government is deliberately obstructing or being hostile to the rights of a marginalized group.⁶⁴ In the cases analysed, the STF insisted on weak remedies despite the constant reports of non-compliance, the court's frustration with the behaviour of authorities, and the hostility of high-level authorities towards the rights of marginalized groups.

One could argue that the STF made a mistake and that it should have opted for stronger remedies.⁶⁵ However, it is important to consider that this would have come at the cost of forsaking the advantages of weaker remedies and increasing the risk of defiance by an uncooperative government. This was evident in ADPF 635, when the STF made a weak but relatively stronger order and authorities not only openly ignored the decision but also blamed the court for the subsequent increase in police violence. Moreover, when courts expect their decisions to be resisted, highly specific orders can make the government's defiance clearer for the public, threatening the institutional prestige on which courts' political legitimacy relies. The trade-off between giving more teeth to their decisions and the negative consequences of open defiance limits the willingness of a court to make

63 Mark V Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2009) 256; Mark V Tushnet, 'A Response to David Landau' (2012) *Harvard International Law Journal* 53, 161.

64 Katharine G Young, 'A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review' (2010) 8 *International Journal of Constitutional Law* 385, 385–420.

65 Daniel M Brinks, 'Solving the Problem of (Non)Compliance in Social and Economic Rights Litigation' in Malcolm Langford, César Rodríguez-Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance* (Cambridge University Press 2017).

stronger orders. In this situation, a court may prefer to insist on weaker remedies to mask non-compliance while maintaining that the status quo is unacceptable.⁶⁶

These case studies also frustrate the expectation that when supportive judges meet a support structure for rights advocacy, a “rights revolution” – judicial attention to, support for, and implementation of new rights – will likely happen.⁶⁷ The STF, to different degrees, was supportive of the claims and the support structure was present in all three cases. They were all filed by at least one political party with representation in Congress; the claimants were represented by an eminent public interest lawyer, Daniel Sarmiento, who runs a human rights clinic based at a prestigious university; and there was significant involvement of civil society and grass-roots movements throughout the proceedings and in the implementation stage (there were 28 *amici curiae* in ADPF 635, 15 in ADPF 347, and 10 in ADPF 709, almost all of them in favour of the claims). Over a hundred NGOs signed a letter to the STF urging it to take measures for the de-incarceration of vulnerable prisoners during the pandemic, given the “state of unconstitutionality” the Court itself declared in ADPF 347.⁶⁸

In sum, and contrary to what the literature suggests, this chapter found no evidence of direct material outcomes from cases that combine independent judges sympathetic towards the claims, support structure for rights-advocacy litigation, and decisions that are textbook examples of “strong rights, weak or moderate structural remedies, and strong monitoring”. These results seem to vindicate Rosenberg’s argument in his seminal work *The Hollow Hope* that, even when cases are won in the courtroom, litigation is unlikely to promote social change when the recipients of the orders and the political elites are unsupportive or hostile to the reforms directed by judges.⁶⁹

66 Jeffrey K Staton and Georg Vanberg, ‘The Value of Vagueness: Delegation, Defiance, and Judicial Opinions’ (2008) 52 *American Journal of Political Science* 504.

67 Charles R Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press 1998) 195.

68 Instituto Brasileiro de Ciências Criminais, ‘Pandemia de COVID-19: Entidades e Juristas Cobram STF por Medidas em Favor de Pessoas Presas’ (*ibccrim.org.br*, 27 March 2020) www.ibccrim.org.br/noticias/exibir/108 accessed 7 March 2024.

69 Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (2nd ed, University of Chicago Press 2008) 31–36.

6 Conclusion

Indigenous groups, the prison population, and *favela* dwellers were under unprecedented threat with the emergence of Covid-19. Yet, the “unparalleled” solidarity response for the broader population during the pandemic fell short of addressing the particular vulnerabilities of these marginalized groups.

Through the language of legal rights and structural litigation at the STF, these marginalized groups and their advocates tried to force an uneager government to materialize the solidaristic values engraved in the Constitution. The STF was assertive in affirming these groups’ “strong” rights. The STF understood the urgency and the gravity of the situation and made preliminary decisions soon after claims were filed, granting at least some of the requests (although the one related to the prison population was quickly reversed).

In some cases, the STF also went beyond making bold judicial statements. Structural injunctions were made with different levels of strength, and there was constant monitoring by the court to compel governments to act and to engage with civil society and stakeholders. However, the STF insisted on weaker remedies even when it was clear that the implementation of the decision was problematic and that the situation was deteriorating rather than improving.

Although the STF articulated the language of rights to reaffirm the solidaristic commitments in the Constitution, the findings in this chapter highlight the limits of structural litigation to promote social change. In the same way that transformative constitutions can coexist with high levels of marginalization, eloquent and innovative court rulings can coexist with a largely undisturbed status quo for marginalized sectors of the population.⁷⁰

The most serious cases of rights violation and marginalization have deep historical roots and, therefore, require intense reforms in institutions and wide-ranging policies. While more appropriate for judges handling complex policy issues, weak remedies can lead to mock compliance and inertia if authorities are unsupportive of the change courts aim to promote. Courts seem less able to promote timely material change when they are most needed, that is, when there is a widespread and acute violation of marginalized groups’ rights under a government that is either hostile or indifferent to them.

70 Diego Werneck Arguelles, ‘Transformative Constitutionalism: A View from Brazil’ in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020).

