PRISON OVERCROWDING AND THE TRANSNATIONAL LEGAL ORDER (TLO) TO REGULATE THE USE OF IMPRISONMENT: EVIDENCE FROM BRAZIL

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COLEÇÃO DE ARTIGOS DIREITO GV (WORKING PAPERS)
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A discussão nesta fase cria a oportunidade para a crítica e eventual alteração da abordagem adotada, além de permitir a incorporação de dados e teorias das quais o autor não teve notícia. Considerando-se que, cada vez mais, o trabalho de pesquisa é coletivo diante da amplitude da bibliografia, da proliferação de fontes de informação e da complexidade dos temas, o debate torna-se condição necessária para a alta qualidade de um trabalho acadêmico.
O desenvolvimento e a consolidação de uma rede de interlocutores nacionais e internacionais é imprescindível para evitar a repetição de fórmulas de pesquisa e o confinamento do pesquisador a apenas um conjunto de teorias e fontes. Por isso, a publicação na Internet destes trabalhos é importante para facilitar o acesso público ao trabalho da Direito GV, contribuindo para ampliar o círculo de interlocutores de nossos professores e pesquisadores.
Convidamos todos os interessados a lerem os textos aqui publicados e a enviarem seus comentários aos autores. Lembramos a todos que, por se tratarem de textos inacabados, é proibido citá-los, exceto com a autorização expressa do autor.
Prison overcrowding finally starts to become part of the transnational legal and political agenda. The phenomenon is recognized worldwide, although illustrations indicate a wide variety of situations that could be described as prison overcrowding. From the addition of two more persons in a cell designed for five to the triple capacity of an institution, prison overcrowding encompasses very different scenarios of inadequacies of the prison system. Besides what can be considered circumstantial or easily solved with the construction of two or three new buildings, this paper understands prison overcrowding as a chronic and long-standing mismatch between the number of citizens serving prison sentences and the capacity of the government to build new institutions – while satisfactorily managing the old ones. From this perspective, prison overcrowding is a matter of coordination among Legislature, Judiciary and Executive. In other words, prison overcrowding requires, among other things, a substantial revision of the disposition of powers in the domain of crime and punishment. Moreover, this revision must take into account both sides of the equation: on one hand, the sentencing norms and practices that regulate the gateway to the prison system and the length of the sentences and, on the other hand, the rules to be followed by those who manage these institutions and the rights of the inmates.

This approach to prison overcrowding frames the question this paper seeks to explore. Is the current reconfiguration of the transnational legal order to regulate prison systems taking into account prison overcrowding? And how is the issue being addressed in political and legal debates? Our purpose here is to explore this question in a very limited geographical scope. As far as the settling and the reconfiguration of the transnational legal order (TLO) are concerned, this paper examines the main norms, principles and legal instruments adopted in the realm of United Nations (UN)\(^2\). To explore the national and local settling of norms, this paper presents preliminary results of ongoing research in legislation and judicial decisions in Brazil.

Our main challenge is to select and organize the set of legal norms that will fit in what we have called “a transnational legal order to regulate the use of imprisonment”. Put in these very broad terms, this TLO would encompass not only the norms and institutions related to the criminal justice system (definition of behaviors, procedures and sanctions) but also the wide range of human and social rights of citizens living inside these institutions – health, education, labor – as well as the specific needs of women, children, foreigners, people with disability and so forth. In other words, prison systems are in the intersection of different orienting issue frames. In an effort to organize the myriad of legal
norms that deals with the use of imprisonment, this paper will test three ana-
lytical distinctions.

First, transnational legal norms diverge regarding the role of the prison sys-
tems in contemporary societies: for some, prisons are part of the solution; for
others, prisons are part of the problem. For the ones that see prison as part of
the solution, two scenarios can be identified. Generally speaking, international
criminal law instruments currently in force are either reinforcing (directly or
indirectly) the use of imprisonment or being indifferent to it. The first group of
instruments reinforces the adequacy of imprisonment as a form of dealing with
serious social problems in contemporary societies. Our main example here is the
Rome Statute of the International Criminal Court that establishes both life
imprisonment and prison sentences not exceeding thirty-years. A second group
is formed by instruments that, even without explicitly mentioning incarceration,
call for a “fight against” a social problem and for “effective and meaningful pun-
ishment” against the perpetrators. In this case, instruments rely on a widespread
assumption according to which the only way to suppress undesirable behavior
or to offer greater protection for vulnerable people is through punishment. And
for the last two centuries since modern societies got rid of the gallows and other
forms of physical harm as forms of sanction, imprisonment seems to be the main
– in many countries virtually the only – form of making someone accountable
for his behavior. In a context where these ideas are deeply rooted among politi-
cians, actors of the justice system, legal scholars and social movements,
transnational legal norms can be exempted of detailing the specific form of pun-
ishment they recommend.

Let’s leave aside the instruments that emphasize – or are indifferent to – the
message that incarcerating people is an adequate mechanism to deal with seri-
ous social concerns to look at a different set of instruments: the ones that
recognize the prison system as the perceived problem they seek to address. Here
again it is possible to identify two subsets of instruments: many are focused on
making prisons better and few pursue something better than prisons (different
forms of punishment and accountability, as well as other strategies of problem
solving). Among these few outside the prevailing trend, our main examples
include: the Tokyo Rules (1990) that explicitly call member states to develop
non-custodial measures as a way of “reducing the use of imprisonment” (article
1.5); the Vienna Declaration on Crime and Justice: Meeting the Challenges
of the Twenty-first Century (2000) that explicitly encouraged the “development
of restorative justice policies, procedures and programs”; and also the Basic
Principles on the Use of Restorative Justice Programs in Criminal Matters
adopted in 2002 by the United Nations Economic and Social Council. It is
worth noticing that the Bangkok Rules on Women Prisoners would need to be
divided in two to fit both sides of our distinction. The same document deals
with improvement of the conditions of women in prison and the use of non-
custodial measures for female offenders.

Again, keeping aside this set of norms that focus on something better than
prisons, and looking at the instruments regarding incarceration, we are still deal-
ing with very different types of legal instruments, and therefore, perceived problems. The (still) provisory distinction applied here is based on two different sorts of alignments between a TLO and the more specific issue of life in prisons. Therefore, it is possible to identify a TLO exclusively devoted to the regulation of the prison institution and a TLO that embraces much broader issues in which imprisonment is just one of them. In other words, our working hypothesis here is that two different transnational legal orders are being shaped to tackle incarceration. One originates with the declarations of principles of penitentiary congresses at the end of the nineteenth century and becomes normatively settled, at the transnational level, with the United Nations Standard Minimum Rules for the treatment of prisoners (1955). The other emerges from human rights declarations that recurrently devote one article or two to the rights of prisoners and the acceptable forms of punishment.

This paper will only cover the settling of and efforts to reconfigure the first TLO – which will be called, temporarily, “TLO for better prisons”. The research on the second TLO – currently under way – poses major descriptive challenges in view of the paradox that characterizes the relationship between human rights and modern criminal law. Extensive research on the topic has shown that a type of “human rights rationale” succeeded in penetrating the criminal law procedure (rights of the defendant, presumption of innocence and so forth) but faces major obstacles in influencing the definition of sanctions and the sentencing process as a whole (Pires and Garcia 2007). According to these researches and the theoretical framework that emerged from them, the core ideas regarding punishment are still strongly attached to the modern theories of punishment developed in the 18th century (retribution and deterrence) that conceive sanction as a form of infliction of suffering. The emergence of human rights instruments has explicitly confronted the physical dimension of suffering – through the prohibition of corporal or degrading forms of punishment and alike – and, at the same time, accepted the temporal dimension of suffering embodied in long prison sentences and life imprisonment. In view of these considerations, the next stage of the present research will cover the settlement of human rights instruments, in particular of the norms concerning the prohibition of “inhuman and degrading” forms of punishment, as well as best practices on sentencing. Attention will also be given to case law from the Inter-American Court of Human Rights.

The remainder of this paper is divided into three parts. Section 1 examines the transnational settling of the TLO centered entirely on the prison systems (TLO for better prisons), focusing on its formation (1.1.) and reconfiguration (1.2.). Section 2 addresses the institutionalization of this TLO in Brazil. In particular, this section provides an overview of the preliminary findings of an ongoing research on public-interest civil actions regarding prison overcrowding and prison conditions in São Paulo (2.1.), and presents the final results of a research developed on the same issue at the database of the Brazilian Parliament from 1984 until 2011 (2.2.). Section 3 sketches preliminary findings and main topics for further research.
1. A TLO FOR BETTER PRISONS

UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR), adopted in September 1955, is currently under debate among Human Rights NGOs, criminal law scholars, prison experts and the UN Office on Drugs and Crime. Since the mid-eighties, and more intensively during the nineties, some Resolutions from the General Assembly, the Economic and Social Council and UN Congresses on the Prevention of Crime and Treatment of the Offenders have emphasized their concern about the practical implementation of the Minimum Rules. In spite of being the “longest standing set of United Nations norms” (Clark 1994, 166), the UNSMR received little attention from the literature in the field. In view of this, this section builds on different UN Documents to briefly present some of the key elements concerning the formation of the TLO (1.1.) and the recent efforts towards its reconfiguration (1.2.).

1.1. THE 19TH CENTURY IDEAS AND THE FORMATION OF THE TLO

Review of the literature on the contribution of the penitentiary congresses held at the end of the 19th century and the beginning of the 20th is still underway, but from the information gathered so far, it is quite clear that government officials, politicians and scholars that regularly met at that period to discuss the prison institutions played a fundamental role in the development of both a theory of punishment (rehabilitation) and a body of norms and standards that should regulate life and power relations within the prison institutions. The main reference here is the National Congress on Penitentiary and Reformatory Discipline that took place in Cincinnati in 1870. With representatives from most of the American states and some others from abroad, the Congress adopted a Declaration of Principles that laid the ground for great enthusiasm about the possibility of reforming individuals. Time and space became their main concerns. Under the ideology of treatment and moral reform, the length of incarceration and the indeterminate sentence were essential conditions to the fulfillment of imprisonment’s objectives. At the same time, the spatial dimension of incarceration is required to be compatible with routines, industrial labor, intellectual education and moral training. As Rothman (1981: 377) writes, “[u]nder the influence of this ideology, legislators appropriated massive sums to build the new institutions, and with similar optimism and enthusiasm judges passed long sentences on the convicted”.

The influence of these ideas in the preparatory works that resulted in the UN Standards Minimum Rules for the treatment of the prisoners (UNSMR) is quite manifest in the structure and content of the two documents. Great part of the minimum rules is devoted to accommodation, personal hygiene, medical services, exercises and sports, education and work. The Minimum Rules are three times longer than the Declaration of Principles; therefore several of these aspects are thoroughly described in the Rules.

Even though a systematic comparison between these two documents cannot be developed here, it is worth noticing that the emphasis on the idea of treatment that gives the tone of the UNSMR appears at the 1870 declaration right after the first article on the definition of crime and punishment and it reads:
“treatment of criminals by society is for the protection of the society. But since such treatment is directed to the criminal rather than the crime, its great object should be his moral regeneration.”

The emphasis on the protection of the society is once more described in the minimum rules and the concept of moral regeneration is renamed there as “reformation” and “social rehabilitation.” Also, the idea of treatment is deeply combined with concerns about the length of the sentences in both documents. The 1870 Declaration recognizes that “the proper duration of imprisonment (...) is one of the most perplexing questions in criminal jurisprudence” (Rec. 28). The minimum rules do not even comment on sentencing issues but emphasize, in different situations, that the length of the sentence is a core element of the treatment.

For both documents, prison overcrowding is not yet an issue. The 1870 Declaration does not even mention it. The UN SM R, on the other hand, does consider the possibility of “a temporary overcrowding” that would allow the prison administration to make an exception to the rule establishing that “each prisoner shall occupy by night a cell or a room by himself” (Rule 9).

After the adoption of the Minimum Rules by the First United Nations Congress on the Prevention of Crime and the Treatment of the Offender in 1955, different bodies of the United Nations manifested their approval or reinforced the importance of their implementation. A Background Note prepared in 2011 lists eleven UN instruments “focusing” on the treatment of prisoners and other twenty-three UN instruments considered “relevant” for the treatment of prisoners (page 9 and 10). Only the most significant for the purposes of this paper will be mentioned in this section.

The Economic and Social Council that approved the Rules in 1957 returned to the issue thirty years later to respond “to the challenges of translating the Rules into domestic provisions and practices”. The Council then adopted the Procedures for effective implementation of the minimum rules (Resolution 1984/47) that, among other things, states that it is necessary “to embody the Rules within national legislation and regulations” (Procedure 2, commentary) and also to inform the Secretary-General “every five years of the extent of the implementation and progress made” (Procedure 5 and 11). Other recommendations focused on the dissemination of the minimum rules both externally and within UN bodies (Procedures 7 and 8).

A few years later, in 1988, the General Assembly adopted the Body of Principles for the protection of all persons under any form of detention or imprisonment (Resolution 43/173) and, in 1990, the Basic Principles for the treatment of prisoners (Resolution 45/111). Both documents are concerned mainly with the rights of prisoners and seem to expand and combine the minimum rules with the norms from the human rights treaties in force at that time.

These three UN instruments do not mention prison overcrowding. The first document to do so is the Kampala Declaration on Prison Conditions in Africa adopted by the Economic and Social Council in 1997 (Resolution 1997/36). The declaration recognizes right at the beginning that “in many countries in
Africa the level of overcrowding is inhuman”. The consequences of overcrowded prisons are perceived as much broader than accommodations issues and include “lack of hygiene”, “poor food”, lack of medical care, physical activities or education, “as well as an inability to maintain family ties”. As a whole, the description of the prison conditions and the list of recommendations that follow illustrate systematic lack of compliance with 1955 UN Minimum Rules and even with the 1870 Declaration.

Notwithstanding, the recommendations that directly tackle prison overcrowding introduce two radical changes in the content and direction of the legal norms this paper has examined so far. First, the Kampala Declaration explicitly recognizes “the limited effectiveness of imprisonment” as well as “the costs of imprisonment to the whole society” and recommends the application of “the principle of civil reparation and financial recompense” (Rec. 3 – alternative sentencing) and the preference for community service and other non-custodial measures rather than imprisonment (Rec. 5 – alternative sentencing). Specifically when addressing petty offenses, the Kampala Declaration recommends avoiding the use of the criminal justice system and instead recommends the use of “customary practices” and mediation between the parties involved (Rec. 1 and 2 – alternative sentencing). Second, when dealing with remand prisoners, which happen to be a large part of those imprisoned in Africa, the Kampala Declaration breaks the barrier between the prison administration and the criminal justice system (police, prosecutors and the judiciary) by recommending they should all be “aware of the problems caused by prison overcrowding” and work together “in seeking solution to reduce this” (Rec. 1 – remand prisoners).

The reduction of the use of imprisonment through the development of non-custodial measures was mentioned seven years before at the Tokyo Rules (UN Standard Minimum Rules for non-custodial measures, 1990). These rules also cover the sentencing stage, but in doing so, they also open the possibility of a very limited use of non-custodial measures. According to these rules, the judicial authority “having at its disposal a range of noncustodial measures” should take into consideration in the sentencing decision “the rehabilitative needs of the offender, the protection of society and the interests of the victims”. Formulated as such, a substantial reliance on non-custodial measures would require national actors free from the widespread theories that reinforce the role of imprisonment as a form of “protection of the society”. In any case, these rules simply do not make a strong point on the problems and limitations of the use of imprisonment, as does the Kampala Declaration.

These few instruments that were challenging, still very timidly, the centrality of the imprisonment in the justice system were echoing a body of literature, official reports and political debate that developed, since the 1970’s, a strong critique – not to the inadequacies of the prison institution – but to the concept of incarceration. At that moment, a remarkable consensus “on the inherent defects of incarceration” is achieved: “[f]rom all quarters there is a startlingly unanimous view: incarceration has failed. Institutions cannot rehabilitate. We had better devote some energy and attention to alternatives” (Rothman 1981, 381).
How should we measure the impact of what Rothman called “new phase in the history of incarceration” at the transnational legal order to regulate the use of imprisonment? At this stage of the research, our preliminary impression is that this broad consensus around the failure of the prison systems allowed the appearance of a marginal set of norms and instruments but did not touch the core of the TLO. Interestingly enough, the Tokyo Rules are not even mentioned in the Background Note list mentioned above as “focusing” or “relevant” for the treatment of offenders. This is a remarkable effect of this transnational legal order strongly centered at the prison institutions: instruments and norms that, either explicitly or not, disagree on the diagnosis of the underlying problem are simply not taken into account. 

1.2. Recent efforts to change the configuration of the TLO

The most recent efforts to revise the UN Standard Minimum Rules for the treatment of the offender (UNSMR) started in 2010 with resolution 65/230 from the General Assembly that endorsed the “Salvador Declaration” adopted by the Twelfth Congress on Crime Prevention and Criminal Justice. The topic of imprisonment appears at the end of the Declaration, after more than forty recommendations regarding the enhancement of national systems and international cooperation to prosecute and punish corruption, terrorism, different sorts of trafficking and other “transnational criminal threats” (Rec. 13). The centrality of incarceration is expressed right at the first recommendation devoted to the topic: “We recognize that the penitentiary system is one of the key components of the criminal justice system” (Rec. 48). After affirming the use of the UNSMR “as a source of guidance in the development or updating of our national codes of penitentiary administration” (Rec. 48), the Salvador Declaration considers the possibility of convening an “intergovernmental expert group” to, among other things, “exchange information and best practices” in view of the revision of the UNSMR “so that they reflect recent advances in correctional science and best practices” (Rec. 49). The “need to reinforce alternatives to imprisonment” is mentioned in the following recommendation without further details or concerns about their extent and/or implementation. Finally, prison overcrowding is not mentioned in the entire document.

As a consequence of the General Assembly request, a number of UN documents have been produced in the last two years to prepare the ground for the revision of the UNSMR. These documents are an interesting source of information for our research as they provide a glimpse of the perception of the participants of these meetings on the role played by the minimum rules fifty years after their approval; some elements for a diagnosis of the current problems faced in the prison systems and therefore the capacity of the UNSMR to address them.

First, it is worth mentioning that one of the documents summarizes the reports received in December 2011 from 28 countries that replied to the request of the General Assembly to report “on national legislation and best practices on the treatment of prisoners” (GA resolution 65/230, paragraph 10). The low number of replies to the Note Verbale and the subsequent reminder note might...
indicate the level of priority of the issue for a large number of member states. And this seems to have been the case for a long time. Clark (1994, 165-177) discusses the five surveys on the implementation of the UNSMR that were conducted between 1970 and 1990 and asserts that “neither the volume of responses to the surveys nor the picture that emerges from them gives any impression of vast enthusiasm among the Foreign Offices and Justice Departments of the world”.

In any case, the Background Note asserts that “chronic overcrowding” was expressly recognized by “a large number of reporting countries” as the main reason for the persistence of “the problems in the application of national provisions” based or “greatly influenced” by the 1955 minimum rules. In spite of that, virtually no country reported a “best practice” to deal with this issue. The exception was South Africa, which, according to the UN report, “implemented a multi-pronged strategy against prison overcrowding” which involved inter alia, “improved use of conversion of sentence to alternatives” and “encouraging national debate about reasons for incarceration as a sentence”\(^\text{19}\). The length of the sentence was also remembered in the context of the “changes and developments in the use of imprisonment since 1957\(^\text{2}\)”, to which the Background Note dedicated a whole section. Still, the only implications foreseen by the document were related to the increase of the “age profile of prisoners” and the requirement of “end of life medical (…) care”\(^\text{20}\).

Second, even though the wording of the UN documents tends to minimize divergence among the participants, a high level of conflicting interests and disputes can be easily identified. The key point of discussion in the different expert and intergovernmental meetings held in the last two years is the extent of the revision of the 1955 rules. In this regard, opinions varied from a full revision to a more targeted and focused updating of some of the rules. As this section shows, among the ones who support the substantial revision, a second question comes up regarding the desirability of drafting a convention to substitute the minimum rules. The reasoning presented at the report regarding these two aspects is particularly useful to elaborate on the process of reconfiguration of this TLO.

The specific concerns of the actors that urged the full revision were not explicitly mentioned in any of the UN reports consulted so far. Reports simply indicated that the European Prison Rules could function as a model to a “complete restructuring and substantive redrafting of the rule”. The Background Note lists 33 out of the 95 existing rules as the ones that would require substantial revision. Among them are the scope and basic principles (rules 4, 6, 94 and 95) and also the rules concerning nature of punishment and purpose and justification of a prison sentence (rules 57 and 58). The document also pointed out that it would be necessary to rewrite the rules “to make them gender neutral” and to significantly update the terminology. And it concludes by highlighting that this option involves “the commitment of significant resources by Member States” and, most importantly, is “likely to be lengthy and its outcome would not be guaranteed”\(^\text{21}\).
A second option would be to restrict the redrafting to an essential minimum. It would include a new preamble and the revision of 15 rules. This list mentions the scope and basic principles but does not include the rules on the nature of punishment and its justification. The Background Note is also skeptical regarding this option: “It is likely that negotiations to redraft these rules might still be complex and fraught with difficulty”.22 Besides, the document points out that Member States might disagree with the essential minimum and re-open discussion on other rules.

The final option would be to “acknowledge the consensus view that the Rules have stood the test of time and remain valid today” and channel the efforts to implement the existing Rules rather than “embarking on a lengthy process of review”. According to this option, a new preamble could be added by simply listing the fundamental principles contained in treaties and standards, as well as recent developments in international law and national legislation. As far as the implementation is concerned, this option also considers the revival of the Procedures for the effective implementation of the SMR adopted in 1984 by the Economic and Social Council (Resolution 1984/47).

Finally, as far as the binding nature of the rules is concerned, the idea of drafting a convention on the treatment of the offenders is described as a recurring one. Three Reports prepared by the Secretariat on the United Nations Congress held in 1970 (Kyoto), in 1990 (Cuba) and in 2010 (Salvador) considered the option of a binding instrument.23 Moreover, the Background Notes highlights that a convention would bring two sorts of obligations: to “ensure certain standards in places of detention” and “to accept inspection visits through a system of mutual evaluation”24. This definitely does not seem to be the course of the debates that took place in the beginning of 2012. The Expert Group reiterated that the UNSMR “has stood the test of time”, asserted the existence of “a consensus that any changes to the Rules should not lower any of the existing standards” and listed nine preliminary areas “for possible consideration”.25

2. THE TLO TO REGULATE THE USE OF IMPRISONMENT IN BRAZIL

In Brazil imprisonment has been the main form of punishment since the first criminal code that dates back to 1830. In spite of that, our first federal legislation entirely devoted to the regulation of the prison system only entered into force in 1957.26 The first article lists the main principles of UN Standard Minimum Rules for the treatment of prisoners: classification and separation of prisoners, moral education, physical activities, work and social assistance. The following articles specify and thoroughly describe these principles. In the beginning of the 1980’s, the Minister of Justice named a group of well-known legal scholars to prepare a more complete and developed body of rules regarding the administration of punishment. The so-called Law of Enforcement of Punishment (LEP) entered into force by the end of 1984.27

The long explanatory note that introduces the new legislation explicitly refers to the results of a Parliamentary Investigation Commission (PIC) created
in 1975 to examine the prison conditions in the country. In the final report, the Commission highlighted the crisis of the Brazilian penitentiary system: “great part of the prison population is confined in jails, houses of detention, prisons and similar establishments where dangerous prisoners share overcrowded cells with occasional criminals” and the environment is described as “a stove where idleness (...) and impairment to health” prevails. Among other things, the Parliamentary Commission recommended the expansion of probation and non-custodial measures. The Commission also stressed the need for the development of new legislation that would remove “criminal enforcement from the legality gap”.

The explanatory note also mentions the UN Standard Minimum Rules for the treatment of offenders along with the International Covenant on Civil and Political Rights. This reference is made in two of the nineteen sections of the explanatory note. After a few paragraphs containing the history of the UNSMR and an enthusiastic formulation that “they are an expression of universal values taken as immutable”, the explanatory note observes that the central issue is to convert those principles in legally established “rights of the prisoners”. That’s what the note considers the new legislation does in a “clear and precise way”. Second, and very briefly, in the section regarding the assistance of the prisoners by the State, the note lists the forms of assistance – material, health, legal, educational, social and religious – and expresses that it became necessary to define and clarify them due to the international and principles rules that emerge from UN Minimum Rules.

In 1994, ten years after the new legislation, the National Council of Penitentiary and Criminal Policy adopted a resolution to establish “the minimum rules for the treatment of the prisoner in Brazil” answering a recommendation from the UN Commission on Prevention of Crime and Criminal Justice from that same year. In this resolution, the UNSMR is translated into Portuguese and the rules are slightly re-organized into chapters that, in most cases, keep the titles given in the original document. Several of the rules are fully maintained and others are added or modified. A word-by-word comparison of rules 9 and 58 – which this paper quotes in the previous section – indicates a substantial change in the ideas brought forth by the National Council. The exception to the rule of one person per cell established in the original minimum rules in case of “temporarily overcrowding” was eliminated from the Brazilian version. The long explanation on the goals and justifications of sentencing based on the idea of rehabilitation was also excluded.

From what we have seen so far, prison overcrowding was already an issue in Brazil. It was very well documented in a widespread manner at least after the Parliamentary Investigation Commission (1975), but also long before that in newspaper stories regarding specific prison institutions. At the same time, the integration of the transitional legal norms discussed earlier was not exactly helpful in this regard. The new legislation from 1984 recognizes the existence of the problem, opens the door to non-custodial measures and probation but fails to establish a sentencing frame that has an impact on the use of imprisonment.
According to SISPENAS – a database of the criminal legislation currently in force – only 4 out of the 1,688 existing crimes do not have minimum and maximum terms of imprisonment. Some legislative reforms were approved in the last two decades to allow judges – at the sentencing stage – to replace incarceration for non-prison sentences, but these laws were too shy and therefore unable to reach the cases that are more likely to receive prison sentences. Furthermore, they were counter-attacked by other laws that raised the length of mandatory minimum sentences and made probation and early-release much more difficult to obtain. The impact on the prison rate was strong and immediately felt.

According to the numbers provided by the Brazilian Ministry of Justice, the Brazilian prison population increased 144% from 1995 to 2005, going from 148,000 to 361,000 inmates. In December 2011 the prison population reached 515,000. The incarceration rate is of 270 per 100,000 citizens, higher than the median rate for South America (175) and much higher the median rate for western European (96). The Brazilian rate is almost half of the United States of America, which has the highest prison population rate in the world (743).

Infopen also informs that these 515,000 inmates are somehow living in a space designed for 306,000 distributed among 1,312 institutions. Less than nineteen are managed by the private sector. Roughly 48,000 inmates have access to some sort of educational activities and almost 110,000 of them are working inside or outside the prisons. Moreover, more than 53% are under thirty years old. As far as the length of the sentences is concerned, 88% are serving more than four-year sentences and 74% are arrested for crimes against property and drug trafficking.

To explore what has been done at the political and judicial level to deal with this scenario, this paper now turns to the results of two empirical researches designed to capture how local actors have been responding to prison overcrowding. The first part of the next section sketches the preliminary findings of an ongoing research on public-interest civil actions regarding prison overcrowding and prison conditions in establishments located in the state of São Paulo. The decision to focus on the state of São Paulo is not random. Apart from being the richest and most populated state in the country, São Paulo houses 111 prison facilities with 180,059 inmates in a space designed for 100,034. The second part presents the final results of a research developed at the database of Brazilian Parliament from 1984 – when the Law of Enforcement of Punishment entered into force – until 2011.

2.1. PUBLIC CIVIL ACTIONS AND PRISON CONDITIONS IN THE STATE OF SÃO PAULO

The performance of the Brazilian justice system over the imprisonment matter can be understood according to two major groups of lawsuits and appeals. On the one hand there are those that are concerned with the path of a particular citizen through the criminal justice system and on the other, those that focus on the prison facility itself. In the first group, it is reasonable to assume
that both spatial and temporal dimensions of incarceration are taken into account. Even without being able to ascertain the degree of responsiveness of the judiciary to living conditions in prison, it is possible to find many examples of situations where they are taken into account.\textsuperscript{42}

However, our main interest here is the litigation of the imprisonment problem through lawsuits that focus on the prison facilities themselves. Even if the LEP (Law of Enforcement of Punishment)\textsuperscript{43} sets forth specific rules for the judicial intervention of the facilities, it is possible to identify the frequent use of a different path: the public-interest civil action. In this type of lawsuit, the Public Prosecutor’s Office – or some other legitimate agent – seeks to force the executive branch to solve the various problems concerning the management of prison facilities. In the case of a public-interest civil action filed against the Treasury Department, they usually seek to force the executive branch to either do or stop doing something, by establishing, in some cases, daily fines for the non-compliance of such legal obligation. Therefore these lawsuits provide great empirical data to collect information on the characteristics of the imprisonment matters of different cities, as well as how the judiciary system deals with them.

Our database encompasses 106 decisions given by the Court of Appeals of the State of São Paulo (TJ/SP) from 2009 to 2011 with respect to public-interest civil actions that dealt with overcrowding and imprisonment matters\textsuperscript{44}. However, this preliminary version of our findings will present and discuss only the decisions given in 2011. Our search was designed to cover prison overcrowding but also other issues regarding prison conditions.\textsuperscript{45} Out of the 29 decisions we discuss here, 15 of them were appellate decisions, 10 were interlocutory appeals and 4 were motions for clarification. The decisions refer to prison facilities located in 27 municipalities of the state of São Paulo.\textsuperscript{46}

The public-interest civil actions decisions from the TJ/SP analyzed here deal mainly with removal and transfer requests – including the prohibition of new admissions into such facilities (14/29). Then, there are the requests of judicial intervention or simply shutting down facilities (8/29), which end up meaning the immediate removal of prisoners serving sentences there. A second group of cases referred to requests for the judiciary to intervene in the construction of prison facilities – before or during the construction – based on allegations that the surroundings do not suit the requirements set out by law, as well as that proper studies and reports have not been done yet (4/29). Finally, our database has three cases in which public prosecutors request that the executive branch carry out basic infrastructure works related to the sewage treatment of the prison facility (3/29).

Given that our empirical data is limited to appellate court rulings, not all of them provide details about the deteriorating state of the prison space. Anyway, among those who do so (16/29), they often mention the “dramatic situation” of prison overcrowding: “44 female inmates in three prison cells, with capacity for six inmates each”, “118 inmates when the total capacity was originally 24 “, “more than three times the number of prisoners the facility was designed to house”, and also built for “24 inmates (...) currently holding 132
inmates.” Whenever they describe the “deteriorating state” of the prison facilities, the appellate decisions bring us all sorts of information regarding the hygiene, health and safety conditions of these facilities. One can picture the situation when they mention “excessive heat, humidity in the corridors and cells, poor lighting and insufficient ventilation”; “the ceiling is beyond repair, electrical wiring is poor, as well as the hydraulic conditions and there is no proper sewage” and also “numerous excavations (...) the absence of satisfactory ventilation, excessively humid, signs of mold and rust, sewage is partially exposed, faulty electrical wiring can cause fire and besides that, there are no toilets.”

The decisions discussed here foresee consequences of this situation for the “inmates” themselves and also to “society”. In the first group, we find mentions of “unfit for human habitation” – such as “alternating turns to sleep” – and the health implications, with the records showing one inmate dying of tuberculosis. In some cases, life risks encompass not only those of the inmates, but also those who work there. In the second group, referred by our empirical data as “community” or “society”, the surroundings of the prison facilities are the main concern. In particular, some public-interest civil actions have to do with the sewage conditions: “dumped on bare ground, in the open, with clear soil and groundwater contamination” causing “irreparable damage and serious harm to the environment and public health”, and “bad odors in the surrounding areas.”

A third subject appears frequently in our empirical data when it comes to stating the consequences or implications of prison conditions: the issue of safety. In several appellate decisions, the possibility of riots and prisoners escaping is directly associated with low level of security in the prisons facilities.

Finally, regarding the responsiveness of the judiciary to this set of such diverse problems, it is possible to say that first-instance judges tend to agree more often with the Public Prosecutor’s Office than appellate judges. According to our database, first-instance judges ruled in favor of judicial intervention in most of the public-interest civil actions (20/29). This number is nearly half in the Appellate Court (12/29). It is important to note that there are two situations in which the TJ/SP denied to intervene due to external factors: in one case, the prison facility had already been shut down, and in the other, the public-interest civil action had already been tried.

The reasons given by the judiciary for denying intervening on the prison matters described by prosecutors vary substantially. In our preliminary analysis of the data, we could observe that the separation of powers is an argument used in over half of the cases (16/29). Focusing on decisions in which the division of tasks between the judiciary and the public administrator is a recurrent issue, we could observe that most judges see the separation of powers as an obstacle for the judicial intervention in the problem discussed in the lawsuit (10/16). The division of tasks as an obstacle for further action – or as a safeguard for not doing anything – takes many shapes and forms. In some cases, the question takes place in terms of “competence” and the supervisory judge is called into action to intervene on the issue according to what is set forth in the legislation (LEP) on the subject of judicial intervention of prison facilities.
In others, it is stated that it is not the judiciary’s business to “meddle” in the matters of the executive branch. According to these decisions, the problems described in the public-interest civil actions depend on budget allocations and “priorities set by government authorities” for which the intervention of the judiciary appears to be “impossible” or “inadequate.”

On the other hand, when the theme of separation of powers is not brought to light to hinder the judiciary actions on the matter, there is another fundamental component added to the debate: public safety. In such cases, the recognition of the need – and even the obligation – of the judiciary to intervene in the prison administration is seen as “the constitutional duty to ensure safety.” In those appellate decisions, there is mention, for example, of safety “for everyone, including the [local] population and neighboring towns”. The duty to ensure the “integrity” of the citizens serving prison terms appears in a single appellate decision as sufficient justification to withdraw the exclusive attribution of the executive branch to confront the prison issue.

This brief overview on the decisions of the Appeals Court of the State of São Paulo in 2011 sought to give us the initial findings of the matters discussed in public-interest civil actions dealing with the living conditions of prisons in the state of São Paulo and its effects on the cities that house them. Based on the empirical data we collected it is possible to formulate some hypotheses about the characteristics of the litigation of the prison problem in the State of São Paulo. First, there is still almost no mention of the obstacles brought on by the state itself for the inmates to be rehabilitated – as set forth in the TLO to regulate the use of imprisonment discussed above. Poor facilities and permanent overcrowding are so severe that the debate focuses on judicial protection of life and safety, with little focus on the right to health, and without even mentioning the right to work, to study, to decent housing and all other rights that inmates maintain. Besides, none of the UN documents discussed above is mentioned in the decisions. The Inter-American Convention of Human Rights, on the other hand, is quoted twice.

2.2 DRAFT LAWS AND PRISON CONDITIONS IN BRAZIL

Our second area of research is composed by a database of draft laws concerning the enforcement of punishment in Brazil. Such a broad expression covers norms defining the appropriate sanctions for crimes, sentencing and management of penal institutions in general. This database encompasses 500 draft laws submitted to the National Parliament between 1984 and 2011. Before presenting our sampling and findings, it seems relevant to emphasize why we consider this type of material particularly interesting for the purposes of this research.

A database of draft laws allows us to capture the ideas and strategies elaborated in legal terms by different social actors. When we study the legislative production focusing on what was sent to Parliament – and not on what entered into force – we gain access to the ideas and strategies that were not selected by the legal and political filters that intervene throughout the legislative process. Consequently, this sort of material is particularly rich in discussing how
innovative ideas enter (or not) into national legislation. The question it allows us to answer is: are innovative ideas blocked during the legislative process or do they simply not even reach the Parliament debate? If the findings point to this second possibility – which is definitely the case here – it becomes possible to minimize political struggles within the Parliament as a relevant explanation to legislative change.

With these methodological possibilities in mind, we compiled a sample of draft laws that seem to point to the awareness of the problem of incarceration in Brazil. As we did in the selection of the public civil actions, we expanded the focus on overcrowding to encompass all draft laws that touched on prison conditions in the country. Of the 500 draft laws, 62 mention this issue either in the legal proposition itself or in the justification attached to it. The findings presented hereafter refer to this set of draft laws.

For the purposes of this paper, we would like to highlight five key findings. First, these 62 draft laws concerned with prison conditions in Brazil were evenly distributed along the 26 years covered by the research. Therefore no foreign or local episode seems to have had an impact on the number of draft laws submitted to the Parliament. Second, when looking at the political parties of the proponents of the draft laws, our findings confirm the sociological discovery according to which the support or critique of incarceration does not follow political lines (Pires, Cellard and Pelletier 2001). Half of the draft laws come from the three major political parties (PFL, PT and PMDB) that during the time frame covered in the research alternated in supporting and opposing the government. The other half is distributed across fifteen different political parties.

Third, very few draft laws refer to any form of data to describe prison conditions. Only four among them quote reports from Brazilian agencies that produce information about the topic. None of the draft laws touched on the episodes of human rights violations inside the prison system, not even the ones that became well known in view of the proceedings brought against Brazil at the OAS Human Rights Court and Commission.

Fourth, transnational legal norms and instruments are rarely cited. Only three draft laws mention UN Standard Minimum Rules. One of them refers to the “non-custodial measures” (Tokyo Rules) in the context of a draft law from 2000 to reform the entire criminal code. The Tokyo Rules are referred to “as the international orientation that cannot be neglected in the penal reform”; however, nothing else is said regarding the sort of change these rules were about to promote. In any case, this draft law does not challenge the current four-year threshold for the application of non-custodial measures and does not reduce the minimum terms of imprisonment for the crimes that are the target of the Brazilian criminal justice system. In other words, its scope is extremely limited to foster any change in the use of imprisonment.

The other two draft laws mention the UNSMR for treatment of prisoners in a very similar manner. In both cases UN Rules appear as a normative authority that reinforces the relevance of the proposal but does not offer useful tools to create and implement norms. In other words, these draft laws refer to the
UN document to affirm its consistency with what is being proposed. Moreover, both draft laws seek to push Brazilian legislation far beyond the content of the minimum rules. And they do that by establishing proceedings and/or legal mechanisms to guarantee the enforcement of general rules.

One of them, from 2001, aims to create a legal authorization so that a judge may release a prisoner prior to the enforcement of an incarceration sentence whenever the prison system has reached full capacity. In its justification, the draft law asserts that “the UN SM R for the treatment of the prisoners (...) in force at the Brazilian legal order, have been, in practice, solemnly disregarded”53. Also, this draft law proposes to amend the 1984 Law of Enforcement of Punishment (LEP) to explicitly indicate that the National Council of Criminal and Penitentiary Policy (CNPCP) must define the maximum capacity of the prison establishments “in strict compliance with the minimum rules set by the United Nations”54. As a reminder, the minimum rules regulate the accommodation in individual cells and dormitories and foresee the requirements regarding health, climate conditions, minimum floor space, lighting, heating and ventilation” (Rule 10). It also states that it “is desirable that the number of prisoners in closed institutions should not be so large that the individualization of treatment is hindered” (Rule 63.3).

The other draft law aims to set incentives for prisoners who commit to engaging in educational activities. According to the proposal, for every three days of effective presence at the educational program, prisoners would be able to reduce one day of their prison sentence. UNMSR – “ratified in Brazil in 1994” – are mentioned in the justification of the proposal as they foresee educational assistance to prisoners55.

Fifth and finally, what outcomes are these 62 draft laws that take the incarceration problem somehow into account pursuing? To begin with, only six proposals deal with non-custodial measures. Three of them establish community services and such to a very limited scope of crimes. The others authorize the judge to require electronic monitoring for certain prisoners that leave the prison system in probation. None of them touched on the long sentences and the widespread use of imprisonment. The majority of the remaining draft laws focus on the management of prison space within penal institutions (32) – basically the creation of more space and the redistribution of prisoners – and several (20) focus on the sentencing process. A quite diversified range of proposals could be included in this group. Different forms of pardon and suspension of sentences, as well as mechanisms to reduce the time of imprisonment in view of engagement in educational and work activities, are the most frequent. Others are concerned with the expansion of work opportunities and the establishment of partnerships with private companies. Finally, just three might be considered innovative to the Brazilian legislation. One draft law suggests the reduction of the minimum terms for release or probation and another expands the power of the judges at the sentencing process. The last draft law suggests the creation of the concept of “overpunishment” (sobrepena) that would allow judges to ascertain that a prisoner is submitted to degrading conditions such
as “prison overcrowding (...) inadequate cell conditions or lack of medical and psychological services” and, in view of these conditions, to reduce from the prison sentence as much as one or two times the period in which the “over-punishment” occurred.

3. PRELIMINARY CONCLUSIONS AND TOPICS FOR FURTHER RESEARCH

(a) The research conducted so far indicates that the “TLO for better prisons” is strongly resisting any form of change. At the same time, our preliminary findings regarding the “TLO for human rights in punishment” seem to reveal that, in different ways, a reconfiguration of prison overcrowding is being pursued, taking into account, on one hand, the number of citizens being incarcerated daily and the length of the sentences and, on the other, the budgetary limitations of many countries. This could lead this research to embrace the debate on the effects of social rights litigation and the problem of resource availability, which have been extensively discussed in Brazil particularly regarding health rights (Ferraz 2008 and 2009). This venue could perhaps contribute to the investigation of the questions regarding how TLOs conflict and align, as well as how they change over time (Halliday and Shaffer 2012, 2 and 16).

(b) The conclusion of the research concerning the “TLO for human rights in punishment” would also put us in a better position to discuss the combination of attributes affecting the relative authority of the instruments discussed here. As we have seen, the “TLO for better prisons” is basically formed by norms directed at legal institutions inside nation-states. The inclusion of human rights conventions and case law could, therefore, pose new hypotheses – or (dis)confirm the ones already laid – regarding the level of influence of the relative authority on the national adoption of norms (Halliday and Shaffer 2012, 6).

(c) The description of the “TLO for better prisons” tells the story from the perspective of what has been documented by the United Nations. A systematic review of NGO reports – and perhaps in-depth interviews with main actors – could bring into light more elements to explain this awkward pathway of the recurring adoption of new documents and, at the same time, of overall neglect in most countries. The focus here would be on the expansion of the description of the TLO formation to map the key actors that were drawn into the TLO (Halliday and Shaffer 2012, 14).

(d) Also in this regard, this research could also gather more information regarding the countries that have been participating in the transnational legal processes and compare the results regarding prison rates and other indicators of prison conditions. The idea would be to check for any type of correlation between the extension of the perceived problem and the level of commitment to the reconfiguration of the TLO.

(e) Finally, one of the remarkable features of the TLO discussed in this paper is that the ones who are supposed to be real “key actors” of a TLO for better prisons are systematically kept out. In all of the documents examined in this paper
not a single mention was found of the participation of prisoners, individually or collectively, in the different processes described here.\textsuperscript{57} To be sure, the only document that touched this issue was one of the draft laws discussed in section 2.2. The proposal seeks to change the composition of the National Council of Penitentiary and Criminal Policy (CNPCP) to include prison employees and relatives of the prisoners. In its justification, the proposal highlights the importance of having “people who, more than anybody else, know the routine, the difficulties and a part of the solutions to correct the omission of the State regarding Brazilian prisoners”.\textsuperscript{58}
NOTAS

1 Paper revised by Daniela Sequeira and presented at Law and Society Conference (Honolulu 2012).

2 A second stage of the present research will cover the legal instruments adopted in the realm of the Organization of the American States (OAS).

3 Rome Statute of the International Criminal Court (article 7.1.a and b). See also the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1998) that explicitly mentions “imprisonment” among the sanctions “which take into account the grave nature of these offences” (article 3.4.a).

4 Several criminal conventions in force would fit into this group. Apart from what the wording of the preambles illustrates, this paper cites just one example of how subtle and scathing these norms can be. The United Nations Convention against Transnational Organized Crime (2000) asserts that “[e]ach State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release (…)” (article 11.4). This norm clearly alludes to imprisonment – as no other sanction could have an “early release” – and reinforces an old and highly debatable idea according to which the sanctions should fit “the nature of the crime” and not the concrete circumstances of the person being convicted.


6 Also a Handbook was prepared by UNODC and published in 2006.


8 Exploratory search in this field has shown that the Brazilian cases regarding human rights violations within the prison system are conceived as violations of “the right to life” – as all of them deal with the death of dozens of prisoners – and not violations of the norms regarding “prison conditions” and “degrading forms of punishment”. For a general overview, see Report on the human rights of persons deprived of liberty in the Americas (2011) - Inter-American Commission on Human Rights.

9 Clark 1994, 147-148 mentions the “sparse literature” and the lack of substantial discussion in “most authorities who might have been expected” to do so.

10 Declaration of principles 1870, articles 8 and 20.
11 Declaration of principles 1870, articles 10, 11, 12, 17, 31 and 33.

12 Declaration of principles 1870, article 2.

13 UN Standards Minimum Rules for the treatment of the prisoners 1955, article 58.

14 See, for example, rule 65: “The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility”.

15 The Background Note as well as the other UN documents linked with the revision or the UNSMR are available at UNODC website: http://www.unodc.org/unodc/en/justice-and-prison-reform/expert-group-meetings4.html (Last accessed 25th May 2012)

16 A more detailed comparison developed by Clark (1994, 149-150) indicates that some of the principles are “within the spirit” of the 1955 rules while others “represent a different emphasis and perhaps even a change of direction”.

17 The other documents mentioned in Table 1 in the column “prison in a problem in itself, let’s do something else” are not in the Background list either. The exceptions are the documents that deal with both issues at the same time, as the Kampala Declaration and the Bangkok Rules.


19 Background Note 2012, page 5.

20 Background Note 2012, page 3.

21 Background Note 2012, page 7.

22 Background Note 2012, page 8.

23 Clark (1994, 135) discusses these first two and other efforts to make the UNSMR “more legally binding” but does not explore the reasons why they were systematically withdrawn. All he says is that “the time is apparently not right”.


26 Law 3274/1957. Other draft laws and codes concerning the prison system were elaborated and discussed throughout the twentieth century but none of them came into force. Research at these legislative files to check out for explicit and implicit relation with foreign penitentiary congresses and the UNSMR are currently under way.
Law 7210/1984 (Lei de Execução Penal). In Brazil we still employ the expression “penal execution” to refer to the broad domain of correctional services and administration of penal institutions.

Explanatory Note of Law 7210/1984, paragraph 100. It is worth mentioning that two other Parliamentary Investigation Commissions were created in 1993 and 2008 to examine prison conditions in Brazil.


Explanatory Note 1984, paragraphs 69-75.

Explanatory Note 1984, paragraphs 40 and 41.

The National Council of Penitentiary and Criminal Policy was created in the beginning of the 1980’s inside the Ministry of Justice. Its main attribution is the production of norms regarding the architecture of the prison institutions as well as the guidelines to the criminal statistics. The National Council is also responsible for conducting inspections and demanding judicial intervention in prisons in case of violation of norms. The Ministry of Justice appoints the members for a period of two years. Most frequently, they are criminal lawyers, judges and prosecutors and, sometimes, psychologists, legal scholars or architects.

See UNSMR 1955, Rule 9 of and article 8 of the Brazilian rules.

See UNSMR 1955, Rules 58 to 64 of and the beginning of title II, chapter XIX of the Brazilian rules that skip the rules regarding the “guiding principles” and “treatment” to start directly with the rules on classification (article 53 of the Brazilian rules).

The State Penitentiary of built in São Paulo in the beginning of the 1920’s “as a model reformatory institution” was reported to be overcrowded for the first time in October 1939, according to ongoing media content analysis at Folha de São Paulo newspaper. See also Salla (2006). Fifty years later, one of the buildings of what became a “complex of prison institutions” was the scenario of the “Carandiru Massacre” when the military police invaded the prison to contain a rebellion and killed 111 prisoners. The case was submitted to the OAS Human Rights Commission (Report on the Merits 34/00).

SISPENAS comprehends software and database developed to provide quantitative information on legal norms concerning crimes, penalties and alternatives to punishment (Machado, Machado and Andrade 2009).


Walmsley, Roy (2011). World Prison Population List, 9th edition. The report also presents the methodological issues and concerns faced by this sort of compilation.


I would like to thank researcher Bruno Paschoal for having brought to my attention
the potential of researching this field. I am also thankful to researcher Luisa Ferreira for her invaluable contribution in organizing the database.

42 We are unaware of studies that aimed at organizing the data regarding the impact of living conditions in prison in sentencing decisions, but a simple search for the term “overcrowding” in the database of the São Paulo State Court allows us to say that these issues are definitely present in the debate regarding freedom restraint. Here are some examples: habeas corpus filed against the Secretariat of State for Penitentiary Administration regarding the imprisonment of a man in a Provisional Detention Centre, “a facility that is not suited for anyone to serve his/her sentence, since it is designed for provisional prisoners only and is currently experiencing overcrowding” (TJSP, HC 0036997-65.2012.8.26.0000); habeas corpus filed to allow the inmate to be transferred to semi-open conditions, in consequence of the “notorious prison overcrowding” (TJSP, HC 0023775-64.2011.8.26.0000).

43 Article 66, section 8 and Article 81-B, section 6.

44 It’s worth mentioning that our database is comprised of decisions of the Court of Appeals of the State of São Paulo (TJ/SP) and consequently does not cover (i) lawsuits that did not reach this level as they were refused by the first instance judge, as well as (ii) proceedings in which the trials court ruled against the public prosecutor, who, for different reasons, did not appeal the decision. When the prosecutor wins, on the other hand, the decision is automatically sent for review to the Court of Appeals. According to Brazilian law, whenever the State loses a case there is an “automatic appeal” to the courts.

45 It is important to note that the search engine of the TJ/SP website is so deficient that the use of keywords listed here reached 89 decisions only for 2011. 59 were excluded: 43 for being repeated lawsuits and 17 for discussing matters unrelated to the purposes of our research, for example, appellate decisions with the words “environmental protection chain” (TJSP, Appeal 0003919-02.2009.8.26.0642).

46 Only two municipalities appeared twice in our database. The city of São Paulo appears twice with different prison facilities. And the town of Colina appears in our database twice, with the same prison facility: once in an appellate decision, and the other, in a motion for clarification.

47 This was an interlocutory appeal against the granting of an injunction by the first-instance judge. When it was time to judge the appeal, the public-interest civil action had already been tried, thus, harming the appeal.

48 This database was first developed in collaboration with Alvaro Pires, from Ottawa University (Machado, Pires et alii 2010), and then substantially expanded by one of the researchers of our Law and Development Masters Program, Carolina Cutrupi Ferreira (Ferreira 2011).

49 A much more detailed presentation of these findings can be found at Ferreira and Machado (2012 forthcoming).

50 Besides references to overcrowding and overpopulation, the use of the expressions “penitentiary crisis”, “failure of the system” and alike were also taken into account.
Only two among them entered into force. Fifty were automatically discontinued at the end of the four-year legislature and nine are still in discussion at the Parliament.

PLC 3473/00, paragraph 53.

PL 5478/01, justification.

This provision is proposed to amend article 85 of Law 7210/84 (LEP).

PLC 6254/05. Rules 77 and 78 of UN SMR deal with educational programs but do not mention any form of incentives.

PLC 4655/2009

We are aware of the body of literature that discusses the impact of suits by prisoners to the reform of America’s prisons. See, generally, Feeley and Rubin 1998 and Taggart 1989. However, within our geographical scope, suits by prisoners are mainly focusing on their own individual cases and not the prison system or a prison facility. In any case, a comparison with US experience in this regard could also figure as an interesting topic for further research.

PLC 4.211/2008.
REFERENCES


Halliday, Terence and Shaffer, Gregory. 2012. Transnational Legal Orders (framing paper).


