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CRIMINAL SELECTIVITY AND INCARCERATION POLICY

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Emergency Criminal Law aims to intensify the criminal treatment given to crimes that cause greater indignation and social discontent.

The legislator is called upon to punish such crimes more rigorously, almost always resulting in a “policy of incarceration”.

It turns out that, when carrying out an empirical analysis of crimes whose *state jus puniendi* has proven to be more rigorous, whether by providing for custodial sentences or by increasing the time spent serving the sentence in a closed regime, it is possible to verify that criminal rigor affects only one portion of delinquents, that which corresponds to the poor class of society.

The crimes of robbery, theft and trafficking are responsible for the majority of the prison population, according to data from the Pastoral Carcerária report:

“[...] almost half of the 725 thousand Brazilian inmates do not have a definitive conviction, more than half are imprisoned for non-violent crimes and more than 70% are in prison due to crimes against property or small illegal drug trade.”

As we know, crimes such as robberies and thefts are committed by individuals from the underprivileged class, while “white collar” crimes are committed by agents from the highest level of society, such criminals occupy a high social position and therefore have access privileged to those in power who dictate the means of social control.

Asseverates Sica (2002, p. 53): “Interestingly, when it comes to this corporate or “white collar” crime, the principle of *ultima ratio* and subsidiarity are used as ways of legitimizing their exclusion from Criminal Law”.

As the same author SICA (op.cit.) highlights, it is not a question of questioning the validity of the minimum intervention of Criminal Law in business crimes, but rather, it is questioning the fact that the application

of criminal principles that limit the actions of *State jus puniendi* occurs in a punctual manner, according to the convenience of those in power and in the interests of a small portion of the population, when in truth, such principles must guide all criminal policy.

The harmfulness of crimes whose results affect the entire society is removed from the eyes of ordinary citizens. Crimes with macroeconomic repercussions, such as the crime of money laundering involving embezzlement of public money, have the power to bankrupt public finances. This recently occurred in the State of Rio de Janeiro, where the huge corruption scheme revealed resulted in chaos in the public sector, where there were not even resources to pay its employees.

The “assault” on public coffers, resulting from fraudulent schemes carried out in the dark, is viler and more pernicious than the robbery and theft carried out on street corners.

“White collar” crime kills on a large scale in hospital queues, in the absence of medicine. The most vulnerable part of society dies of hunger and poverty.

However, paradoxically, it is observed that punishment for such crimes almost never results in the imprisonment of their agents. Recent facts prove this, such as the famous “operation car wash” by the Federal Police that disrupted the biggest bribery scheme in Brazilian history, resulting in the conviction of major contractors, lobbyists, money changers and politicians (among them a former President of the Republic).

As can be seen, many of the main organizers of this fraudulent scheme that collapsed Petrobras, the largest state-owned company in the country, are serving their sentences under house arrest, benefiting from the plea bargain applied to crimes involving criminal organizations.

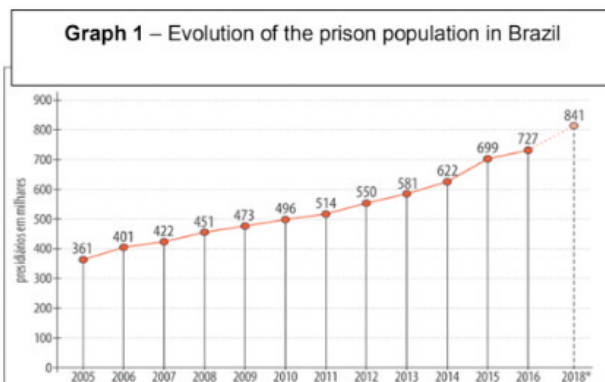
In contrast, in crimes considered to be

property, the scenario is very different, robbery and theft result in the segregation of their agents, most of the time in a precautionary manner, it is procedural arrest. The reasoning made based on the abstract dangerousness of these crimes by judges throughout Brazil, combined with the feeling of social revenge fueled by mass media, increases the prison population day by day.

In Brazil there has never been a public policy to combat incarceration, on the contrary, what can be noted is that the enactment of tougher criminal laws indicates that prison is seen by government officials as a solution to control crime.

It is true that the Legislative State enacted laws that bring decarcerating instruments, such as the replacement of custodial sentences with sentences that restrict rights, the conditional suspension of the sentence, the criminal transaction, the conditional suspension of the process. However, it is possible to verify that these resources have not been able to contain the increase in the prison population, as from time to time the Legislative Branch makes use of more rigorous laws in criminal treatment that always result in an increase in incarceration, denoting that in the In Brazil there is a predilection for a segregating policy.

The growth of the prison population in recent decades can be better observed from the table below, taken from the Senate news portal, which shows the most recent data from the National Penitentiary Information Survey (Infopen):



Graph 1 – Evolution of the prison population in Brazil

Source: National Penitentiary Information Survey (Infopen), 2018.

The above data was also reported by the United Nations (UN), which highlighted that in 2016 alone “the total number of prisoners in the country reached 726,712 in June 2016, while the number of places in the system was 368,049”¹.

These are alarming data that reveal that prison has been used by the State as a means of combating crime.

It turns out that, despite the large increase in incarceration seen in the last two decades, the crime rate has been increasingly high, signaling that crime cannot be combated with prisons. Contrary to this, the segregation environment in Brazilian prisons is a true criminal factory.

Just to illustrate, it must be remembered that one of the largest criminal organizations in Brazil, the PCC - Primeiro Comando da Capital (Group of drug dealers), was formed inside a penitentiary in São Paulo by a group of inmates dissatisfied with the poor conditions of the prison and the (bad) treatment given to them.

Three of the 17 points of the PCC Statute were highlighted below, denoting the organization of this faction which even

1. UNITED NATIONS BRAZIL. CNJ and UNDP reach agreement to face the challenge of prison issues in Brazil. Available on the website: <<https://nacoesunidas.org/cnj-e-undp-fecham-acordo-para-enfrentar-desafio-da-questao-carceraria-no-brasil/>>. Accessed on 09/07/2019.

contains a manual of rules of conduct to be followed by its members, but what is intended to be emphasized here is the motivation for the formation of the PCC, which was precisely the fight for better conditions in the prison, which was described by members of the faction as a “concentration camp”, as shown below:

14. We must remain united and organized to prevent a massacre similar or worse to the one that occurred at the House of Detention on October 2, 1992 from occurring again, where 11 prisoners were cowardly murdered, a massacre that will never be forgotten in the consciousness of Brazilian society. Because we at the Command are going to change prison practices, which are inhumane, full of injustice, oppression, torture, and massacres in prisons.

15. The Command's priority in the amount is to pressure the State Governor to deactivate that Concentration Camp “attached” to the House of Custody and Treatment of Taubaté, from where the seeds and roots of the command emerged, in the midst of so many inglorious and to so many atrocious sufferings.

16. Starting from the Central Command of the Capital of the State KG, the guidelines for simultaneous organized actions in all the State's penal establishments, in a war without truce, without borders, until final victory.

17. The important thing is that no one will stop us in this fight because the seed of the Command has spread throughout all the Penitentiary Systems of the state and we have also managed to structure ourselves on the outside, with many sacrifices and many irreparable losses, but we have consolidated ourselves at a level state and in the medium and long term we will consolidate ourselves at a national level. In coalition with “Comando Vermelho” (Group of drug dealers) - CV and PCC we will revolutionize the country inside prisons and our armed wing will be the Terror of “the Powerful”

oppressors and tyrants who use the Annex of Taubaté and Bangu I of Rio de Janeiro as an instrument of revenge for the society in the making of monsters. We know our strength and the strength of our powerful enemies, but we are prepared, united and a united people will never be defeated (“Peace, Justice and Freedom”).

The PCC surpassed the walls of the Taubaté House of Custody and became the largest and most cruel criminal faction linked to drug trafficking in Brazil, even operating in neighboring countries such as Bolivia, Paraguay and Colombia.²

The issue is very serious. Our penitentiary system has reproduced one of the largest criminal factions in Latin America! The PCC was created outside the State, and even so, this was not enough to change this segregating policy.

It becomes redundant to say that the current incarceration model does not recover anyone, on the contrary, what we see in Brazilian prisons is that the individuals segregated there are left to their own devices, having to live in a hostile, inhospitable environment, a fertile breeding ground for crime.

Luiz Flávio Gomes severely criticized our incarceration model, which, in the words of the eminent jurist, prison in Brazil is “an expensive factory for more criminality”:

In advanced nations with evolved and distributive capitalism, founded on quality education for all (Denmark, Sweden, Holland, Switzerland, Japan, South Korea, etc.), prisons are not factories of violence. On the contrary. Norway, for example, recovers 80% of prisoners (only 20% reoffend). In Brazil governed by extractive and savage capitalism, by ignorance and parasitism, everything is inverted. We pay a lot (about R\$2,000 a month for each prisoner) to prepare him for organized groups and to attack us again when he leaves prison. But we are “happy” with this irrationality:

2. WIKIPÉDIA. The free encyclopedia. Primeiro Comando da Capital. Available on the website <https://pt.wikipedia.org/wiki/Primeiro_Comando_da_Capital>. Accessed on 10/05/2019.

we close schools (19%), to build more prisons (300%), which convert amateur criminals into professionals and these into organized wild animals. Their rational use recommends them exclusively for really dangerous criminals. For others, alternative sentences.³

Our society, driven by a feeling of revenge, is not concerned with resocializing the prisoner. Nobody is worried about the treatment given to the thief or that small drug dealer in prisons. In fact, many want the prisoner to be mistreated, to experience a cruel sentence, returning to the scenario of torture in which the condemned “paid” his sentence with his own flesh.

The resocializing nature of Brazil’s sentence is evaded, both by the State and by society. However, what is forgotten is that in our criminal legal system there is no perpetual sentence, which means that a convict who served his sentence in degrading conditions and who was not subjected to a process of social reintegration will return to live with society and, in most cases, will return to offending.

In 2015, the Institute for Applied Economic Research (IPEA), in technical cooperation with the National Council of Justice (CNJ), carried out important research on the topic.

This is a report on criminal recidivism in Brazil prepared based on the analysis of empirical data. (IPEA, 2015)

Initially, this work sought to distinguish the concepts of recidivism addressed in previous research, also carried out through the analysis of other sources.

For IPEA, recidivism must be represented only by those definitively convicted who commit crimes again, thus, provisional prisoners must be disregarded in the number determined. According to the Institute, the 70% recidivism rate is only so high because it

considers all prisoners, both provisional and those serving a definitive sentence.

The table below prepared by IPEA shows the different conceptions and percentages of recidivism from different official research sources.

The table below shows the percentage of recidivism according to IPEA:

Certainly, those prisoners who return to the penitentiary system without having previously served their sentence must not be labeled repeat offenders. In other words, without a definitive conviction there is no recidivism. This is what can be seen from article 63 of the Penal Code.

Therefore, the phenomenon of recidivism must not include prisoners who enter the system on a provisional basis, in the case of preventive detention, for example. This is rightly the case in the IPEA research report.

However, the issue is much deeper than the dichotomy between provisional and permanent prisoners. It must not be overlooked that both recidivists (with a final conviction) and non-repeat offenders, when they commit a new criminal offense and return to the prison system, are all ex-offenders from the same system.

Take, for example, a pre-trial detainee who responded to every criminal case in pre-trial detention, and this was his first contact with prison. Suppose that, in the end, he was acquitted and released. Sometime later, he returns to prison in new preventive detention, which, at the end of the instruction, with the conviction, becomes prison for definitive conviction, his first criminal conviction.

In the example above, there is nothing to talk about recidivism, as the first arrest was only on a provisional basis. However, it can be said that he is an ex-prisoner from the penitentiary system given his return to prison.

Thus, even though the rate of criminal

3. GOMES, Luiz Flávio. Jusbrasil. Prisons: expensive factory for more criminals. Available on the website: <<https://professorlfg.jusbrasil.com.br/artigos/112811890/prisoos-fabrica-cara-para-mais-bandidagem>>. Accessed on 09/14/2019

Author	Title	Concept of recidivism used in research	Recidivism cases
Sérgio Adorno; Elia Bordini	<i>A Prisão sob a Ótica de seus Protagonistas: itinerário de uma pesquisa.</i>	Criminal recidivism, more than one crime, conviction in two of them, regardless of 5 years.	São Paulo: 29,34%.
Sérgio Adorno; Elia Bordini	<i>Reincidência e Reincidentes Penitenciários em São Paulo (1974-1985).</i>	Penitentiary recidivism, re-entry into the penitentiary system to serve punishment or security measures.	São Paulo: 46,3%.
Julita Lemgruber	<i>Reincidência e Reincidentes Penitenciários no Sistema Penal do Estado do Rio de Janeiro.</i>	Penitentiary recidivism, re-entry into the penitentiary system to serve punishment or security measures. According to the author: this includes a repeat prison offender, as someone who, having served such a sentence, or such a security measure, was returned to the penal establishment, to serve a new sentence or security measure. (Lemgruber, 1989, page: 45)	Rio de Janeiro: 30,7%.
Túlio Kahn	<i>Além das Grades: radiografia e alternativas ao sistema prisional.</i>	Criminal recidivism: new conviction, but not necessarily for prison terms. According to Kahn, it can be assumed that in cases of more serious crimes, the concepts of criminal recidivism and penitentiary recidivism basically measure the same things, since serious crimes are almost always punished with imprisonment.	São Paulo: 50% in 1994; 45.2% in 1995; 47% in 1996 in the 1970s, the rate did not exceed 32%.
Depen	Dados de 2001 para Brasil e de 2006 para Minas Gerais, Alagoas, Pernambuco e Rio de Janeiro.	Penitentiary recidivism: considering convicted and provisional prisoners with previous passage in the prison system.	Brazil: 70% and Minas Gerais, Alagoas, Pernambuco and Rio de Janeiro: 55.15%
Source: IPEA research (bibliographical review)			

Table 1 – Main national research on recidivism

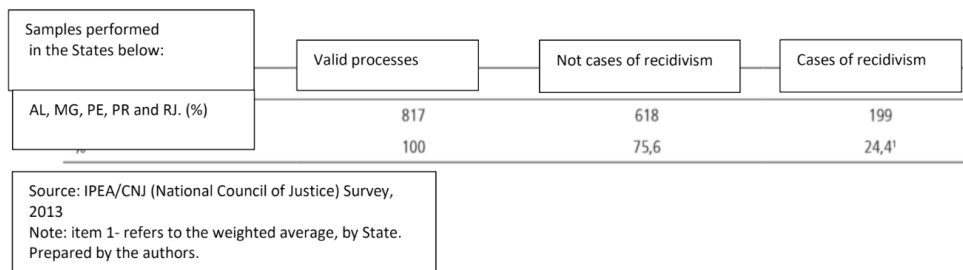


Table 1 – Number of convicts, non-repeat offenders and repeat offenders

recidivism, according to IPEA, is around 24.4%, the rate of people leaving the penitentiary system (those who return to prison provisionally or definitively) is much higher, reaching to the range of 70% as announced by the National Penitentiary Department (Depen), which denotes the system's major failure in recovering individuals who pass through there.

Below is an excerpt from an interview carried out with a manager at Seap (Secretary of the State for Penitentiary Administration), taken from the aforementioned IPEA report, which demonstrates that in a single prison unit the rate of people leaving the system is 50%:

In our first survey, we observed that 50% of prisoners are repeat offenders. This means that half of those who are there, they were arrested again. This is very worrying to me, because it shows the increase in crime. (...) The pre-trial detainee unit is where there is the greatest movement, there are 20 to 40 prisoners per day. Every day they get stuck there. And then, we make a record and check if he has already been in one of our detentions. If he is not a repeat offender, then this is his first time in prison. And for now, we have reached a number of 50% of new prisoners, which I find more reckless and worrying than recidivism. (SEAP Manager).

It is worth noting that both Depen and other research sources, such as the fragment linked above, refer to criminal recidivism in a very broad sense, including any and all passage of an individual through the penitentiary system, which in this work

we prefer to conceptualize of ex-offenders from the system, since the legal concept of recidivism is much more restrictive, covering only those definitively convicted who reoffend within the purification period provided for in article 64, I of the Penal Code.

The inability of the prison system to resocialize prisoners can be seen from several aspects, especially structural. Brazil's penitentiaries do not have the structure to accommodate its current population demand; in almost all prisons analyzed in the research, there is a latent lack of vacancies.

As will be seen later, another IPEA survey on the same topic showed that in Brazilian prisons there is no separation between provisional and permanent prisoners, a serious violation of the rights provided for in article 84 of the Penal Execution Law.

This way, individuals who are temporarily imprisoned live with individuals who have already been convicted and, in most cases, are much more experienced in the life of crime, making an environment conducive to the "bandit factory", in the exact words of Luiz Flávio Gomes.

This new research carried out in the same year by IPEA in partnership with the CNJ (National Council of Justice) provided important data on criminal recidivism in Brazil (IPEA, 2015).

This new work proposed a reflection on the resocializing role of punishment in Brazil and to this end, empirical research was carried out in several prisons in Brazil.

At the end of this large study, IPEA researchers reached the following conclusions about our prison system:

- Difficulty in guaranteeing the individual, deprived of liberty, the status of subject of law;
- Actions, programs and projects of a resocializing nature are generally carried out on a punctual basis;

- Lack of equity in the care of individuals deprived of liberty;
- Lack of clear criteria and standardized procedures for individuals to integrate resocialization programs;
- Lack of a consistent education, work, training and training policy and job creation in the penitentiary system. Most actions are carried out precariously, without material resources and in improvised spaces;
- There is a lack of working conditions for technicians who work in the penitentiary system. The work of technicians, for example, social workers and psychologists, is almost always limited to responding to immediate protocol demands required by the Judiciary. Most of these professionals' time ends up participating in technical evaluation committees, as well as criminological examinations, in fact disregarding the main social and psychological demands presented by inmates;
- Lack of legal assistance;
- Failure to differentiate detainees by criminal type and condition in the criminal process (provisional and convicted, closed, semi-open and open);
- Distance between prison and society. Weakness, or even non-existence, of community councils; It is
- Lack of programs that include the participation of the families of prisoners and inmates. (IPEA, 2015, p.42-43)

The study concludes by stating that:

Amid the serious social issue of crime, criminal recidivism remains a crucial problem. In addition to criticism of the prison system as a "school of crime", there

is the fact that programs aimed at social reintegration have a very limited effect on the lives of inmates. Furthermore, such actions have minimal reach in terms of those who have graduated from the system, who must be a primary audience for programs of this nature. (IPEA, 2015, p.43)

Therefore, reducing the age of criminal responsibility will only result in an increase in the prison population, increasing the number of young people entering the penitentiary system, whose state of bankruptcy was even recognized by the Federal Supreme Court which, when judging the Claim of Non-compliance with a Fundamental Precept, number: 347, defined Brazilian penitentiaries as a true “unconstitutional state of affairs”, an expression coined by the Colombian Constitutional Court, an environment in which there is massive disrespect for the fundamental rights of prisoners, a place where the dignity of the human person has no value and that only serves to encourage violence that turns against society itself.

In the words of Petrório Excelso:

The Plenary noted that in the Brazilian prison system there would be a widespread violation of prisoners’ fundamental rights in terms of dignity, physical health and psychological integrity. The custodial sentences applied in prisons would become cruel and inhumane sentences. In this context, several constitutional provisions (articles 1, III, 5, III, XLVII, and, XLVIII, XLIX, LXXIV, and 6), international standards recognizing prisoners’ rights (the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman and Degrading Treatments and Punishments and the American Convention on Human Rights) and infraconstitutional norms such as the LEP and LC 79/1994, which created Funpen, would have been violated. In relation to Funpen, resources would be restricted by the Union, which would prevent the formulation of new public policies or the improvement

of existing ones and would contribute to the worsening of the situation. He highlighted that the strong violation of the fundamental rights of prisoners would have repercussions beyond their respective subjective situations and would produce more violence against society itself. Brazilian prisons, in addition to not serving the resocialization of prisoners, would encourage an increase in crime, as they would transform small delinquents into “crime monsters”. Proof of the system’s inefficiency as a public security policy would be the high rates of recidivism. And the repeat offender would go on to commit even more serious crimes. He stated that the situation would be frightening: inside prisons, systematic violations of human rights; outside of them, an increase in crime and social insecurity. He noted that responsibility for this situation could not be attributed to a single and exclusive power, but to all three — Legislative, Executive and Judiciary — and not only those of the Union, but also those of the Member States and the Federal District. He considered that there would be problems both in the formulation and implementation of public policies, and in the interpretation and application of criminal law. Furthermore, there would be a lack of institutional coordination. The absence of effective legislative, administrative and budgetary measures would represent a structural failure that would generate both the repeated infringement of rights and the perpetuation and worsening of the situation. The Judiciary would also be responsible, since approximately 41% of prisoners would be in provisional custody and research would demonstrate that, when tried, the majority would achieve acquittal or sentence to alternative sentences. Furthermore, maintaining a high number of prisoners beyond the fixed sentence would demonstrate inadequate legal assistance. The violation of fundamental rights would amount to a transgression of human dignity and the existential minimum itself and would justify the more assertive action of the STF. [...]⁴

Given this scenario, it can be asserted

4. BRAZIL. STF Newsletter. Available in <<http://www.stf.jus.br/arquivo/informativo/documento/informativo798.htm>>

that prison does not combat crime and does not restore much-desired peace and social order. On the contrary, the policy of mass incarceration only contributes to the worsening of the situation of a society of conflict.

Accessed on 10/05/2019.

REFERENCES

CAULYT, Fernando. **Brasil, terceira maior população carcerário, aprisiona cada vez mais.** *Carta Capital*. Disponível em <<https://www.cartacapital.com.br/sociedade/brasil-terceira-maior-populacao-carceraria-aprisiona-cada-vez-mais/>> Acesso em 03/08/2019.

SICA, Leonardo. **Direito penal de emergência e alternativas à prisão.** São Paulo: Editora Revista dos Tribunais, 2002.

NAÇÕES UNIDAS BRASIL. Disponível em: <<https://nacoesunidas.org/cnj-e-pnud-fecham-acordo-para-enfrentar-desafio-da-questao-carceraria-no-brasil/>>. Acesso em 07/09/2019.

WIKIPÉDIA. A enciclopédia livre. **Primeiro Comando da Capital.** Disponível em <https://pt.wikipedia.org/wiki/Primeiro_Comando_da_Capital>. Acesso em 05/10/2019.

WIKIQUOTE. **Estatuto do PCC.** Disponível em <https://pt.wikiquote.org/wiki/Estatuto_do_PCC>. Acesso em 05/10/2019.

GOMES, Luiz Flávio. Jusbrasil. **Prisões: fábrica cara para mais bandidagem.** Disponível em: <<https://professorlfg.jusbrasil.com.br/artigos/112811890/priso-es-fabrica-cara-para-mais-bandidagem>>. Acesso em 14/09/2019.

TARDÁGUILA, Cristina. **A reincidência atinge mais de 70% dos presos no Brasil?** Disponível em: <<https://piaui.folha.uol.com.br/lupa/2016/07/12/lupaaqui-a-reincidencia-atinge-mais-de-70-dos-presos-no-brasil/>>. Acesso em 17/09/2019.

BRASIL. **Informativo STF.** Disponível em <<http://www.stf.jus.br/arquivo/informativo/documento/informativo798.htm>> Acesso em 05/10/2019.