

Human Rights Violations in Brazilian Prisons and the Role of the Brazilian Supreme Court and of the National Council of Justice

A Violação dos Direitos Humanos nas Prisões Brasileiras e o Papel do Superior Tribunal Federal e do Conselho Nacional de Justiça

La Violación de los Derechos Humanos en las Cárceles Brasileñas y el Papel del Superior Tribunal Federal y del Consejo Nacional de Justicia

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Abstract

This research aims to assess the role of the Brazilian Judicial Power in the protection of human rights in prisons, in the light of the actions of the STF and the 'National Council of Justice' (CNJ). Initially, from the division of Powers in the Brazilian State, it is conducted a survey of the competences in the Brazilian State to the management of prisons and to the protection of human rights in prisons; subsequently, it is studied the role of the Judiciary in protecting these rights, based on the analysis of the STF and the CNJ actions. As a result, initially, it was found that the violation of human rights in prisons is not something new in Brazil and it reflects other structural problems in Brazilian society, such as the great social inequality and the systemic racism. This violence is worst to women and to sexual minorities, due to either action or omission from the State institutions. In the end, it was found that the STF has important decisions in favor of the protection of the human rights in prisons; however, some decisions of the same court, which toughen incarceration measures, have had an impact on the worsening of the chaotic situation of the Brazilian prison system. Additionally, the CNJ played an important role in monitoring and promoting the protection of human rights in prisons. The method applied in the development of the research is the inductive method, by which it tries to reach a general conclusion from particular data.

Keywords: Human Rights; Prisons; Brazilian Supreme Court; Brazilian National Council of Justice; Prisoners.

Resumo

Esta pesquisa pretende avaliar qual o papel do Poder Judiciário brasileiro na proteção dos direitos humanos nas prisões, à luz das ações do STF e do Conselho Nacional de Justiça (CNJ). Para tanto, inicialmente, a partir da divisão dos Poderes nos Estado brasileiro, pretende-se realizar uma pesquisa estrutural das competências no Estado brasileiro na tutela das prisões e da proteção dos direitos humanos nas prisões; na sequência, pretende-se o estudo de qual tem sido a atuação do Poder Judiciário na proteção desses direitos, a partir da análise de ações do STF e do CNJ. Inicialmente, constatou-se que a violação dos direitos humanos nas prisões não é algo recente no Estado brasileiro e reflete outros problemas estruturais da sociedade brasileira, como a grande desigualdade social e o racismo estrutural. Essa violência é pior para mulheres e minorias sexuais, em virtude tanto da ação quanto da omissão do Estado. Ao final, constatou-se que o STF possui importantes decisões em prol da proteção dos direitos humanos das prisões; no entanto algumas decisões da mesma corte, as quais endurecem medidas de encarceramento, provocaram impactos no agravamento da situação caótica do sistema prisional brasileiro. Adicionalmente, o CNJ tem desempenhado um importante papel para a monitorar e promover a proteção dos direitos humanos nas prisões. O método aplicado no desenvolvimento da pesquisa em curso é o método indutivo, pelo qual se busca alcançar uma conclusão geral a partir de dados particulares.

Palavras-chave: Direitos Humanos; Prisões; Supremo Tribunal Federal; Conselho Nacional de Justiça; Presidiários.

Resumen

Esta investigación tiene como objetivo evaluar el papel del Poder Judicial brasileño en la protección de los derechos humanos en las cárceles, a la luz de las acciones del STF y del Consejo Nacional de Justicia (CNJ).

Inicialmente, desde la división de poderes presente en el Estado brasileño, se pretende realizar un estudio estructural de las competencias nacionales en relación a la protección de los derechos humanos en las cárceles; posteriormente, se ha pretendido el estudio del papel del Poder Judicial en la protección de derechos, a partir del análisis de la actuación del STF y CNJ. Primeramente, se encontró que la violación de los derechos humanos en las cárceles no es algo reciente en el Brasil y refleja problemas estructurales de la sociedad, como la gran desigualdad social y el racismo estructural. Esta violencia es peor para las mujeres y las minorías sexuales, tanto por la acción como por la omisión del Estado. Al final, se encontró que el STF tiene decisiones importantes a favor de la protección de los derechos humanos de las cárceles; sin embargo, decisiones del mismo tribunal, que endurecen las medidas de encarcelamiento, han tenido impacto en el agravamiento de la situación en el sistema penitenciario brasileño. Además, el CNJ ha tenido un papel importante en el seguimiento y promoción de la protección de los derechos humanos en las cárceles. Se ha aplicado en la investigación el método inductivo, buscándose llegar a una conclusión general basada en datos particulares.

Palabras clave: Derechos Humanos; Cárceles; Supremo Tribunal Federal; Consejo Nacional de Justicia; Presos.

1. Introduction

In Brazil, hundreds of thousands of people are held imprisoned.¹ Meanwhile, Brazilian prisons are known for their persistent human rights violations: overcrowded, filthy and unhealthy cells; without guarantee of basic hygiene products or adequate food, lack of drinking water and constant violence. And, in these places, women, pregnant women and sexual minorities are especially affected. These violations go from lack of resources and investment in the facilities to the lack of dignity of the treatment that prisoners receive from the administration. To summarize, the Brazilian prison system presents a scenario of “unconstitutional state of affairs”. The expression was used by the Brazilian ‘Supreme Federal Court’ (STF) to describe the Brazilian prison system, in the ‘Action for Breach of Fundamental Principle’ (ADPF) n. 347, due to the serious violations of human and fundamental rights in Brazilian prisons.

But there are other aspects that need attention when it comes to protection of rights in prisons. Brazil Prison’s issue reflects other structural problems in Brazilian society, such as the great social inequality and systemic racism. With the insufficiency of measures tackling poverty and income distribution, Brazilian criminal policies end up promoting criminal intervention instead of welfare policies that guarantee basic social human rights. Brazil is also remembered for being the last country to abolish black-people slavery, in the late nineteenth century, without giving any support or basic rights to the newly free people. And this delay on freedom and dignity to black people still plays a huge part on how the justice system works, and how black people are more likely to not have access to good legal defense, to be misjudged and to go to prison. In the end, poor and non-white (black and indigenous) people are the most affected by the dysfunctional Brazilian prison system. Furthermore, mostly justified by the war on drugs, Brazil’s criminal policies systematically promote mass incarceration and urban violence, since the Brazilian State has not been fully successful in fighting against organized crime, composed by many gang groups (‘factions’), that are still fighting with each other over the drug and illegal market control.²

Thus, these violence and conflict between the State, its police and criminal organizations play a part in human rights violations in prisons, due to, to some extent, the lack of control in prison facilities by the administration of the prison. Brazilian prisons are overall influenced by organized crime, and, in some contexts, the administration of the prison has poor control over the facilities, or even lost control at all. Moreover, the dispute between opponent organized crime gangs (‘factions’) turns the life of the inmates especially unsafe, taking them to making bonds with a gang in order to get protection and to meet their basic

¹ In March 2021, Brazil held more than 900.000 people in prisons, and had more than 300.000 orders of arrest yet to be executed. These informations were available in the National Prison Monitoring Bank (Banco Nacional de Monitoramento de Prisões - BNMP), that tracks the number of people imprisoned in Brazil. (Banco Nacional de Monitoramento de Prisões, n.d.).

² Criminal organizations such as the Brazilian factions and gangs are a complex issue that merges historical and sociological aspects linked to a failed drug police, urban violence and the prison environment. Official data and researches point out to a dispute of faction among Brazilian territory and that reveals intricate economic and political disputes of the criminal organization over the control of the illegal market. For more information, check (Fórum Brasileiro de Segurança Pública, 2018, n.p.).

needs. These gangs often offer financial support and supplies to the inmates, sometimes even for their families, in exchange for their loyalty and respect. Once an alliance is made, it is hard to disengage the bond with a specific criminal organization.

In this scenario, overpopulation and lack of conditions that allows some dignity to the inmates also takes a huge part in Brazilian Prisons. Sometimes, before the omission of the State, in these facilities, overcrowded with poor inmates, some Non-Profit Organizations (NGO) and religious organizations end up supporting the inmates and their families. Anyway, in these places, women, pregnant women and LGBTQ+ community are especially affected, either because the State may fail in addressing the special needs that may arise and the facilities are not fully suited for them,³ either because there are flaws in the way that the prison systems recognize them as subjects of rights. In fact, many of the human rights violations that occur in prisons rely on the lack of recognition of the inmates as persons, citizens that deserve respect and whose dignity must be protected. Thus, there are many studies that put these particularities into context and discuss the impact and the extension that being women, disabled or LGBTQ+ has in the human rights of people imprisoned, and how human rights violations are promoted not just by the prison environment, but by the chaos that describes Brazilian prison system.

Yet, hundreds of thousands of inmates are not fully convicted by the judicial system, they are in a pre-trial detention that can take years, and which contributes to the chaos in the prison system. So, the acting of the Judiciary can take a huge influence on prison overpopulation and in the guarantee of basic rights and needs of the inmate. That being said, this research aims to assess the role of the Judiciary in the protection of human rights in prisons. So it's analyzed the actions of the Brazilian Supreme Court ('Supreme Federal Court' - 'Supremo Tribunal Federal' - STF) and the 'National Council of Justice' ('Conselho Nacional de Justiça' - CNJ), since both, being on top of the Brazilian Judiciary organization, can have a considerable influence on the directions of human rights protection in Brazil. On the one hand, STF, that is often referred as the 'Constitution Guardian', has numerous competences linked to the protections of civil rights and liberties recognized by the 1988 Federal Constitution and the human rights that Brazil is bound over the international order.

2. Methodology

To reach the purposes of this paper, initially, it is analyzed the division of jurisdictions among the three branches of Federative Republic of Brazil (executive, legislative and judicial branch) and then it is conducted a survey of the competences of these branches in the management of prisons and to the protection of human rights in prisons. Subsequently, it is studied the role of the Judiciary in protecting these rights, based on the analysis of the STF actions, highlighting the 'Action for Breach of Fundamental Principle' (ADPF) n. 347, that decides about topics related to the serious violations of human and civil rights and liberties in Brazilian prisons. It also studied the impact of National Council of Justice (CNJ) actions in the protection of rights in the prison system. The method applied in the development of the research is the inductive method, by which it tries to reach a general conclusion from particular data, especially the data collected in public open data.

The theoretical perspective of this investigation is based mainly on public data provided by the Brazilian Public Sources. Additionally, in a criminological standpoint, it was considered the ideas of a "total institution" by Erving Goffman.⁴

³ According to the National Registry of Pregnant or Lactating Prisoners of the National Council of Justice (CNJ), at the end of February 2018, of 685 pregnant or breastfeeding inmates in prisons across the country. Of this total, 420 women are pregnant and 265, lactating. (National Council of Justice, 2019). Also, the number of women imprisoned increased in the last two decades. Some data point out that the number was 'multiplied by eight. The number of prisoners rose from 5,601 in 2000 to 44,721 in 2016, according to the National Penitentiary Department (Depen) of the Ministry of Justice. With the increase, the representation of women in the prison mass went from 3.2% to 6.8% in the period.' (National Council of Justice, 2017) Some other issues of judicial system unfortunately play a part into increasing vulnerability of women in prisons, especially expecting and newborns' mothers: 'After delivery, the prey can breastfeed the baby for at least six months, as provided by the Law of Penal Execution (LEP). Not all prisons, however, meet the deadline and part of them apply it as a maximum time, according to Frago. "The moment when the child leaves the prison is conducted in a generally abrupt way, uncompromised with the need for adaptation and with the possible impacts on the psychological health of incarcerated women", he says. Judges have the means to reduce the number of mothers behind bars. (...) Non-custodial sentences should be preferred for pregnant women and children with dependent children, according to the Bangkok Norms, approved by the United Nations. The main normative on the subject reserves the prison for serious cases or in which the mother represents a threat.' (National Council of Justice, 2017)

⁴ In his work "Manicômios, Prisões e Conventos", Goffman understands that human beings act in the spheres of life in different places, with different actors and under different authorities, and there is no general rational plan that outlines this path. The moment a person is inserted in a social institution, he starts to act in

3. Discussion and Results

This Section is divided in two parts. In the first part, it is discussed the division of powers among branches in the Federative Republic of Brazil and its impact in prison maintenance. In the second part, it is discussed the role of the Judiciary in the protection of rights and it is examined the role of the Brazilian Supreme Court and of the National Council of Justice in human rights protection.

3.1 The branches of Brazilian State and its impact in prison maintenance

Among this division of the Constitutional Power in branches, there is a classification of different functions or jurisdiction that are ‘typical’ (that characterize the function of a specific branch within the State) and ‘atypical’ (that a branch may perform even if it is not its ‘natural’ or ‘typical’ jurisdiction). That is, the Legislative mainly holds the jurisdiction of law-making and of supervising the other branches; the Executive develops the government programs and actions under the law; and the Judiciary ends disputes and gives the interpretation of the law. This division represents the principle of independence among branches and is granted by the article 2. of Brazilian 1988 Federal Constitution, which says: ‘*The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union.*’ Thus, this work mainly focuses on the typical jurisdiction of each power, because typical jurisdictions carry the core of the actions or inaction of each branch.

As it was said, the goal of this paper is to examine the role of the Brazilian Supreme Court and of the National Council of Justice in the protection of human rights in prisons. But first, in the light of the powers granted by the Constitution, it is important to identify which branches and institutions have the duty to oversight, to prevent violations or to protect the human rights guaranteed to the inmates. For thus, in this section, we start from the traditional division of Constitutional Powers in Brazil (separated in executive branch, legislative branch and judicial branch), in order to assess the role that these institutions should have in human rights protection. That being said, although many sociological and historical aspects may show a huge importance in these situations, this part of research mainly focuses on the legal and institutional aspects of the problem, glancing at some other elements only when needed to illustrate the severity of the issues discussed in this paper.

Within the structure of Brazilian Federated Unity, there are four entities: the Federal Union (that represents the countrywide interests and represents Brazil in the international field); the Federated States; the Municipality (corresponding to the cities governments) and Federal District (that mingle State and Municipality powers and it houses the Brazilian capital ‘Brasília’).⁵ The Executive and the Legislative branches follow the Federal Union order: there is a government (a separated administration) and a Legislative House⁶ for each entity. In contrast, the judiciary is a unified institution in the Brazilian State, even though it has separated jurisdictions and several different types of Courts, based on the location, the matter, or the party to the case. In this structure, the 1988 Federal Constitution grants the law-making power over penitentiary law to the Federal Union, the States and the Federal Districts (article 24.I). In other words, they all can pass legislation about penitentiary law, although the Federal Union is supposed to create general rules, and the States and Federal Districts to make rules that match their regional needs. Therefore, since the legislative of these entities have the constitution law-making power, it is understood that the respective executive branch has the control over the prison within its jurisdiction. So, in general terms, Brazil has federal and

the same place, with the same group of people and under equal treatment, obligations and rules for the performance of imposed activities. When this social institution organizes itself so as to serve individuals in similar situations, separating them from the wider society for a period of time and imposing on them a closed life under a rigorously formal administration that is based on the discourse of meeting institutional objectives, it has a tendency to “close” which will symbolize its “totalitarian” character. This total character of the institution acts on the person in a way that their view undergoes dramatic transformations from a personal and social role point of view. Therefore, the methodology of this work is based on such a perspective to analyze the state of the Brazilian prison system. Check on. GOFFMAN, E (2001). *Manicômios, Prisões e Conventos*. Editora Perspectiva.

⁵ There is also the possibility of creation of ‘Territories’ (article 33, 1988 Federal Constitution) as an special entity that mingles federative competences, but, at the moment, there is no territory in Brazil.

⁶ The Legislative of the Federal Union is the National Congress, composed by two separated houses, the Federal Senate and the Chamber of Deputies.

state prisons (although state prisons are most of them)⁷, and each Federated State, the Federal District or the Federal Union is responsible for funding its own facilities, according to its jurisdiction. Nevertheless, even the Legislative and Executive being the branches that hold the control over prison (and that includes the financial and the administration jurisdiction), the Judiciary is also directly responsible for what happens in prisons. In other words, all the branches are responsible for implementing the commands, rights and liberties granted by the 1988 Federal Constitution and the international legal rules by which Brazil is bonded. Otherwise, Brazilian branches incur in unconstitutionality if they allow, by action or inaction, rights and liberties violations in prisons.

In the legal order, both national and international, there is a solid body of rules granting rights and liberties to the inmates, such there is the 1988 Federal Constitution; the Law of Penal Execution (Act n. 7.210, from 1984) and there are other human rights and liberties Treaties and Conventions. Even so, the performance of typical jurisdiction by the Legislative is, at times, unsatisfactory and faces inner challenges. This is because the Legislative Houses' work mirrors the divisions that already exist in society, hindering consensus around active measures to protect the rights and liberties of the inmates. Additionally, tax and distribution of wealth within the Brazilian State are an important part in the maintenance of the facilities. Many of the Federated States (that rule over the majority of prisons) have a huge public debt and are unable to finance basic infrastructure investments, and then rely on federal help to maintain its prisons functioning. Beyond that, another fact to be considered is the unpopularity of strong measures and investments in prisons, which depend on the consent and the approval of the respective Legislative House, because it is the legislative that has the jurisdiction over public budget and, in general terms, plans how public resources will or will not be spent.⁸

Another starting conclusion is that even though Brazilian Constitution grants the division of power among the federated entities, in practical terms the Federal Union (and so its Executive and Legislative) ends up having greater powers and budget than the Federated States and its decisions have a special importance in regional realities. In other words, because the Federal Government has the majority of resources and the States are often lacking resources, there is a dependency from the States to the Federal Union; and because the Legislative from the Union takes the bigger decisions in law-making and oversight the compliance of the States, its actions end up having an special role on the course of prison maintenance.

In the next part of the section, it is studied the role of the judiciary in the protection of rights and the Brazilian Supreme Court and of the National Council of Justice towards this protection.

3.2 The role of the judiciary in the protection of rights and the actions of the Brazilian Supreme Court and of the National Council of Justice

Based on the division of powers among branches, the Judiciary, in the criminal field, is responsible not just for the law enforcement, but also for granting the rights and liberties of people and for preventing arbitrariness. In other words, while the Legislative has the jurisdiction to oversight the other Constitutional Powers, within the structure of the Brazilian State, the Judiciary has the jurisdiction to apply the law, considering that the law itself grants protection towards Power. Nevertheless, Brazilian Judiciary acts ambiguously towards the protection of rights in prisons: some of its decisions actively protect the rights of inmates; but others end up using law enforcement to disproportionately promote imprisonment, when it would be possible the

⁷ The Brazilian prison system consists of federal and state facilities, splitted in male and female facilities, with some minimum standards disposed by the Law of Penal Execution (Act n. 7.210, 1984 - LEP), that in most cases are yet to be complied with. The LEP commands that inmates have individual prison cells, with dormitory and bathroom, with some wholesomeness, at least 6m² long (article 88). The facilities must be located in urban areas and in a location accessible to visits (article 90).

⁸ Some argue in defense of privatization of Brazilian prisons, since they are all controlled by public authorities. They propose they propose models, arguing that it would promote more efficiency to the prison system. Although there are many models and discussions of this subject around the world (REIS, 1995, p. 43), the topic is still a taboo in public discussion. This idea is criticized and viewed with suspicion by many human right activists, arguing that the lack of control of prisons by public authorities could lead to exploitation of the workforce from prisoners, hiding the political choice in criminalization of poverty.

adoption of other less harmful measures. Additionally, the Judiciary itself endures an overload of cases, turning into a challenge having a rapid outcome for the endless cases still pending. The execution proceeding also flows in a slow pace and often the requests made by the inmates (such as the granting of basic rights) are examined by the Judiciary months (or even years) ahead. Thus, the slowness of the judicial proceeding may let people imprisoned longer than needed or even in pretrial for years, reinforcing some weak aspects of the judicial system.

Another relevant aspect is that most inmates are poor and depending solely on the Public Legal Defense's service⁹ to get their rights recognized and complied with. So, here again, even though there is an everlasting effort by the Public Defenders to grant the inmates rights, the overload of cases, as well as resources and financial limitations, or even the own slowness of the Judiciary, may hinder the rights and liberties protection.

Also, the Brazilian Prosecution Office is held by the 'Public Prosecution' ('Ministério Público'), but criminal prosecution is only one of its constitutional functions. Yet, the passionate work of the prosecution (that celebrates and promotes imprisonment measures as the only tool for public safety) can contribute to worsening the chaotic scenario of Brazilian prisons. At the same time, The Public Prosecution also has the jurisdiction to inspect and, thus, to supervise rights compliance in prison. So, although this mix of functions and constitutional duties can cause some confusion in practical terms, some initiatives held by the Public Prosecution offices are taken towards human rights protection and the improvement of living conditions in prison.¹⁰ Therefore, as well as the whole judicial system, Brazilian Prosecution Office can also show ambiguous action towards rights protection.

When it comes to the action of the Supreme Court of Brazil, the analyses shift to the impact that its decisions have in giving guidelines to interpret the law accordingly to the Constitution. Thus, the 'Supreme Federal Court' ('Supremo Tribunal Federal' - STF) is considered the 'guardian of the Constitution'. It is a Court composed by 11 judges, all of them indicated by the President of Brazil and approved by the Federal Senate. Although Brazil has had many Constitutions since its independence, in 1822, STF has been a traditional Court in the Brazilian State. In this sense, the 1988 Federal Constitution granted the Supreme Court several jurisdictions (Section 102), notably in the interpretation of the Constitution. Thus, STF ends up deciding how the many rights and liberties granted by the Constitution will be applied. In fact, there is a huge discussion about the extension of powers of the STF, its political influence and its judicial activism. In any case, it is certain that the 1988 Federal Constitution is an extensive document, with hundreds of articles and sections, that marked the transition to democracy, after decades of the military dictatorship that began in 1964. Although the 1988 Federal Constitution has been reformed for more than a hundred times, its 5th Article guarantees a huge variety of civil rights and liberties to people in Brazilian territory. Its 60.4. Article also bars any reforms capable of abolishing the federative form of State; the direct, secret, universal and periodical voting; the separation of Powers; and civil rights and liberties. To sum up, the 1988 Brazilian Constitution expresses the hope in the Rule of Law and in Democracy as a way to create a 'the free, just and solidary society' (Article 3.I.). Therefore, even though Brazilian Constitution is constantly reformed and adapted to Brazilian reality, it grants a solid and extensive variety of rights and liberties to people. For instance, the 5th Article of 1988 Federal Constitution grants the following:

⁹ 1988 Brazilian Constitution grants Public Legal Defence as '*a permanent institution, essential to the jurisdictional function of the State, and is responsible primarily, as an expression and an instrument of the democratic regime, for the judicial guidance, the promotion of human rights, and the full and free-of-charge defence, in all levels, both judicially and extrajudicially, of individual and collective rights of the needy (...)*'. (article 134) The service of Public Legal Defence is splitted in a federal body and a State body, according to the jurisdiction of the Court the service is destined for.

¹⁰ The "Public Prosecution" is considered by the 1988 Federal Constitution as a 'Function Essential to Justice',. It is "*a permanent institution, essential to the jurisdictional function of the State, and it is its duty to defend the juridical order, the democratic regime and the inalienable social and individual interests.*" (article 127). It is an independent institution (article 127, paragraph 1.), bound by constitutional jurisdictions. In the criminal field, besides acting as prosecutor, it also inspects the criminal execution (Article 67, Law of Penal Execution) and visits prison facilities regularly. For extended information, to check some official documents produced by the Public Prosecution office, such as the 'Prison Units Inspection Manual' (Manual de Inspeção a Unidades Prisionais. - National Council of public ministry) and the 'Inspection of Criminal Establishments' ('Grupo Temático da Execução Criminal - Fiscalização de Estabelecimentos Penais' - Ministério Público do Rio Grande do Sul, 2017). Some papers produced institutionally by Prosecutors can glance over the complexity of the 'Public Prosecution' actions - 'The Public Prosecutor's View of the Brazilian Prison System' (A Visão do Ministério Público sobre o Sistema Prisional brasileiro - National Council of Public Ministry, 2020).

XLV – no punishment shall go beyond the person of the convict, and the obligation to compensate for the damage, as well as the decreeing of loss of assets may, under the terms of the law, be extended to the successors and executed against them, up to the limit of the value of the assets transferred;

XLVI – the law shall regulate the individualization of punishment and shall adopt the following, among others: a) deprivation or restriction of freedom; b) loss of assets; c) fine; d) alternative rendering of social service; e) suspension or deprivation of rights;

XLVII – there shall be no punishment: a) of death, save in case of declared war, under the terms of article 84, item XIX; b) of life imprisonment; c) of hard labour d) of banishment; e) which is cruel;

XLVIII – the sentence shall be served in separate establishments, according to the nature of the offence, the age and the sex of the convict;

XLIX – prisoners are ensured of respect to their physical and moral integrity;

L – female prisoners shall be ensured of adequate conditions to stay with their children during the nursing period;

That being said, over the years, STF has been holding many leading cases with a huge impact in Brazilian Prisons and law enforcement, and then in the human rights protection in prisons. In the ‘Action for Breach of Fundamental Principle’ n. 347 (ADPF n. 347 - 2015), moved by the ‘Socialism and Liberty Party’ (PSOL), it has been discussed the chaos that reigns in Brazilian prison system. This case is notorious for recognizing the Brazilian prison system as an ‘unconstitutional state of affairs’ (‘estado de coisas inconstitucional’) and it is still pending of full trial. The core claim of the complaint consists of the adoption of structural measures before the harms to rights and liberties from inmates, caused by actions and inactions from authorities of the Federal Union, Federal District and Federal States. This complaint was based on a variety of rules, both national and international, that protect the human dignity (such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) and the civil and social rights granted by the 1988 Federal Constitution to the inmates (such as education, health, work, security, etc.).

In the reasoning of the complaint, it was reported various issues from the Brazilian penitentiary system, lack of adequate conditions of incarceration by the facilities, due to overcrowding and poor infrastructure. Also, it was reported that the Federal Union was cutting the funds from the ‘National Prison Fund’ (‘Fundo Penitenciário Nacional’)¹¹ that should be addressed to the States, although there was a budget available and the resources were needed for the maintenance of the prisons and improvement of the living conditions in prisons. Furthermore, it was reported the disregard by the judiciary from the Article 9.3 of the International Covenant on Civil and Political Rights¹² and the Article 7.5. of the American Convention on Human Rights¹³ to conduct the initial appearance of the arrestee caught in *flagrante delicto*.¹⁴ Additionally, it was reported the persistent Judiciary practice of, without the due reasoning, denying alternative measures to prison when they would be legally possible, even though the facilities are already housing way more people than they were designed for. In practical terms, the prisons are full with people in pretrial detention and the Judiciary often do not strictly follow legal proceedings that command the assessment of unlawful or unnecessary arrests. It was also reported, with details, the chaotic scenario of Brazilian prisons, highlighting the human dignity violations and the violence in which the inmates are immersed. As it was described, these violations are caused not only by other inmates, but also by public officials and the administration itself. There is also a persistent lack of adequate

¹¹ The ‘National Prison Fund’ (‘Fundo Penitenciário Nacional’ - Funpen) was created in 1994 with the main goal of offering resources and means to financing and supporting activities and programs of modernization and improvement in the national penitentiary system. The Fundep controlled by the Federal Union, The release of funds depends on previous legal authorization and a public end expressed by law, so it demands both the participation from de executive and legislative branches. (Fundo Penitenciário Nacional, 2021)

¹² Article 9.3., International Covenant on Civil and Political Rights : “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.” (United Nations, 1976).

¹³ Article 7.5., American Convention on Human Rights: “Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.” (Inter-American Commission on Human Rights, 1969)

¹⁴ ‘Launched in 2015, custody hearings consist of the quick presentation of the prisoner to a judge in cases of arrests in the act, in a hearing where the manifestations of the Public Ministry, the Public Defender’s Office or the prisoner’s lawyer are also heard. The judge analyzes the prison from the point of view of the legality, the need and the adequacy of the continuity of the prison or the possible granting of liberty, with or without the imposition of other precautionary measures. It also evaluates possible occurrences of torture or ill-treatment, among other irregularities.’ - (National Council of Justice - Custody Hearings)

free legal counsel (letting inmates that already served their sentence stay imprisoned) and lack of basic social rights, such as education, healthcare and work. It also highlighted the role of the criminal organizations ('factions') in the facilities and the mingle of newly criminal with repeat offenders linked to organized crime, increasing the chance of recidivism. It was also described how women and LGBT+ community often do not receive the proper treatment, illuminating gender issues faced inside prisons and the special vulnerability that expecting mothers and mother from toddlers are exposed in the facilities, specially in terms of healthcare and basic health and hygiene products. Also, sexual minorities are constantly exposed to prejudice and sexual harassment, getting more easily exposed to Sexually Transmitted Infections (STIs).

The petition was filed with several requests aiming at the prevention and repair of rights violations in Brazilian prisons. Most of these requests are yet to be fully analyzed by STF. In 2015, STF partially decided to grant the motion, recognizing the 'unconstitutional state of affair' of Brazilian prisons, and that was particularly important in terms of grounds for other actions aiming at human rights protection in Brazilian courts. In the years that followed, the Supreme Court also held other decisions towards human rights protection, both in ADPF n. 347 as well as in other processes. So, even though ADPF n. 347 may not be the only case in which STF dealt with human rights protection in prisons, it's a remarkable one that has been opening spaces for human rights protection in the whole judicial system. It also highlights how the precedents of STF allows judicial intervention on other branches when the rights violations are so intense that it can not be just ignored by the Judiciary. That being said, this recognition from ADPF of the 'unconstitutional state of affairs' allows the command to all branches to take immediate measures towards rights and liberties protection in prisons, as well as to oversee the compliance with the legal commands.

Nevertheless, the same STF has held other decisions that contributed to more imprisonment and overcrowding. An obvious one is the oscillation in the interpretation over the extension of the 'presumption of innocence' civil right, granted by the 1988 Federal Constitution. The Article 5.LVII of the 1988 Federal Constitution says '*no one shall be considered guilty before the issuing of a final and unappealable penal sentence*'. The interpretation of this rule has been strongly discussed in the past few years. The traditional and literal interpretation, which had guided judicial practice for decades, was that one would only serve its sentence after the 'final and unappealable penal sentence' - in other words, one only would have his/her penal sentence executed when there was not anymore an appeal available by the legal order. In 2016, this interpretation shifted by the majority of opinions of the Supreme Court and STF started to allow the provisory execution of the 'penal sentence' and, so, to consider possible for one to serve his/her sentence after the ordinary appeal was over - in other words, it would be possible to one serve his/her sentence even though there was still a possibility of appeal to the Superior Courts (STF and 'Superior Court of Justice' - STJ); and even though there was still a possibility of reversing the conviction.¹⁵ This shift in the understanding about the 'presumption of innocence' was taken in a politically agitated environment, wherein huge investigations of politicians were taken throughout the country (such as the 'Car Wash' investigations and operations) and imprisonment measures had a huge popularity in public opinion. However, after a lot of criticism and discussions, in 2019, STF shifted again its guidelines, returning to its traditional precedentes, following the literality of the constitutional rule.¹⁶

Nonetheless, in practical terms, this variation on STF precedents caused not only a great 'juridical insecurity', but also promoted mass incarceration of thousands of people waiting to the final conviction and that could, theoretically, end up acquitted of the crime. Furthermore, this variation on the STF's understandings on 'presumption of innocence' - partly encouraged by a false discourse of harsh and disproportionate law enforcement as a mean to fight against impunity - ended up for creating judicial

¹⁵ In Brazil, there are both state and federal trial courts, and then there are three levels of appellate jurisdiction. After a judgment is entered by the trial court, there are three levels of appellate jurisdiction, being the first one a regional or stat court; and the last two 'Superior Court of Justice' (STJ - it gives the interpretation of non-constitutional matters) and 'Supreme Federal Court' (STF). The defendant is presumed innocent until the complete exhaustion of all three levels of appeal.

¹⁶ The leading case for this shift was Habeas Corpus n. 126.292. In the Direct Actions of Constitutionality 43, 44 and 54 ('Ação Direta de Constitucionalidade' - ADC), In 2019, STF came back to its original understanding (that the penal execution only would allowed after there was no more appeal available, and, therefore prohibiting the provisory execution as against the Constitution).

space for needless incarceration of people in a prison system that already faced structural issues of overcrowding and poor maintenance.

In any case, it is not only the STF that has been showing an important role in the rights and liberties protection in prisons. Also the National Council of Justice (CNJ) has important actions towards human rights protection. CNJ is not properly a Court, but an administrative, financial, and disciplinary body, created in 2004, that is composed of representatives of Judicial actors (judges, lawyers, prosecutors and citizens) and chaired by the President of STF; its competences are linked to the oversight of the whole Brazilian Judicial system and can take disciplinary measures against judges. To summarize, it is “*a public institution that aims to improve the work of the Brazilian judicial system, mainly with regard to control and administrative and procedural transparency*” (National Council of Justice, Who we are). In terms of prison oversight, CNJ has different initiatives, inspecting the overall judicial work, the prisons itself and creating regulations to unify judicial practice, as well as collecting data about judicial activities and tracking progress of the adopted measures.

As an example, it can be pointed out the prison task forces (‘*mutirões carcerários*’), a project that began in 2008 ‘*as a way of guaranteeing and promoting fundamental rights in the prison area*’. Until 2014, judges went to different units of the federation to analyze the procedural situation of people serving time, in addition to inspecting prison units, in order to remedy irregularities and ensure compliance with the Criminal Executions Law. Thus, CNJ claims to have analyzed about 400 thousand cases with more than 80 thousand benefits granted (such as progression of sentence, provisional freedom, right to external work, among others) and to have released at least 45,000 prisoners for serving their sentences. In 2019, an update to the task force model was promoted, adopting electronic resources as a tool to centralize and unify criminal enforcement across the country, which allowed the filtering of processes according to pre-established criteria, making the review process more agile and less costly (National Council of Justice, Prison Task Force). Another remarkable initiative is the incentive of Restorative Justice, creating programs and projects preventing needless incarceration and promoting alternative solutions to criminal acts. (National Council of Justice, Restorative Justice). Besides, CNJ has other programs that help people who served their sentence to find a job and to access public services and social rights (National Council of Justice, Attention Policy for Persons Leaving the Prison System - Social Offices).

To summarize, although these actions may not solve other structural issues from Brazilian society, they have a tangible impact on reducing mass incarceration and creating better judicial and institutional practices towards rights and liberties protection (National Council of Justice, 2018 - *Pre-trial detainees: Piauí reduces rate of detainees awaiting trial*) (National Council of Justice, Doing Justice). In conclusion, it was noticed the positive impact of the CNJ work in terms of increasing human dignity and in terms of promoting human rights in prisons.

4. Final Considerations

Brazilian prisons historically rely on the dehumanization of inmates and their backgrounds. Furthermore, this mirrors structural issues from Brazilian society, such as social inequality and systemic racism, by which black (and indigenous) people are more likely to be imprisoned. Other gender aspects play a part, when it comes to the particularities of the treatment received by inmates: although the majority of inmates is composed of men, women are specially affected by it and their specific vulnerabilities are often overlooked by the institutions¹⁷. Likewise, LGBTQ+ community is a natural target of prejudice, in and out of the judicial system, and when it comes to human rights violations, they are more vulnerable to the inaction from the State in guaranteeing basic rights and meeting their basic needs. Even though prisons are ‘total institutions’ in which human rights violations are more likely to occur, it is important to not take these particular issues as something abstract or inherent to the

¹⁷Check it on: GOFFMAN, E (2001). *Manicômios, Prisões e Conventos*. Editora Perspectiva.

prison system. Although rights and liberties violations in prisons are not something recent in Brazilian history, its worst effect is to perceive the unbearable treatment of prisons as something natural and, so, to allow its continuity. Based on this, the overcrowding of prisons is just part of the problem when it comes to the maintenance of prisons and it can lead to the false conclusion that the problem of Brazilian prison system relies solely on building new prisons. Besides building new facilities, the existing ones often have poor infrastructure and the maintenance of basic needs in prison is often a challenge for its administration. Many of the basic hygiene and supplies are in charge of the prisoner family or his/her own money. That is when the organized crime plays a role, giving material support for the prisoner and its family, often when the State does nothing in that sense. That is specially felt by the young and poor inmates (the majority), that are pushed to make alliances in order to survive.

The research aimed to assess the role of the Brazilian Judicial Power in the protection of human rights in prisons, in the light of the actions of the 'Supreme Federal Court' (STF) and the 'National Council of Justice' (CNJ). But rights violations in prison cannot rely solely on the Judiciary actions; they may certainly contribute, but the big picture shows that the complexity and contradictions of the Brazilian State merge together and enable the chaos in the prison system to rise. Thereby, it was initially studied the division of jurisdiction among the Executive, the Legislative and the Judicial branches, as well as the Federative separation within Brazilian State. So, the Legislative Powers from the Federal States, from the Federal District and from the Federal Union are responsible for ruling on penitentiary law (art. 24, I, 1988 Federal Constitution) and, consequently, the Executive Powers of these entities are responsible for managing the prisons. So, in terms of Executive and Legislative branches actions and inactions, it may be important taxes and wealth distribution, as well as proactive political measures, for correcting the infrastructure problems and complying with the inmate's rights and liberties. Also, to tackle criminal issues and roots to rights violations, the State would have to retrieve full control over the prison facilities that are currently controlled by criminal organizations and to review its dysfunctional drug policies. To do so, it would be necessary to have strong and coordinated measures among branches, to which seemingly there is no forecast or political intention.

In terms of the role of the Judiciary in protecting these rights, the analysis of the STF role in rights and liberties protection indicated ambiguous actions. Although STF had held precedents favoring the rule of law, the protection of human rights in prisons and the general improvement of living conditions in prisons, it has also promoted incarceration measures by hardening the law enforcement, worsening the chaotic situation of the Brazilian prison system. An example of that would be oscillation on STF's understanding about the 'presumption of innocence', and about the possibility of one serving his/her sentence before the final and unappealable conviction. However, the ADPF n. 347 recognition of the 'unconstitutional state of affairs' was an important step towards rights and liberty protection in prisons, since it allowed grounding for other judicial requests aiming at rights protection and the compliance with the legal commands.

Moreover, it was noticed that CNJ led several institutional initiatives towards rights protection in prisons, by its many programs and projects avoiding needless imprisonment and promoting alternative measures to prison. Additionally, since CNJ is a body that binds the whole Judicial system, it has some jurisdiction in regulation of judicial activities, aiming at unifying proceedings and orienting judicial practice throughout the country, helping the judicial system in general. Hence, it was noticed a positive impact by CNJ's work in terms of increasing human dignity and living conditions in prisons.

Finally, it is suggested that this research could be deepened by further research on a smaller scale, studying how the public entities have worked in the granting of rights within the Brazilian states and the inactions that have promoted the chaotic Brazilian prison system.

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