

CONTROLLING THE ACTIVITY OF CRIMINAL FACTIONS WITHIN THE BRAZILIAN PRISON SYSTEM

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I. THE CHARACTERISTICS AND CURRENT STATE OF ORGANIZED CRIME AND TERRORISM

A. The Current State of the Brazilian Prison System

In June 30, 2014, which is the date of the latest official data available¹, Brazil had a prison population of 607,731 inmates, distributed in 1,424 prisons spread over the country. The installed capacity of these prisons is 376,669 places², which means that there is an overcrowding of 61%. The prison population grew by an average 7% per year from 2000 to 2014, while the total population grew only a much smaller average of 1%.

In absolute numbers, Brazil has the fourth largest prison population in the world, after the United States, China and Russia. Relative to their general population, rates of imprisonment in these countries also rank Brazil as the fourth largest prison population: only the United States, Russia and Thailand have more people behind bars.

The Brazilian federal prison system comprises 4 prisons, each one with 208 vacancies, where the most dangerous criminals and leaders of criminal organizations are held. All other prisons are run by the states. The state of Espírito Santo manages 35 prison units. By June 13, 2017, it counted 19,778 inmates for a total of 13,873 vacancies.

B. The Current State of Terrorists in the Brazilian Prison System

Terrorist groups and cells have not been acting significantly in Brazil. There have been no reports of terrorist attacks since the country's re-democratization in 1986. There are groups of individuals carrying out illegal activities similar to terrorism. However, they do not fit into the most usual international definitions. Among them, left-wing oriented social movements such as the Landless Rural Workers Movement (*Movimento dos Trabalhadores Rurais Sem Terra - MST*), which promote occupation and often depredation of public buildings, as well as highway blockades. Also, the news has been frequently reporting attacks to police facilities and public buildings promoted by criminal organizations related to drug trafficking, such as the First Command of the Capital (*Primeiro Comando da Capital - PCC*) from São Paulo and the Red Command (*Comando Vermelho - CV*) from Rio de Janeiro.

The National Security Act issued during the military government (Law 7170/1983) incorporated a broad definition of terrorism, which was criticized by Criminal Law scholars for not describing in detail the criminal conduct, as can be seen from article 20:

Article 20 - Devastating, pillaging, extorting, robbing, kidnapping, keeping in false imprisonment, setting fire, wrecking, provoking explosion, assaulting individuals or carrying out acts of terrorism, for political non-conformity or acquisition of funds intended for maintaining clandestine or subversive political organizations. (Punishment: imprisonment, from 3 to 10 years.)

Sole Paragraph - Should the assault result in aggravated battery, the punishment shall be increased in up to double; should it result in death, the punishment shall be increased up to three times.

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¹ <http://www.justica.gov.br/seus-direitos/politica-penal/documentos/relatorio-depen-versao-web.pdf>

² The Globo Media Group, in January 2017, has come to the number of 668,182 inmates for 394,835 vacancies, which means an overcrowding of 69.2%. <http://g1.globo.com/politica/noticia/am-supera-pe-e-lidera-ranking-de-superlotacao-em-presidios-brasil-tem-270-mil-presos-acima-da-capacidade.ghtml>

In fact, the conduct criminalized by virtue of article 20 was similar to then existing definitions of criminal acts. New definitions brought by Law 7170/1983 were qualified as “crimes against national security, political and social order” depending on the element of *mens rea*. Criminal intent sufficient to qualify such offences, however, was not clear. On the other hand, the conduct of terrorism was described only as “carrying out acts of terrorism”.

With the intensification of international terrorism, notably after the 9.11 attacks in New York, Brazil became a signatory to international agreements and was pushed to pass legislation that would promote more modern and detailed criminalization of terrorism. Such legislation has become more urgent with the designation of Brazil to host world events such as the 2014 FIFA World Cup and the 2016 Olympic Games.

Law 13260/2016 came into force on March 2016, a few months before the Olympic Games. It incorporated the following legal definition of terrorism:

Art. 2 Terrorism consists in the practice by one or more individuals of the acts foreseen in this article, for reasons of xenophobia, discrimination or prejudice in regard to race, color, ethnicity and religion, when committed for the purpose of provoking social or generalized terror, exposing persons, property, public peace or public safety to danger.

Paragraph 1. The acts of terrorism are:

I - use or threaten to use, carry, keep, possess or bring explosives, toxic gases, poisons, biological content, chemical, nuclear or other means capable of causing damage or promoting mass destruction;

II and III - (VETOED);

IV - to sabotage the functioning of or to seize, with violence, by means of posing a serious threat to persons, or through making use of cybernetic mechanisms, the total or partial control, albeit on a temporary basis, of means of communication or transportation; ports; airports; railways or bus stations; hospitals; nursing homes; schools; sports stadiums; public facilities or places where essential works of public services are performed; facilities for the generation or transmission of energy; military installations; facilities for the exploration, refining, and processing of oil and gas; and bank institutions or their service network;

V - to make an attempt against the life or physical integrity of a person.

Penalty - imprisonment, from 12 to 30 years, in addition to the sanctions corresponding to the threat or violence elsewhere prescribed.

Paragraph 2. The provisions of this article do not apply to the individual or collective conduct of persons in political manifestations, social movements, trade unions, religious, class or professional category, directed by social or claim purposes, aiming to contest, criticize, protest or support, with the purpose of defending constitutional rights, guarantees and freedoms, without prejudice to the criminal classification contained in law.

The aforementioned statute has been enforced only once, in the so-called *Hashtag case*, which culminated in the arrest of 10 persons suspected of terrorist activity on July 21, 2016. In September 2016, Brazil's Federal Prosecution Service indicted eight of those persons based on the new counter-terrorism law. On May 4, 2017, the defendants were sentenced to imprisonment from 5 to 15 years. The sentence is still subject to appeal. Four of them are currently under pre-trial arrest, incarcerated in federal prisons³.

Considering the limited importance of Brazil to international terrorism and the fact that anti-terrorism legislation was passed a little more than a year ago, with only one sentence of conviction imposed so far, Brazil has no experience with the rehabilitation of prisoners convicted of terrorism.

³ http://brasil.elpais.com/brasil/2017/05/06/politica/1494076153_663185.html

C. The Current State of Organized Crime in Brazil

On the other hand, organized crime has played a key role both in the context of high-level national corruption and in the context of urban violence related to drug trafficking.

As to the first, it is worth mentioning the now worldwide famous *Car Wash case*⁴, which has revealed criminal acts by the current President of the republic, former Presidents of the republic, ministers and former ministers, congressmen, state Governors, hundreds of politicians and low-level civil servants, in association with the largest business groups in the country. It has already been shown that this criminal organization was responsible for fundamental decisions in the direction of the country in recent years. *Car Wash* has resulted in several defendants being convicted so far, whereas some other defendants are still under pre-trial arrest. Corruption-related organized crime, however, is not relevant in the context of the prison system.

Organized crime related to drug trafficking is the most pressing problem for the Brazilian prison system. In March 2017, around 32.6% of prisoners were held for illicit drug trafficking⁵. Among women, the percentage grows up to 70%⁶. In addition to that, trafficking of illicit substances fuels firearms and ammunition smuggling, as well as the bulk of police corruption. Most homicides are related to drug trafficking. Even property crimes such as theft, bank or vehicle robbery have a strong link to the trafficking of narcotics, as they are a means of financing drug use, paying debts related to trafficking, or simply a way to raise money for criminal organizations, when the crackdown of drug trafficking itself increases.

It should be stressed that simple personal consumption of drugs, although still formally a criminal offence, does not lead to imprisonment, since a number of alternatives to incarceration are at hand. In fact, drug users are seldom being subjected to law enforcement. Even petty trafficking has been treated more leniently by the courts. As a result, it is unlikely that a defendant will be sentenced to a long prison term for drug trafficking alone.

Thus, it can be said that criminal organizations related to drug trafficking are responsible for the most criminal convictions. The greatest threat to the correctional system, however, is the domination of prisons by these organizations, known as criminal factions.

D. The Current State of Organized Crime in the Brazilian Prison System

In October 2016, the warfare between aforementioned criminal factions PCC and CV led to rebellions in the states of Rondônia, Roraima and Pará, with the death of 18 detainees. In 2016, Brazil had 379 violent deaths inside prisons. The state of Espírito Santo had none⁷.

In January 2017, the same 'war' led to the deaths of 60 inmates inside a prison in the city of Manaus, state of Amazonas, and 33 inmates were killed in Roraima. In Manaus, the victims were members of the PCC, while in Roraima the members of the PCC were the executors. Between January 1st and 16th 2017, violent deaths in Brazilian prisons reached a peak of 133⁸.

These events of violence and related numbers demonstrate that many prisons are completely dominated by criminal organizations. Over them, the state has no control. Very often, state control is only exercised off the walls, to prevent prison-breaks, whereas the internal routine of prisons is dictated by the leaders of criminal factions.

Even in state-controlled prisons, order is often maintained only by the separation of prisoners affiliated to different criminal factions in different wings, which makes those prisons a space for strengthening these organizations and increasing their internal cohesion.

⁴ For a case presentation in English: <http://www.mpf.mp.br/atuacao-tematica/sci/car-wash-case/car-wash-case-brasilia-april-2016.pdf> The official website in portuguese is <http://lavajato.mpf.mp.br/lavajato/index.html>

⁵ <http://g1.globo.com/politica/noticia/um-em-cada-tres-presos-do-pais-responde-por-trafico-de-drogas.ghtml>

⁶ <https://jota.info/artigos/10-anos-da-lei-de-drogas-quantos-sao-os-presos-por-trafico-no-brasil-24082016>

⁷ <http://g1.globo.com/politica/noticia/brasil-teve-mais-de-370-mortes-violentas-nos-presidios-em-2016.ghtml>

⁸ <http://g1.globo.com/bom-dia-brasil/noticia/2017/01/mortes-em-presidios-do-pais-em-2017-ja-superam-o-massacre-do-carandiru.html>

The domination of criminal factions over the prison system is fundamentally linked to the lack of resources being invested in the prison system: (i) lack of investment in the increasing of vacancies, which leads to permanent overcrowding; (ii) low numbers of prison staff, leading to difficulty in controlling inmates; (iii) lack of investment in technologies such as surveillance cameras, metal detectors, X-ray machines; (iv) lack of physical structure for legal, medical, dental, psychological and social assistance; (v) permission for visitors to bring inside prisons food, clothing, medicines and hygiene material, which are not adequately supplied by the state; and (vi) lack of job opportunities, education and professional qualification.

The state of Espírito Santo has made massive investment in its prison system over the last ten years. These investments led to the building of new prison units, the hiring and training of prison staff, and ultimately the re-gaining of prison control by the state, with full provision of all the needs of inmates and the prohibition of private materials inside the prison system. For those reasons, Espírito Santo has been currently regarded as a model for other states in Brazil.

II. DISENGAGEMENT INTERVENTIONS IN PRISON

A. Prison Intelligence and the Separation of Faction Members

For the disarticulation of criminal organizations in the prison system, prison intelligence activity plays a crucial role. Prison intelligence works by identifying negative leaders in the prison environment, members of wealthy criminal organizations, violent prisoners, prisoners capable of inciting uprising and indiscipline.

Initially, these prisoners are separated inside the prison unit in specific wings or cells. The most serious cases are transferred to maximum security units or to the federal prison system.

Practice has shown that the separation of prisoners by criminal offence type, with the exception of a few exceptional cases such as sexual offences, is not the best strategy. Separation of prisoners in accordance with their level of reintegration can be more effective. First, if the focus is on social rehabilitation and reintegration, the most important thing is what the prisoner sees in his/her future instead of the crime he/she has committed in the past. Second, the absolute majority of prisoners have been sentenced for drug trafficking or related offences, so there is significant homogeneity. Third, the grouping of prisoners who study, work, or take part in a particular rehabilitation programme facilitates their movement inside prison facilities, and stimulates the mutual encouragement to maintain discipline and make progress towards re-socialization. In addition, for security reasons, since inmates who work or study may be pressed by others to bring prohibited items to the cells or carry unauthorized communications, it's better that they dwell separately.

In addition to prison intelligence considerations, classification and separation are decided by multidisciplinary commissions, the Technical Classification Commissions, taking into account a range of criteria.

Acts of indiscipline are punished through administrative processes. Serious misconduct reflects in the impossibility of obtaining progression of prison regime and legal benefits such as pardon, grace, commutation of sentence or conditional release. Less serious misbehaviour entails less harsh consequences, such as temporary bans on social visits or intimate visits, bans on playing games in the cells or watching movies or TV in the wings.

Law 10792/2003 introduced what is termed Differentiated Disciplinary Regime (*Regime disciplinar diferenciado* - RDD). This prison regime is designed for highly dangerous prisoners, and is intended to last a maximum of a 1-year term in which the prisoner is deprived of collective activities, work or study, remaining 23 hours a day in his individual cell. Social visits and interviews with lawyers, however, are maintained. If separation in specific wings or maximum-security units does not suffice, the detainee may be put under RDD.

Law 11671/2008 regulated the system of federal prisons, designed to remove inmates with great articulation capacity from their state of origin. The federal system is the destiny of the top leaders of criminal factions. Although some degree of communication with the criminal faction outside prison still remains, no breakouts have been reported since its creation.

The isolation of leaders of criminal factions is impossible as long as they are entitled to contact visits, whether social visits or intimate visits, or even have physical contact with lawyers. The other way of breaking the isolation regime is by means of corrupting prison agents.

Apart from the isolation of members of criminal factions from the outside world, segregation of members of criminal organizations from other prisoners who are not part of these organizations is crucial. These prisoners become employees or servants of faction members and begin to carry out their orders, including outside prisons upon release. These orders are related especially to sending scraps abroad; practising acts of indiscipline, and even beating up or executing prisoners of other factions.

Criminal organization members seek to be as disciplined and obedient as possible, in order to be entitled to the benefits related to good behaviour, and to get out of jail quickly. All their indiscipline acts are carried out through the other prisoners, who even assume the authorship of the leader's crimes or disciplinary faults.

B. Progressive Execution of the Prison Sentence

The execution of sentences in Brazil takes place progressively. There are three statutory penalty regimes: closed, semi-open, and open regimes. A convicted defendant may begin to serve his/her sentence in any of these regimes depending on the length of the sentence imposed, the type of crime committed and the personality of the sentenced person. Then, after certain periods of time and maintaining good behaviour, a prisoner can progress to a more favourable regime.

A closed regime is executed in maximum-security or average-security prison units. It allows the inmate to work, study or participate in re-socialization programmes inside the prison unit. Initial closed regime is applicable for prison sentences of more than eight years or those resulting from a conviction for heinous crimes, including terrorism.

A semi-open regime is implemented in the so-called agricultural or industrial colony. It allows an inmate to work or study outside the prison unit if certain requirements are met. A prisoner is entitled to temporary exits of up to seven days, up to four times a year. It is the initial prison regime for sentences from four to eight years of custody.

An open regime is based on self-discipline of the inmate, who must work or study outside the prison system without supervision, remaining at a designated place at night and on days off. Although it is expected that the sentenced would sleep at certain public establishments called sheltered houses (*Casa de albergado*), due to their scarcity, usually they practice the house recollection. Community labour and periodic attendance at court may also be added as conditions of this prison regime.

In many states in Brazil, the open regime can be executed through electronic monitoring. The main use of electronic tagging, however, is as a substitute for pre-trial detention.

There is also conditional release (*livramento condicional*), by means of which an offender can leave prison under parole. It is intended for those convicted who have served one-third to two-thirds of the sentence, depending on the crime committed. He/she must comply with certain conditions such as attendance by social service staff.

III. MECHANISMS FOR REHABILITATION AND SOCIAL REINTEGRATION

The main mechanism of social re-insertion carried out in prison units is internal and external work, paid or voluntary — unpaid, but never forced. Unpaid work is not mandatory under the Brazilian legal framework, but it allows a reduction of sentence and is one of the main factors taken into account when selecting an inmate for paid work. Work of the inmate is stimulated with tax benefits and exemption from labour charges. Nevertheless, it still faces great resistance from society and companies, so there are few workplaces in the prison system.

Likewise, formal education and professional training are not compulsory, but they ensure a reduction of the sentence term, preparation for a paid job during the sentence and afterwards. Despite the absence of

statutory provision, judges sometimes admit that the mere reading of certain books, accompanied by a review to be evaluated by an appointed teacher, can also reduce prison time.

Psychological care and treatment of the prisoner's health are fundamental mechanisms for re-socialization, in large part by the recovery of self-esteem and dignity, especially when it comes to dependants of chemical substances.

There is also strong presence of social services, seeking to resolve documentary barriers to work and promoting the monitoring of prisoners by families.

A major ally of the prison system are religious assistance groups, almost entirely Protestant and Catholic Christians. They have easy access to prison units, to attend individually and to worship in common. In almost every case, desisting from crime and drug use is heavily influenced by religious engagement. In any case, for many sentenced persons, religious practice does not prevent them from returning to their previous criminal life as soon as they leave the prison system.

Experience in the prison system shows that family and religious practice are the most important motivational factors for re-socialization. In the case of members of criminal organizations, they are the only ones.

Criminal factions are governed by their own statutes of mutual protection and vows of reciprocal loyalty. Desertion is punishable with death as provided in the PCC statute. In some other criminal factions such as the First Command of Vitoria (*Primeiro Comando de Vitória - PCV*), in addition to death, the individual conversion to a Christian faith is the sole reason accepted for abandoning the faction.

Drug trafficking is a highly profitable economic activity, which allows individuals to enjoy an economic standard of living absolutely inaccessible to people without formal education, who came from humble families and who have no interest in working hard. It is difficult for the common trafficker to comply to the rules of honest work, which requires much more dedication and discipline and provides much smaller gains. This breakup requires a great deal of will, family support, and humility.

For members of criminal factions, the punishment of death for desertion is the factor that virtually prevents their re-socialization. After adhering to a criminal faction, criminals treated each other as "brothers" and enter a network of mutual protection that provides them with legal and financial support and protects their family when they are incarcerated. Upon release, they have an obligation to remain in their previous criminal life in order to obtain resources for the faction to be able to also support those who are in jail. Desisting from crime and breaking such commitment are considered crimes that cannot be forgiven, subject to capital punishment. Only if he/she can move away and disappear, along with his/her family, would it be possible for him/her to untie.

IV. CONCLUSION

Terrorist organizations still have little penetration and little activity in Brazil. Criminal organizations linked to drug trafficking, however, play a leading role not only in criminal life in general, but also in the functioning of Brazilian prisons. There are many prison units controlled by criminal factions, responsible for almost all murders within the prison system.

The lack of investment in the prison system, either because of lack of resources or because of political disinterest, is the main reason why the state has lost control of these prisons.

There is a plethora of support activities aiming at re-socialization, promoted by the state, although insufficient due to lack of resources. The re-socialization of members of criminal factions is largely hampered by the death penalty they impose on deserters, combined with the low profitability of legal activities as opposed to those coming from drug trafficking.

Only the neutralization of these organizations within the prison system, through effective control by the state, can prevent their continued growth and serve as a basis for the fight by the criminal law enforcement

agencies on the streets.