

SPECIAL NEEDS OFFENDERS IN THE BRAZILIAN CORRECTIONAL SYSTEM — FOCUSING ON INCARCERATED WOMEN

*Duciran Farena**

I. PRISION IN BRAZIL'S LEGAL SYSTEM — FRAMEWORK

The Brazilian Constitution ensures gender equality in all circumstances, the protection of the elderly and the needy, and sets the age of criminal responsibility at 18 years old (below this age, minors are not subject to the criminal justice system, but only to a set of protective measures, of which the most serious is the confinement in Juvenile Reeducations Centres for up to three years).

The Brazilian Constitution ensures to all offenders the right to corporal and moral integrity, due process of law, and the right not to be subjected to torture or other inhuman or degrading treatment (article 5). It also assures that every violation of rights can be subjected to the review of the Judiciary, and assures full and free legal assistance to the needy. Convicts must serve their sentences in separate facilities, according to their situation (sentenced inmates or pre-trial, first offender or re-offender), the nature of the offence, age and sex (article 5, XLVIII).

The right to counsel and access to justice extend to the procedures for the deprivation of freedom, which in Brazil, is subject to judicial authority, and is carried on by a specific court called the “Penal Execution” Court (For lack of a better translation, “Penal Execution” Court should be understood as a special court in charge of measures related to the deprivation and restriction of freedom).

Article 8, paragraph “e” of the Inter-American Convention on Human Rights assures that the defence of all inalienable rights is “to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.”

The Brazilian Law recognizes the human rights of the imprisoned and incorporates the 1955 United Nations Standard Minimum Rules for the Treatment of Prisoners. The focus is not retribution, but embodies the purposes of rehabilitation and reintegration into society. The administration of punishment should be conducted so that the prisoner becomes able to reenter society. This reentry is prepared throughout the progression of the prison regime, from incarceration to parole. Alternatives to detention are provided by law, such as bail, community service and probation. The law also establishes the separate housing of incarcerated men and women, and requires that those in custody before final sentence must be held apart from sentenced inmates. The classification of inmates is based on the law by technical bodies, but has little effect in practice, given the overcrowded situation of Brazilian prisons.

Under the Law n. 7210/84, convicts are entitled not only to respect for their physical integrity and dignity, but also to paid work, education, healthcare, social security, etc. The law ensures even the basic requirements of the cell units, like floor space, sleeping accommodation, sanitary conditions, among others. An example of the humanizing effort of the law is the protection of the right to intimate visits for both sexes (art. 41) in which the spouse or companion of the inmate can visit the inmate at predetermined times. Recently this right has been extended to same-sex relationships, although there are still difficulties in putting this into practice. Another example is social security protection given to families whose primary provider has been incarcerated. However, the extent of this benefit is small, for it is limited to those who had formal employment at the time of sentencing. In most cases, the

*Federal Prosecutor, State of Paraiba, Federal Public Prosecution Office, Brazil.

family of the detainee has to resort to general social programmes for the poor.

This set of rules, unfortunately, has not been enough to ensure the humanization of the Brazilian correctional system, still marked by inhumane treatment, overcrowding, and lack of legal assistance, healthcare, labor and education. A significant proportion of inmates are illiterate or semi-literate and not able to understand their rights. The rights of prisoners, including progression, are violated, contributing to overpopulation and recurrent episodes of prison violence, as seen in Carandiru (1991), Urso Branco Penitentiary (2002) and the Pedrinhas Penitentiary (2013).

II. SPECIAL NEEDS OFFENDERS IN THE BRAZILIAN CORRECTIONAL SYSTEM — FOCUSING ON INCARCERATED WOMEN

The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) state that family visits will be encouraged and facilitated by all reasonable means:

Women prisoners' contact with their families, including their children, and their children's guardians and legal representatives shall be encouraged and facilitated by all reasonable means. Where possible, measures shall be taken to counterbalance disadvantages faced by women detained in institutions located far from their homes.

Addressing the problem of incarcerated mothers, the Brazilian Constitution provides that "imprisoned mothers shall be ensured conditions that [they] can stay with their children during the period of breastfeeding" (art. 5, G). On the other hand, the Law 7210/84 ensures that mothers who have newborns will receive special assistance. It provides, therefore, medical assistance to the women, "especially in the prenatal and postpartum, assistance extensive to the newborn" (art. 14, § 3). Women's prisons must have "nurseries where inmates can take care of their children, including nurse them [until at] least six months old."

Women's penitentiaries must be endowed with a section to house pregnant and parturient women and their dependent children for six (6) months and less than seven (7) years, for the purpose of watching helpless children whose guardians have been incarcerated.

Under the Brazilian Penal Law, there is no specific provision for alternative measures to detain women. In theory, all defendants and convicted persons are entitled to the same alternatives provided for in the Penal Procedures Code: custody as a last resort, plea bargaining and suspension of prosecution for minor offences, substitution of the punishment for community service, etc.

Despite the legal provisions, few female prisons in Brazil meet the requirements of the law. Female inmates in Brazil suffer from the same general problems of the correctional system, in particular overcrowding and lack of medical and legal assistance. When there is a nursery, the mother and her newborn can only remain there for the first few days after birth in view of the need to make room for other mothers. She then has to return with her child to an unsanitary cell and uncertain conditions.

III. CHARACTERISTICS OF THE OFFENCES COMMITTED BY SPECIAL NEEDS OFFENDERS, FOCUSING ON INCARCERATED WOMEN

According to INFOPEN (Brazil's National Penitentiary Information System) data (2012), Brazil currently has approximately 549,577 incarcerated persons, of which about 36,000 are women. It is the fourth largest prison population in the world, second only to the United States, Russia and China. The country has a rate of about 228 prisoners for every 100,000 inhabitants. The majority of the population are held (both convicted and defendants) for state crimes (543,158 men and 35,367 women).

One of the characteristics of the Federal Justice System is the large number of inmates held for international drug trafficking (5,803 men and 994 women — including Brazilians and foreigners). Drug trafficking and crimes against property count for the majority of the sentences and pre-trial detentions. Lengthy trials — because of the overload of criminal cases — appeals and social pressure for aggres-

sive responses to crime led to the excessive use of custody and to the proportion of 42/43% of the inmates held in custody.

The Brazilian prison reality reflects the country's social inequality, and the vast majority of inmates come from the lower levels of the population. Persons detained for economic crimes, despite extensive punitive legislation, are rare. The shortcomings of the legal system allow numerous opportunities for white-collar criminals to evade justice, leaving the system with traditional targets, crimes related to protection of property, murder and especially drug trafficking.

Anti-drug laws enacted in the end of the last century providing for stricter penalties for drug trafficking resulted in an explosive increase in the Brazilian prison population — among these, in particular, the female prison population. Studies carried on in some women's penitentiaries indicated that 80% of women are incarcerated for crimes related to drug trafficking, basically for complicity with companions or husbands. In many cases they are arrested on drug trafficking charges for trying to smuggle drugs to their husbands in prison.

Another feature of the Brazilian prison reality that affects women is the fact that almost 50% of prisoners are defendants in custody. Although the law also ensures their rights, few pre-trial prisoners have effective access to these. It is not rare to have cases in which prisoners remain detained for up to four or five years waiting for hearings or trials in minor offences, even when only convicts of the most serious crimes serve that time in the heaviest closed regime.

The Brazilian criminal system does not provide special treatment for women in criminal proceedings (before the definitive judgement). Circumstances such as background history, criminal records, social behaviour, having children or family to care for, can be taken into account in sentencing by the magistrate. Regardless of gender, sentences of up to four years can be replaced by restrictions or community service, if the crime does not involve violence or serious threat, like when a gun is used. Being more than 70 years old at the time of the sentence is a mandatory factor for reduction of jail time.

There is a National Health Prison System Plan, which provides for specific measures to ensure adequate and differential treatment for women's health. Unfortunately, this plan suffers resistance of the States that contain most of the prison population.

Minors under protective measures that involve confinement (in cases like drug trafficking, assault, robbery and murder) have the rights to education, sports, job training, ensured by law. However, most of the Juvenile Reeducation Centers across the country are no different from an adult prison. Frequently, the only educational services available are a few classes.

The convicts suffering from diseases or disabilities can, in general, when they have better economic conditions, hire good lawyers and are allowed to remain under house arrest, given that prisons are not adapted for the disabled and cannot treat serious medical conditions. Although it is not common to find inmates in wheelchairs or seriously ill patients in Brazilian prisons, it is more common to find them among pretrial detainees.

During the penal procedure, persons diagnosed as mentally ill, i.e., unable to understand the consequences of their actions, they cannot be sentenced to criminal punishment, and they are sent to mental hospitals or clinics for treatment. If the psychotic disorder appears in prison, the inmate will have the problem of the lack of access to healthcare and to the Penal Executions Court, which has the power to send the inmate for specialized treatment.

IV. MAIN PROBLEMS FACING SPECIAL NEEDS OFFENDERS AND FEMALE INMATES

A. Lack of Legal Assistance

This problem particularly affects women. Statistics in certain prisons show that half to 80% of the inmates did not appeal their cases, which is quite unusual in a legal system where appeals are risk-free (there are no costs, a court cannot increase a sentence, and the appeals improve defendants' chances to

benefit from the country's generous statutes of limitations).

This indicates not only the background of poverty, but also the lack of effectiveness of the performance of the public defenders who attend to those who cannot afford their own lawyers. If the service is poor during the criminal procedures, the situation gets worse during the correctional procedures (as explained before, these procedures are subject to judicial review) when the counsels' actions are virtually reduced to petitions.

B. Excessive Use of Pre-Trial Detention

Excessive use of pre-trial detention by judges, even in cases where the law, following the principle of prison as the "last resort", provides alternative measures. This situation is worse when the defendant is poor and has poor legal advice.

C. Arbitrary Denial of Rights

As a result of the lack of legal assistance, rights of prisoners are often completely bowled over. Unjustified denial of intimate visits, a humanizing benefit provided by law, is common. There can be no unjustified refusal of this right except in cases of disciplinary offences. In many cases, the inmate has to petition the judge to secure this right, but why the ban was imposed is never investigated.

D. Right of Defence in Disciplinary Offences

The law guarantees the right of defence in the accusation of disciplinary offences, but this right is rarely guaranteed. Often the inmate is not even informed why he or she is being punished. Collective punishment, though forbidden by law, is often applied, like in cases of prison riots and when weapons are found with no culprit in sight. The sanctions have consequences on the progression of the prison regime and can prevent the inmate from obtaining benefits.

E. Invasive Strip Searches

Here the gender difference is manifested with all its intensity in the prison system, affecting the female visitors, who are forced to undress completely in inappropriate environments and are subjected to strip searches, including body cavity searches, under the justification of security needs. The strip searches are also made in women who return to prison after leaving. The fact that they are conducted by female staff does not reduce the humiliation and exposure. Even children visitors are subject to these measures, discouraging the inmate's family from visiting, and thus violating the inmate's right to receive visits.

F. Overloaded Penal Execution Courts Result in Slow Processing of Requests

Progression and concession of benefits, and even concession of freedom are delayed, thus contributing to the overcrowding of the jails.

G. Overcrowded Male and Female Institutions Result in the Violation of Rights to Education, Medical and Psychological Care and Work

Although all these violations can be addressed through lawsuits, in which may be requested even the interdiction of the jails that do not have appropriate conditions, this kind of litigation is rarely used or faces resistance from judges who dismiss them on formal, or technical, grounds.

H. Lack of Support for Reentry of the Inmates into Society

The legal provisions for assistance, including job opportunities and community support, not have materialized.

I. Insufficient Recruitment of Prison Staff, Often Unprepared to Achieve the Goals of Rehabilitation and Focused Only on Repression

The surge of criminal groups operating inside the prison system ultimately has exacerbated this trend and even led to spurious agreements between the prison staff and criminal groups. There are prisons where criminal organizations have effective control and from there coordinate criminal actions outside the prison walls. Disputes over control of prisons by criminal organizations result in frequent massacres, such as that of Pedrinhas Correctional Centre. In women's institutes, the situation is not as catastrophic, but there is a high incidence of suicides, and idleness leads many women to illegal actions

such as smuggling drugs into the prison.

J. Prisons in General are Poorly Administered with No Professional Management

Corruption is widespread, as is impunity. Overall, the direction is given to military or police officers whose only concern is to prevent riots that can provoke bad repercussions. Daily violence, even if in the form of homicides, is more tolerable than rebellions or massacres. The focus of the action ends up being repression, even against legitimate claims.

V. POSSIBLE SOLUTIONS

The Brazilian Prisons Law is one of the most advanced in the world, but the Brazilian prison system is among the worst. It is hard to find another segment of Brazilian life in which the gap between law and reality is greater. Considering the inhumane conditions of the Brazilian prison system, there are no easy solutions to these problems. Unlike the common sense argument that the correctional system in Brazil only needs more financial investment, the enforcement of existing legislation depends mainly on the change of attitude of those involved in the judicial system. We need to change the punitive mentality that prevails in the judiciary and the legislative branch in order to reduce the extensive use of custody. By law, judges are responsible for the situation of the prisoners, but they tend to see the prison system as something external to their functions. Training in alternative measures to detention, and providing the necessary resources to expand personnel and infrastructure of the Penal Execution Courts, often relegated to the background in the judiciary budget, are other measures whose adoption is urgent.

Legal changes are also urgent, such as expanding prosecutorial discretion and offering tax benefits for companies who participate in the reintegration of prisoners into society. It is still important to create procedures and mechanisms to ensure rapid punishment of prison officials involved in abuses against prisoners and corruption, as well as providing a correctional administration that is organized, professional and transparent.

Last but not least, it is important to ensure the performance and effectiveness of Human Rights Organizations, like the Committee for Prevention of Torture, and to support unannounced visits to institutions, which can help the situation of the offenders, in particular those who have special needs, like women, the elderly and the disabled.