International Journal of Humanities and Social Science Invention (IJHSSI)
ISSN (Online): 2319 – 7722, ISSN (Print): 2319 – 7714
www.ijhssi.org ||Volume 9 Issue 3 Ser. II || Mar, 2020 || PP 64-69

Judicialization as a Way to Guarantee the Prisoner's Right to Work: Right to Sentence Redemption, Resocialization and Reduction of Criminal Recidivism in Palmas, Tocantins, Brazil

Tarsis Oliveira1; Paulo Soares2; Ricardo Gonçalves3
[1]Ph.D. in Law from the Federal University of Bahia. Associate Professor of Criminal Law at the Federal University of Tocantins and at the State University of Tocantins.
[2]Ph.D. in Education from UFSCar. Associate Professor of Philosophy at the Federal University of Tocantins.
3Legal Advisor of the Court of Justice of Tocantins, Brazil. Student of the Master's in Judicial Provision and Human Rights of the Federal University of Tocantins.
Corresponding Author: Tarsis Oliveira

ABSTRACT: *Introduction: The objective of this work is to build a theoretical reference that explains the phenomenon of the judicialization of public policies as an essential element to ensure the right to work of the prisoner, ensuring the possibility of remission of the penalty, resocialization, as well as the consequent reduction of criminal recidivism. Method: A thorough study was made from books and online resources. Result: The possibility of guaranteeing the prisoner access to work in the Tocantins prison system has been demonstrated. Conclusion: The judicialization of public politics in the State of Tocantins, Brazil, is an effective mechanismfor the change of the configuration of the prison on behalf of detainees.*
KEYWORDS: *Judicialization; public policies; work; prisoner.*

Date of Submission: 02-03-2020 Date of Acceptance: 19-03-2020

I. INTRODUCTION

Given the "unconstitutional state of affairs"[1] evidenced in the prison system of Palmas (capital of the state of Tocantins, Brazil, this work intends to analyze the judicialization of public policies that ensure the right to work to prisoners of the CPPP (Provisional Penitentiary of Palmas) and URSA (Unit of Half Open Regime in Palmas), using the authors of bibliographic research.

The present work does not examine judicial activism, nor are public-private partnerships the object of analysis. On the contrary, mechanisms to guarantee the fundamental social rights of the prisoners are investigated.

The Federal Supreme Court (STF) recognized that the flagrant inhumanities found in national prisons characterize the Brazilian prison system as an "unconstitutional state of affairs", with the absence of labor supply for prisoners being one of the main factors of non-compliance with the Law of Criminal Execution (LEP).[2].

The CPPP has only 25 from 723 prisoners working. That is, just over three percent, according to data from the National Council of Justice. [3] URSA was destroyed by a fire in August 2016 and the 128 prisoners who are using electronic anklets are under house arrest as an alternative measure of the penalty for lack of adequate establishment for its fulfillment.[4]

Therefore, more than 96% of all prisoners in Palmas do not work and thus have no right to reduction of sentence. Without prison units that satisfactorily comply with the Brazilian Criminal Execution Law, space is opened for rebellions, escapes and criminal recidivism.[5]

Public money spending on private companies for the administration of prisons in the capital of the State of Tocantins have already reached 4,166reais (at about 900 dollars) per prisoner, far greater value than money spent in federal prisons, as already identified in a sentence passed in 2017 by the 2nd Court of Public Records of Palmas.In this lawsuit, probable acts of improbity were detected as practices carried out between the State of Tocantins and the company sued in that court.[6]

The report of a taskforce of the National Council of Justice (CNJ) held at CPPP in 2014 reports the lack of work for the prisoners, frustrating the objectives of criminal execution. In criticism of the situation found there, the Rapporteur mentions that: "[...] the inertia of the Executive is literally endorsed by the Judiciary, further perpetuating social exclusion and unjustified increase of the prison population.[7]

The judicialization of the right to work, whether in a closed or half open regime, removes the image of omission between the Executive and Judiciary and fulfills its constitutional mission to make any state powers comply with the laws that are violated, notably those that guarantee human rights, pointing to the Public

Administration feasible solutions to the prison problem, based on principles related to human rights, as well as on jurisprudences and technical reports that point out the need to guarantee the prisoner the right to work.

II. METHODOLOGY

The scientific method adopted in this research will be the deductive one. From the premises of the Brazilian legal system, treaties on Human Rights, jurisprudence of the STF, andof the Tocantins Court of Justice, technical notes, documents foundon internetand statistical data related to labor and criminal recidivism will be substantiating the conclusion of the work, with suggestions for changes in procedural methods to be adopted by the Executive Power.[8]

The nature of the method will be qualitative, given the complexity of understanding the social reality faced by the phenomenon of judicialization and the lack of compliance of the right to work by the prisoner. Quantitative data will be incorporated into the analysis of expenditures made by the public authorities.[9]

With regard to the objectives, the work will be descriptive. The work will be divided into three steps. The first will contain information about the phenomenon of judicialization; the second will describe the right to work and its interference in the life of the prisoner; the third will present considerations on the work of the prisoner and its judicialization.

III. DISCUSSION

The judicialization of public policies: emergence, conceptualization and effects

In this chapter we will focus through the bibliographic study to understand the phenomenon of judicialization as a result of the increasing performance of the Judiciary in certain areas of Executive and Legislative.

The phenomenon studied here has not only occurred in Brazil, but all over the world in order to expand more and more the role played by the Judiciary, narrowing the gap between the reality of law and politics.

According to Vianna (1999)[10] et al: "politics is judicialized in order to make possible the meeting of the community with its purposes, formally declared in the Constitution".

Considering several studies and scientific productions on the subject of judicialization, it has not been possible to restrict or determine a definitive doctrinal concept for the term. The common understanding is that judicialization can be understood as the expansion of the action of the Judiciary based on the change from the authoritarian system to the democratic system.

Chester Neal Tate[11] conceptualizes judicialization as beingthe process by which courts and judges tend to increasingly dominate the creation of public policies already created by other government agencies, especially legislative and executive ones, and the process by which non-judicial negotiation and decision-making forums become dominated by judicial rules and procedures.[12]

The jurist and minister of the Brazilian Supreme Court (STF), Luiz Roberto Barroso[13], makes this explicit: "Judicialization means that some issues of broad political or social repercussion are being decided by organs of the Judiciary, and not by traditional political instances: the National Congress and the Executive Power - in whose scope the President of the Republic, his ministries and the public administration in general meet. As a result, judicialization involves a transfer of power to judges and courts, with significant changes in the language of argument and the way society participates"[14].

Based on the concepts described, judicialization can be understood as a process in which the Judiciary started to have its fields of action extended, with the main objective of solving social conflicts that should have been solved by the Executive Branch, but which, because they were not attended, become known and decided by the Judiciary power based on what is found in the legal system, with the main purpose of safeguarding fundamental rights and ensuring democracy.

Consequently, the Judiciary becomes the responsible and constituted institution with the legal power to enforce the rights provided for in the legal system. It then becomes possible to perceive judicialization as a process of restructuring the State, in which there are new social actors and new demands that find in the Judiciary the basis with the necessary conditions to ensure fundamental rights, and consequently guarantee the execution of such rights.

To understand the causes of judicialization is simultaneously to understand its necessity, as well as to be aware that this phenomenon has been occurring in several countries with different proportions according to the historical and social context of each nation.

C. N. Tate also points out conditions that facilitate the expansion of the Judiciary that justify the greater use of the Judiciary: countries that have a set of characteristics such as a democratic political system, institutional order based on separation of powers, existence of a charter of rights, access to the Judiciary by interest groups, access to the Judiciary by the opposition, ineffectiveness of the majority institutions in preventing the involvement of judicial institutions in certain political disputes, negative perceptions about the

majority institutions and legitimization of judicial institutions, in addition to a certain degree of delegation of decision-making powers of the majority institutions in favor of judicial institutions.[15]

The aspects presented above should be considered cumulatively, with only variation in their proportion according to the reality of each country.

Thus, it is also possible to see that judicialization is present in a significant part of the world and has its bases firmly established in the democratic system, which, in a certain way, shows a social achievement.

In the following lines, the verification of the phenomenon of judicialization will be justified based on the peculiarities pointed out above.

Democracy is the first and one of the most evident causes of judicialization, since this instrument was not identified in another form of government as the authoritarian, but in the democratic ones it finds fertile soil for its proliferation and strengthening.

This becomes clear from the premise that, based on judicialization, there is the power of review of political acts by the Judiciary, so that only on the basis of a democratic system is its action freely and autonomously authorized and guaranteed. Moreover, it is on the basis of the democratic system that the recognition of rights that may not be guaranteed is made possible.

It becomes clear that democracy allows judicialization by ensuring that members of the Judiciary act independently and protected by the country's Constitution.

That said, and based on the focus of the present study, as it deals with the reality of Brazil, the judicialization gained strength after the promulgation of the Constitution of the Federative Republic of Brazil in 1988.[16] Based on this Bill of Rights, the determinations of fundamental rights are now expressly linked to the Legislative, Executive and Judiciary Powers.

The separation of powers is another factor that influences the judicialization; in this sense it is worth mentioning the teachings of the Minister of the Brazilian Supreme Court, Alexandre de Moraes, who considers that the division according to functional criteria is the famous "separation of powers", which consists of distinguishing three state functions, namely legislation, administration and jurisdiction, which must be attributed to three autonomous bodies among themselves, which will exercise them with exclusivity, was first outlined by Aristotle, in the work "Politics", detailed later by John Locke in the Second Civil Government Treaty, which also recognized three distinct functions, among them the executive, consisting of applying the public force internally to ensure order and law, and the federative, consisting of maintaining relations with other states, especially through alliances. And, finally, consecrated in the work of Montesquieu "The Spirit of Laws", to whom we owe the classic division and distribution, becoming a fundamental principle of the liberal political organization and becoming a dogma by art. 16 of the Declaration of the Rights of Man and of the Citizen, of 1789, and is foreseen in art. 2 of our Federal Constitution".[17]

The idea of the separation of powers has been present since antiquity, but it is consolidated through the theory presented in the work of the French thinker Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, The Spirit of the Laws(1748), retro cited by Minister Alexandre de Moraes. In this theory, each state power has a typical function that must be exercised independently and in harmony with the other powers.

In relation to the typical function of each power, Silva points out: "The legislative function consists of editing general, abstract, impersonal and innovative rules in the legal order, called laws. The executive function solves concrete and individualized problems, according to the laws; it is not limited to the simple execution of the laws, as it is sometimes said; it has prerogatives, and in it all legal acts and facts that do not have a general and impersonal character enter; therefore, it is possible to say that the executive function is distinguished in function of government, with its three basic missions: intervention, promotion and public service. The judicial function has the purpose of applying the law to concrete cases in order to settle conflicts of interest".[18]

The above evidence shows that Montesquieu's theory serves as the essence of democracy, and, consequently, one of the elements that embody the process of judicialization of politics.

The separation of powers in Brazil is enshrined in art. 2 of the 1988 Federal Constitution as a fundamental principle. Thus, it is stated that the Legislative, Executive and Judiciary Powers are constituted of the typical functions determined among articles 44 to 126 of the constitutional text, as well as the atypical functions also delimited therein.

The legal determination of the separation of powers is not enough, it must be reinforced by the system of check and balances[19], because in this way the harmony between the three powers comes into force. There must be no absolutism and the intangibility of each power, intervention in the neighbouring power is necessary every time this balance is notoriously threatened.

In a didactic way, Minister Luís Roberto Barroso explains: "Most democratic states in the world are organized in a model of separation of powers. The state functions of legislating (creating positive law), administering (implementing law and providing public services) and judging (applying law in cases of conflict) are attributed to distinct, specialized and independent bodies. However, the Legislative, Executive and Judiciary exercise reciprocal control over each other's activities, in order to prevent the emergence of hegemonic

instances, capable of offering risks to democracy and fundamental rights. It should be noted that the three Powers interpret the Constitution and their actions must respect the values and promote the purposes set forth therein. In the institutional or legal arrangement, the final word is that of the Judiciary. This primacy does not mean, however, that any matter should be decided in a court of law".[20]

Even if a certain disagreement or misrepresentation of the powers is perceived, there is no doubt that the current Brazilian democratic order is structured on the basis of a system of checks and balances. Through this tool it is possible to ensure balance and, based on this premise, to confer legitimacy to the benefits of judicialization.

Another influential factor for the use of the judicialization of rights is the consecration in the Federal Constitution of the broad access of citizens to the Judiciary to request that their rights be preserved when the entity responsible for this obligation, the Executive Branch, presents obstacles for its fulfillment.

Therefore, the Constitution of the Federative Republic of Brazil of 1988, in its article 5, conferred greater significance to the fundamental rights, since such rights are established in an extensive list with the greater objective of attending and recognizing previous manifestations, as well as protecting the citizen against abuses of public power. Thus, fundamental rights are recognized by means of freedom, social, individual, collective, political and several other rights, based on art. 60, §4, IV, and cannot be suppressed by constitutional amendment, which ensures their permanence in the Brazilian system.

The Constitution, with the determination of fundamental rights, the establishment of the system of constitutionality and the confrontation of subsequent norms with the Brazilian Constitution reinforce and ratify the function of the Judiciary through its role of protecting and caring for the rights democratically placed, so that they do not become mere words illustrated on paper, but can be effectively applied in concrete cases.

In the following lines, the chapter dealing with the right to work as a means of safeguarding fundamental rights will be constructed. Here, the right to work of the prisoner in the penitentiary system will be highlighted.

The Right to Work as a means of guaranteeing fundamental rights

The social value of work is one of the foundations of the Federative Republic of Brazil and agreed upon as a fundamental right to human dignity edited by the General Assembly of the United Nations in 1948 with the publication of the Universal Declaration of Human Rights (UDHR).

Hannah Arendt (2007) highlights the anthropological character of the work, which gives vigor and vitality to the human being.[21]

The work of the prisoner is even more relevant than that of the free citizen, since it is also a "joint work necessary for the interests of the society"[22]. It is through it, among other factors, that the prisoner will demonstrate to be able to be inserted again in the community conviviality.

It will be through the exercise of the work that he will realize that the value of any consumer good lies in the work that is done on it.[23]

By the way, Frederic B. Skinner[24] has studied observable behavioral processes that have given rise to the philosophy of radical behaviorism, related to operant conditioning, demonstrating that positive reinforcement stimuli can lead individuals to a certain desired and perennial attitude.[25] The prisoner needs this positive reinforcement to become permanently aware of the importance of good social coexistence, collective concern for the observance of laws and protection of the environment. In this sense, the Public Power must offer adequate education and work conditions to the detainee.

The Executive Branch of the State of Tocantins, however, has been the target of harsh criticism and various lawsuits for its notorious lack of attention to the fulfillment of its constitutional functions in relation to the needs of the CPP and URSA prisoners, especially for the absence of guarantees of basic rights of that prison population.

Due to these omissions, the representative of the community finds himself obliged to request the judicialization of rights, and, with this, provoke the manifestation of the Judiciary of Tocantins, almost as a rule, for the protection of the rights of the prisoners and other interested parties, harmed by the current prison situation.

In view of the above-mentioned appalling facts, it can be seen that the management of CPP and URSA in Palmas (capital of the State of Tocantins) is not fulfilling its constitutional function to satisfaction, because, despite some efforts, is far from promoting adequate and dignified conditions for the prisoners, either by overcrowding, lack of adequate health treatment, or the presence of dirty and unhealthy cells.

The Universal Declaration of Human Rights is the main source of the protective principle of the rights of the prisoners in Palmas. Its Article 8 states that everyone has the right to effective solution from the competent national courts for acts that violate fundamental rights recognized by the Constitution or the law.[26]

If the Executive Power does not provide prisonerstheir rights: "It is lawful for the Judiciary to impose on the Public Administration an obligation, consistent with the promotion of measures or the execution of

emergency works in prison establishments," [because, guided by the general principles of human rights, the "Supremacy of human dignity legitimizes judicial intervention".[27]

However, the inefficiency of State Justice in the process lies in the excessive valuation of legal formality and no longer in justice itself; thus, legal security has been protected and justice itself has been forgotten. The excessive protection of the process within its formality results in inertia, inefficiency and, according to José Renato Nalini (2008)[28], in the "cause of discredit of Justice".[29]

The Judiciary, based on the phenomenon of judicialization, began to expand its action based on a legitimacy coming from the system itself, with focus on reaching solutions to conflicts that were not being effectively resolved by the other powers. Through judicialization, the aim has been to meet such demands by recognizing and conferring effectiveness to the rights already enshrined in the legal system.

IV. CONCLUSION

The judicialization has been a recurrent phenomenon in some countries and especially in those where there is respect for democracy, showing a greater achievement of social rights.

Fundamental rights, especially the fundamental right to work, are recognized as being of immediate application, based on article 5 of the 1988 Brazilian Constitution[30], and should be recognized as subjective, enjoyable and individual rights. As a result, when the Executive Branch fails to fulfill its role of guaranteeing access to a certain right already recognized, there is an offense and consequent damage to the balance of powers, at which point the Judiciary must be provoked to take upon itself the obligation, based on judicialization, and make it possible to guarantee that right.

The existence of numerous rules on the right to work of the prisoner has not been sufficient to prevent the omission of state power. That said, it must be recognized that a public policy that exists, but is ineffective, must suffer the interventions of the Judiciary on the basis of judicialization.

The violation of the fundamental right to work represents a direct offense against human dignity, so that if the public administration does not protect this right in its entirety, it will be up to the Judiciary to intervene by means of cheks and ballances, directing efforts at reducing social exclusion and the criminal recidivism of prisoners.

REFERENCES

[1]. The statement is based on the Supreme Court's definition of Brazilian prisons. The empirical verification of the prisons of Tocantins and especiallyof the capital of the State (Palmas), allows us to conclude thatthey do not differ from the majority of penitentiaries throughout Brazil.

[2]. BRAZIL. Law No. 7.210, of July 11, 1984. Establishes the Law of Criminal Execution (LEP). Compiled and modified by Law no. 12.433 of 2011. Available at: <https://tinyurl.com/nw3wurm>. Access on: 12 Jul. 2019.

[3]. NATIONAL COUNCIL OF JUSTICE. Criminal Inspection. Palmas Provisional Prison House, Tocantins. National Register of Inspections in Penal Institutions (CNIEP). Brasília, 2018, p.2. Available at: <https://tinyurl.com/y6qk4r5y>. Access on: 12 Jul. 2019.

[4]. PRETE, Renata Lo; REHBEIN, Ana Paula. In Tocantins, whoever is sentenced to prison in the half open regime ends up going home. Jornal da Globo. Rio de Janeiro, 2018. Available at: https://tinyurl.com/y3yshe7j. Access on: 12 Jul. 2019.

[5]. CALDAS, Herisberto e Silva Furtado. O trabalhocomofator de resgate da cidadania dos reeducandos do sistemapenitenciário da Comarca de Araguaína: prevenção à reincidência. Dissertation (Master Program in Jurisdictional Provision and Human Rights). Federal University of Tocantins, 2016, p.13.

[6]. TOCANTINS. Court of Justice of the State of Tocantins. Sentence in public civil action, no. 0006286-35.2017.827.2729, event 78, p. 17. Judge Roniclay Alves de Morais. Palms, 06 Oct. 2017. Available at: <https://tinyurl.com/yyf9os84>. Accessed on 12 Jul. 2019.

[7]. NATIONAL COUNCIL OF JUSTICE. Report from the Tocantins Prison Taskforce. Brasília, 2014, p. 8. Available at: <https://tinyurl.com/y4uuvvqy>. Accessed on 12 Jul. 2019.

[8]. GIL, Antônio Carlos. Métodos e técnicas de pesquisa social. 6. ed. São Paulo: Atlas, 2008, p. 27.

[9]. MEZZAROBA, Orides; MONTEIRO, CláudiaServilha. Manual de metodologia da pesquisa no Direito. 5. ed. São Paulo: Saraiva, 2009, p. 110.

[10]. VIANNA, Luiz Werneck et al. A judicialização da política e das relaçõessociais no Brasil. Rio de Janeiro: Revan. 1999, p. 40.

[11]. American political scientist.

[12]. TATE, Chester Neal. Why the Expansion of Judicial Power? In: TATE, C. N. & VALLINDER, T. (eds.). The Global Expansion of Judicial Power. New York: New York University, 1995, p. 28. Avaible at: <https://tinyurl.com/yyakmzf3>. Access on 12 jul. 2019.

[13]. Full Professor of Constitutional Law, PhD at State University of Rio de Janeiro (UERJ). Master's Degree from Yale Law School.

[14]. [14] BARROSO, Luís Roberto. Judicialização, ativismo judicial e legitimidadedemocrática. Banco de artigos da Faculdade Franca – SP, 2009, p. 3. Avaible at: <https://tinyurl.com/y426vg6o>. Accessed on 12 jul. 2019.

[15]. TATE, Chester Neal, op. cit., p. 28-33.

[16]. BRAZIL. Constitution (1988). Constitution of the Federative Republic of Brazil. Brasília: Federal Supreme Court, Documentation Secretariat, 2018. 530 p. Updated to EC n. 99/2017. Available at: <https://tinyurl.com/y4frb9qt>. Access on: 12 Jul. 2019.

[17]. MORAES, Alexandre de. Direitoconstitucional. 21. ed. São Paulo: Atlas, 2007, p. 385.

[18]. SILVA, José Afonso da. Curso de direitoconstitucionalpositivo. 33. ed. São Paulo: EditoraMalheiros, 2010, p. 108.

[19]. Checks and Balances System, better known in the work of Montesquieu The Spirit of the Laws, of 1748, inspired by Aristotle and John Locke, makes an elucidative prism on the division and main functions of powers and their intermediation for a desired balance of the spheres of state power.

[20]. BARROSO, Luís Roberto, op. cit., p. 15.

[21]. ARENDT, Hannah. A condiçãohumana. Translation of Roberto Raposo. 10. ed. Rio de Janeiro: Ed. ForenseUniversitária, 2007, p. 132-133. Translation of: The Human Condition.
[22]. MILL, John Stuart. Sobre a liberdade. Translation of Pedro Madeira. Rio de Janeiro: Ed. Nova Fronteira, 2011, p. 27. Translation of: On liberty.
[23]. ARENDT, Hannah, op. cit., p. 147.
[24]. Burrhus Frederic Skinner is an American author and psychologist, creator of the philosophy of radical behaviorism, which is an approach that seeks to understand behavior according to the interrelationships between phylogenetics, the environment and the life history of the supposed individual.
[25]. SKINNER, Burrhus Frederic. Sobre o behaviorismo. Translation of Maria da Penha Villalobos. 10. ed. São Paulo: Cultrix, 2006, p. 18.
[26]. GENERAL ASSEMBLY OF THE UNITED NATIONS. Universal Declaration of Human Rights, 10 Dec. 1948. Available at: <https://tinyurl.com/y4ftav9n>. Accessed on 12 Jul. 2019. (our translation).
[27]. BRAZIL. Supreme Court. Extraordinary Appeal No. 592,581. Rapporteur: Justice Ricardo Lewandowski. Brasília, 2016, p. 2. Available at: <https://tinyurl.com/y4q2cldb>. Access on: 12 Jul. 2019.
[28]. José Renato Nalini holds a Master and a PhD in Constitutional Law from the University of São Paulo. Jurist, professor, writer and Brazilian politician, he has also been a Judge of the Court of Justice of the State of São Paulo and a Secretary of Education for the same State.
[29]. NALINI, José Renato. A rebelião da toga. 2. ed. Campinas: Millenium, 2008, p. 179.
[30]. By the way, the constitutional reform No. 45, of 2004, introduced into the Brazilian legal system the possibility of federalizing serious human rights violations, as a way to affirm, protect and materially guarantee the effectiveness of existing humanistic statements in the body of the Federal Constitution, such as those provided by thearticles 1, item III; 4, item II; 5, paragraph 3; and 34, VII, item "b".VÊNCIO FILHO, EsmarCustódio; PARO, MaurícioLaurito; OLIVEIRA, Tarsis Barreto. Incidente de deslocamento de competência: defesa dos direitoshumanosouviolação de princípiosconstitucionais? In: Revista ESMAT. V. 10, n. 16. Palmas: Esmat, 2018, p. 15-40.

Tarsis Oliveira "Judicialization as a Way to Guarantee the Prisoner's Right to Work: Right to Sentence Redemption, Resocialization and Reduction of Criminal Recidivism in Palmas, Tocantins, Brazil" *International Journal of Humanities and Social Science Invention (IJHSSI)*, vol. 09(3), 2020, pp 64-69.