

## JUDICIARY REFORM IN BRAZIL AND THE NATIONAL COUNCIL OF JUSTICE: *IMPROVING COMMUNITY INVOLVEMENT IN OFFENDER TREATMENT*

Márcio Schiefler Fontes

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Auxiliary Judge to Minister Teori Zavascki, Associate Justice of the Brazilian Supreme Court. MSc in Translation Studies (Universidade Federal de Santa Catarina). MBA in Tax Law (Fundação Getúlio Vargas).

Contact: [marcio.schiefler@amc.org.br](mailto:marcio.schiefler@amc.org.br)

**Abstract:** This paper intends to provide an overview of the Brazilian judicial system, its recent reform, and how the National Council of Justice (whose creation was the major goal of that reform) started to address the issues of improving the efficiency of criminal justice and increasing the use of alternatives to detention and imprisonment. The concept behind applying and enforcing convictions aims to remove the convict from society, to avoid further harm, allowing the prisoner to return to society after they have reabsorbed social values. The current challenge facing prison systems is to foster effective methods of rehabilitating and reintegrating these people into society, so that they are capable of living in society when they have finished their sentences. Community involvement in offender treatment is a current worldwide trend that has found the desirable echo in important initiatives championed by the National Council of Justice.

**Keywords:** Brazilian judicial system - National Council of Justice - Community involvement in offender treatment.

*“It is better to prevent crimes than to punish them. This is the fundamental principle of good legislation, which is the art of conducting men to the maximum of happiness, and to the minimum of misery, if we may apply this mathematical expression to the good and evil of life”*

*Cesare Beccaria, On crimes and punishments, 1764.*

*“10. With the participation and help of the community*

*and social institutions, and with due regard to the interests of victims, favourable conditions shall be created for the reintegration of the ex-prisoner into society under the best possible conditions”*

*UN Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly Resolution 45/111 - 14 December 1990.*

## **I. INTRODUCTION**

### **A. Foreword: the Brazilian Judicial System**

Brazil, despite its liberal stereotype and the present political predominance of leftwing parties both in government and in opposition, is a deeply conservative nation<sup>1</sup>. And among all its institutions, the Judiciary is undoubtedly the most conservative. So when one says that in Brazil the community's involvement in the treatment of offenders is scarce or insignificant, he or she should take into account that the average Brazilian does not see any reason to improve the lives of inmates, or to pave their way for a better life in the future. For, after all, why should a huge country with huge social problems, and so eager to grow, worry about their criminals? As lawmakers reflect their voters, society reflects the consensus that the treatment of offenders is no priority at all<sup>2</sup>.

Although court proceedings are very similar to those in force in Europe, as Brazil inherited its law institutes mainly from Germany, France and Italy, apart from its ancient colonial power Portugal, it is

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1 According with almost every poll, a majority of Brazilians support social and political positions generally seen as conservative: oppose abortion; view the nuclear family model, based on the marriage of one man and one women, as society's foundational unit; support the prohibition of drugs, prostitution, and euthanasia; and support the death penalty. In the 2010 Census, for instance, more than 190 thousand enumerators visited 67.6 million housing units in the 5,565 Brazilian municipalities. The website <<http://censo2010.ibge.gov.br/en/>> brings information (also in English) about all the steps of the 2010 Census, with special highlight to the survey results. Another important survey institute in Brazil, Datafolha, has reached similar conclusions in 2012 (<<http://datafolha.folha.uol.com.br/>>, in Portuguese).

2 In November 2012, the Brazilian Minister of Justice (the highest Brazilian authority in charge of the national criminal system) described the nation's prison system as “medieval” and declared that he would prefer to die rather than pass a period in Brazilian jails. Folha de S. Paulo daily reported the statement, which sparked controversy mainly because it was made one day after the Supreme Court sentenced a former senior presidential officer to ten years in prison on corruption charges (<http://frombrazil.blogfolha.uol.com.br/2012/11/21/brazilian-justice-front-and-center/>).

not easy for a foreigner to understand the range of competences inside a many-sided Judiciary of a federative country, with state-level justice and federal-level justice with equal ranks, not rarely unwilling to change anything.

The Brazilian Judiciary is organized into federal and state spheres, consisting of several courts. Municipalities do not have their own justice systems, and must, therefore, resort to state or federal justice systems, depending on the nature of the dispute. The apex of the judicial system is the Federal Supreme Court<sup>3</sup>, which is the guardian of the current Federal Constitution, in force since 5 October 1988, after twenty years of military regime (1964-1985). The 1988 Constitution empowered the Judiciary with enormous administrative and financial autonomy. In all spheres<sup>4</sup>, judges are nominated after a strict public selection process, enjoying the guarantees of life tenure, irremovability, and irreducibility of compensation.

## **B. State-Level Justice**

State-level justice in Brazil upholds the vast majority of competences, and consists of state courts and judges. The Brazilian states organize their own judicial systems, with court jurisdiction defined in each State Constitution, observing that their legal scope is limited by those that do not concern the Federal Constitution. Each state territory is divided into judicial districts (counties) named *comarcas*, which are composed of one or more municipalities. Each *comarca* has at least one trial court, the first instance, with a judge and a public prosecutor. The judge decides alone in all civil cases and in most criminal cases. Only intentional crimes against life are judged by jury.

The 27 states' Supreme Courts (actually Courts of Justice, "Tribunais de Justiça" in Portuguese<sup>5</sup>) are the highest courts of each

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3 The Brazilian Federal Supreme Court is composed by eleven justices (titled as ministers), chosen among native Brazilian citizens, who are more than thirty-five and less than sixty-five years old and have notable legal knowledge and soundness of character (articles 12 and 101, both from the Federal Constitution).

4 Excluding second instance, which has many particularities, as well as national courts, where the president nominates their justices (in Brazil called ministers).

5 The German philosopher Friedrich Schleiermacher, in his famous lecture "*On the Different Methods of Translation*" (1813), distinguished between translation methods: "there are only two. Either the translator leaves the author in peace, as much as possible, and moves the reader toward him. Or he leaves the reader in peace, as much as possible, and moves the author toward him". Lawrence Venutti uses this quotation as a basis for what he labeled "foreignizing translation" and "domesticating translation", herein warning: "Strategies can be defined as 'foreignizing' or 'domesticating' only in relation to specific cultural situations, specific moments in the changing reception of a foreign literature, or in the changing hierarchy of domestic values" (Venutti, L. (1995) *The Translator's Invisibility*. Routledge: London and New York, p.

state judicial system, representing the second instance. They are the states' courts of last resort, have their headquarters in the capital of each state and have jurisdiction over their respective territories. Albeit exceptionally having original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, or prohibition, and in certain *habeas corpus* proceedings, the states' Courts of Justice are basically appellate courts, meaning they can review any decisions taken by the trial courts (district courts), and have the final word on decisions at state level. Their decisions may be overturned only under special conditions, and only by national courts, headquartered in the Federal Capital (Brasília). Second instance judgments in state level are usually made by three justices, called *desembargadores* (an ancient Portuguese title).

### **C. Federal-Level Justice**

Alongside with specialized courts to deal with electoral, labour and military disputes, federal-level justice in Brazil has very specific competences, mainly related to social security law<sup>6</sup>, being responsible for hearing most disputes in which one of the parties is the Federal Union and its agencies; ruling on lawsuits between a foreign Nation or international organization and a municipality or a person residing in Brazil; and judging cases based on treaties or international agreements against a foreign Nation or international body. Few crimes are under exclusive federal jurisdiction, for example smuggling, although there are others that may be submitted to federal courts depending on their circumstances (money laundering when related to certain crimes, international drug trafficking, etc.). The second instance in the federal judicial system is represented by five Regional Federal Courts (“*Tribunais Regionais Federais*” in Portuguese), which have jurisdiction over circuits of several states on lawsuits involving appeals towards the decisions ruled by federal judges, and tend to be headquartered in the largest city of the territory under their jurisdiction. Second instance judgments in federal level are also usually made in a three-judge panel.

### **D. National Courts**

The Superior Court of Justice (“*Superior Tribunal de Justiça*” in Portuguese, shorthand STJ) reviews decisions taken by either federal or

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272). Legal translation, a culture-dependent subject field, is no exception to the rule (Šarčević, S. (2000) *Legal translation and translation theory: a receiver-oriented approach*, accessible at: <http://www.tradulex.org/Actes2000/sarcevic.pdf>).

6 In Brazil, the major branches of social security (social insurance, income maintenance, and public funded medical care) are mostly under the administration of a federal agency.

state second instance, as responsible for upholding federal legislation and international treaties. STJ is the Brazilian highest court in non-constitutional issues and grants a Special Appeal (“Recurso Especial” in Portuguese) when a judgment of a court of second instance offends a federal statute disposition or when two or more second instance courts make different rulings on the same federal statute.

Finally, above all courts stands the Federal Supreme Court (“Supremo Tribunal Federal” in Portuguese, shorthand STF), which has exclusive jurisdiction to: (i) declare laws unconstitutional; (ii) order extradition requests from foreign Nations; and (iii) rule over cases decided in sole instance courts, when the challenged decision may violate the Constitution<sup>7</sup>. As national court of last resort, STF grants Extraordinary Appeals (“Recurso Extraordinário” in Portuguese) when judgments of second instance courts violate the Federal Constitution.

## II. THE NATIONAL COUNCIL OF JUSTICE

### A. Insertion

The National Council of Justice (“Conselho Nacional de Justiça” in Portuguese, shorthand CNJ) is an independent organ inside the Brazilian judicial system, regardless of being under the authority of the Federal Supreme Court. It was created by a 2004 Constitutional Amendment (nº 45) as part of the Judiciary Reform, to be the official

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<sup>7</sup> The main role of the Federal Supreme Court is to guard and interpret the Federal Constitution, deciding matters related to it or about which there is doubt or controversy through special legal actions that work as instruments to evaluate the constitutionality of laws and matters, such as: (i) direct action of unconstitutionality, directed to uphold a law or normative act contrary to the Constitutional text; (ii) declaratory action of constitutionality, an instrument directed to declare constitutional any law or federal norm about which there is controversy or relevant doubt as to the interpretation of the Constitution; (iii) action of unconstitutionality by omission, directed to gauging of unconstitutionality in face of an omission from lawmakers to legislate, thus limiting the exercise of certain rights due to lack of regulamentation; (iv) allegation of disobedience of fundamental precept, an action directed to protect fundamental precepts, mostly guidelines and principles present in the Constitution, from contrary laws or normative acts in case of relevant constitutional controversy. As already pointed, the Supreme Court also decides appeals in last instance and matters of its jurisdiction such as: (i) *habeas corpus* when the constrained party are the Republic’s highest authorities, including the Court’s own justices, or when it is to be decided as an appeal in last instance; (ii) *writ of security* and *habeas data*: the *writ of security* is an legal action designed to quickly protect a manifest right, and the *habeas data* guards the right to knowledge of personal information in records or data banks, both when issued against acts of the Republic’s highest authorities, including the Court’s own justices (more information is available at: [http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte\\_en\\_us](http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us)).

board responsible for supervision of Judicial Branch, both federal and state spheres, including the autonomous states' Courts of Justice, and has acted in several fields. Among its attributions are ensuring that the judicial system remains autonomous, conducting disciplinary proceedings against members of the Judiciary, and compiling and publishing statistics on the Brazilian court system. More than that, it provides a national supervision of all courts administration.

The majority of the fifteen councillors (“conselheiros”) are appointed by the Superior Court of Justice and by the Federal Supreme Court – whose chief justice is perforce the president of the National Council of Justice. However, there are members appointed by the Public Prosecutors Office, by the Brazilian BAR Association (“Ordem dos Advogados do Brasil” in Portuguese, shorthand OAB), and by the National Congress.

## **B. Initiatives and Controversies**

Before the Judiciary Reform<sup>8</sup>, for example, all matters regarding the conduct of judges and courts were considered *interna corporis* and, as such, were examined by judges only; it became a consensus that judges were being too corporative in handling these matters. If Judiciary was corporative when judging their members, it was even more difficult to place any kind of complaint against judges. It was (and still is) possible to appeal against the legality of decisions, but there was not much to be done in cases where, for example, the judge was overbusy and could not look into a lawsuit for years. One of the functions of the National Council of Justice is to give the population a means to oversee the performance of judges, and express their discontentment. The first relevant decision by the Council was to forbid the so-called *nepotism* in the appointment of ancillary judicial staff, determining that all relatives of judges who are occupying trusting positions had to quit their offices immediately.

Not surprisingly, the creation and the attitudes of the National Council of Justice raised vehement reactions, since its acts seem – and in some events truly are – sweeping intrusion into the states' management. Notwithstanding, the Council keeps operating, instigated by a public opinion not always aware of the real interests at stake, mostly fomenting positive movements for alternative dispute resolution or, sometimes, establishing controversial goals aimed at ensuring a faster processing of lawsuits. Recently it has turned over the issues of improving the efficiency of criminal justice and increasing the use of alternatives to detention

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<sup>8</sup> For more information about the Brazilian Judiciary reform, see <http://www.icj.org/dwn/database/Brazil-AttacksonJustice-11072008.pdf>

and imprisonment<sup>9</sup>, on the basis of the principle of imprisonment as a last resort, under the principle of proportionality. One sound measure was to order all judges to carry out month inspections on the prisons under their jurisdiction, having to present electronic reports of these inspections to the Council itself. Finally, it started fostering the idea of citizenship of former prisoners, and soon after began stressing the need of providing new opportunities for them (the “Begin Again” project<sup>10</sup>).

### **C. Deployments**

These initiatives have aroused reflection amongst judges on how to deal with the cultural shift demanded by the National Council of Justice about legal and paralegal services offering advice and representation to help to reduce the unnecessary use of pre-trial detention<sup>11</sup> (Tokyo Rules<sup>12</sup>, n° 6) as well as informal and restorative justice<sup>13</sup> approaches, which divert and resolve cases outside the formal criminal justice process.

A parallel situation are the Council demands on matters of strengthening access to justice and public defense mechanisms, partially attended by “Mutirões Carcerários” (task forces of public defenders, public prosecutors or even judges assigned to verify the legal situation of prisoners who may have fulfilled the requirements to be released or to gain certain legal benefits but cannot afford to hire a privately retained attorney). Even a rich Brazilian state as Santa Catarina (with one of the highest standards of living in Latin America), in southern Brazil, remains up to this day without organizing its publicly funded public defender office. Other states have organized their public defender offices only formally, without actually providing them with minimum conditions for effective action.

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9 In Brazil there are alternatives to prison before conviction (pre-trial: bail, provisional release, conditional suspension) and after conviction (alternative penalties, fines, probation, parole, pardon).

10 See below, section VI.

11 In Brazil there are three species of caution arrest: red-handed arrest, when the offender is caught committing or immediately after committing the crime; temporary arrest, determined by a judge for a period of five to thirty days, depending on how serious the offence is, extendable for one equal period, in order to ensure the investigations by the police; preventive arrest, ordered by a judge when the criminal prosecution, the public order or the fulfilment of the punishment are at risk.

12 United Nations Standard Minimum Rules for Non-custodial Measures, adopted and proclaimed by General Assembly Resolution 45/110, 14 December 1990.

13 Restorative justice has been a constant topic since the 1990s in Brazil, where a new Code of Criminal Procedure is presently (January 2010) under Congress’ final analysis. However, penal mediation is not included.



### **III. THE APPLICATION OF PENALTIES AND CRIME PREVENTION**

#### **A. Overcrowding Pushing the System to the Brink**

As engaging the attention of the community and enhancing their involvement in the treatment of offenders is not an easy task, Brazil suffers the additional and severe problem of prison overcrowding. Indeed, according to the National Penitentiary Department (“Departamento Penitenciário Nacional” in Portuguese, shorthand DEPEN<sup>14</sup>), Brazil is about to reach half million prisoners among 195 million inhabitants. This is the third largest prison population in the world<sup>15</sup>, and the country has been struggling to find creative solutions to deal with it. The same organ estimates that Brazil has a correctional facilities capacity for only 300,000 inmates. The National Council of Justice has repeatedly exhorted the state-level justice (responsible for legal supervision over the vast majority of the correctional facilities) to implement solutions such as diversion, sentencing alternatives to imprisonment, and early release programmes, as recently highlighted in the *Twelfth UN Congress on Crime Prevention and Criminal Justice*, held in Salvador, Brazil, from 12-19 April 2010, with the aim to promote more effective crime prevention policies and criminal justice measures throughout the world.

#### **B. Alternative Penalties and Alternative Measures: Ineffectiveness**

At this point it is essential to add some information about Brazilian non-custodial penalties and the relation between this issue and overcrowding correctional facilities.

During an workshop on “Strategies and Best Practices against Overcrowding in Correctional Facilities”, held at the *Twelfth UN*

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14 An agency linked to the Ministry of Justice, whose attributions are, among others, to plan and co-ordinate the national politics regarding correctional facilities. It is very important to notice that the correctional facilities are under direct control of the states’ Executive Branch, even though criminal judges are in charge of legal supervision over the prisons. Moreover, it was not before 2006 that federal correctional facilities were created, in number of only five.

15 According to Rob Allen (*Effective Countermeasures against Overcrowding of Correctional Facilities*, UNAFEI Resources Material Series n° 80, p. 4), “particularly large rises have recently occurred in Europe, in Turkey and Georgia (both up more than 50 per cent since mid 2006). The largest recent falls in prison population in Europe are in Romania (down 2 per cent since September 2006) and the Netherlands (down 22 per cent since mid 2006, although changes in counting practices may play a part in explaining this). Notable rises elsewhere include those since mid 2006 in Chile (up 28 per cent), Brazil (up 18 per cent) and Indonesia (up 17 per cent)”.



*Congress on Crime Prevention and Criminal Justice*, Ela Wiecko Volkmer de Castilho comprehensively pointed out that in recent years Brazil carried out legislative and administrative provisions necessary to reduce the use of prison as penalty, following international guidelines, in particular the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).

They had already started, even though timidly, with the Penal Code reform in 1984. It took better shape with the Law 9.099 of 1995, which created the Summary Courts (in Brazil called Special Courts).

According to Brazilian law, as well recorded by Ela Castilho, alternative penalties are the criminal sanctions other than imprisonment. Among them, the restricting of certain rights, which replace the deprivation of liberty. But there are more and more alternatives that are not substitutive. In turn, alternative measures consist in a large number of legal instruments which avoid sentencing and the application of a penalty, or, post-sentencing, the imprisonment.

Actually, the application of alternative penalties is limited to crimes whose sentencing do not surpass four years imprisonment and that have not been committed with violence or serious threat to the person, or whatever the sentence, if the crime is non-intentional. It requires as objective condition that the defendant is not a recidivist in intentional crimes, as well as an analysis of the reasons, the circumstances of the crime and subjective elements, such as culpability, previous records, social behaviour and personality.

On the other hand, alternative measures are in a minority. Include civil composition, criminal transaction, suspended process, sursis (on probation<sup>16</sup>), conditional release (which is similar to parole<sup>17</sup>), judicial and legal pardon. The most usual alternative measures are criminal transaction, by which the suspect accepts some restraint in change of not being formally accused, and suspended process, on probation, in crimes for which the maximum penalty, in abstract, not exceed two years in prison. The way both are fulfilled often get mixed up with the pecuniary installment and the community or public services.

However, Castilho remarked (citing Curt Griffiths, Danielle Murdoch and Rodrigo Azevedo) that Brazilian experience shows that these measures are not guarantees of preventing the prison system to get overcrowded. On the contrary, there is the concrete risk that alternative measures and penalties, rather than act as promised to reduce the prison population, increase the punitive control. A key concern with the development of alternatives to prison is that net-widening will occur, wherein additional numbers of persons are brought into the criminal justice system. If this occurs, the net effect will be to increase

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<sup>16</sup> An offender on probation is ordered to follow certain conditions set forth by the court.

<sup>17</sup> The release of prisoners based on prisoners promising to abide by certain restrictions.

the numbers of persons under supervision by the justice system and prison population is unlikely to be reduced. This is what happened in Brazil. By creating summary courts, the law boosted the application of alternatives, included cases considered less offensive in the formal justice system, through informal mechanisms for entry and processing. The exemption to the police investigation for crimes submitted to the summary courts retired police authority, which had the prerogative to select the cases considered more relevant, and so close the proceedings of most of small crimes.

Moreover, many Brazilian judges are not likely to either apply nor really enforce these penalties, often seen as waste of time, since they are always overbusy, and a risk of achieving contradicting results.

### **C. Back to Theory: Sentencing Law**

As remarked by Cooter and Ulen<sup>18</sup>, any theory of crime must answer two questions: “What acts should be punished?” and “To what extent?” An examination of the sentencing law in a specific country basically involves evaluating the foundations of the right to punish in that country. Although there are valid movements demanding for a stricter criminal justice system, especially in relation to violent and property crime, through harsher criminal penalties (well illustrated by the “Law and order” theme, mainly in the United States, where, for example, “three strikes” and similar laws have been enforced), the right to punish in democratic societies is regarded to be based on its social utility, which means not using the criminal system as a means of dispensing vengeance. The direct goal of criminal punishment is to avoid crimes through the fear of punishment that is instilled in those who may be inclined towards criminal activity.

Sentences are mainly used to avoid potential criminal acts that could harm the social body, guiding citizens away from reprehensible activity. In order to achieve this, the choice of punishment and the way in which it is applied should be seen by the public as more effective and longer lasting (preventive) and, at the same time, less cruel. For a punishment to produce its desired effect, the system seeks to ensure that the penalty applied to the guilty party exceeds any supposed advantage obtained by the offender from his acts. On the other hand, a fair punishment will seek to the least possible severity needed to turn man away from crime. The current trend is that the severe punishment is not the most expedient way of preventing crime, what works best is to fight impunity.

Based on this, sentencing must demonstrate a fair balance

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18 Cooter, R. & Ulen, T. (2008). *Law and Economics*. 5 ed. Boston: Pearson, p. 485.

between the crime and the punishment (Tokyo Rules, nº 1), removing the convict from society, if needed, in order to avoid further harm being caused, while allowing this person to return after supposedly being reimbued, in spirit, with the social values of integration and respect in general.

#### **D. Returning to Society**

However, if the government and the society refuse to use or do not create effective mechanisms for subsequent reinsertion into the social group, for example by not offering opportunities for work and education, it is practically impossible for such a person to return to society with any kind of outlook for a better future, or to be aware of their dignity as a human being and their obligation to the society they are returning to.

In his seminal treatise *On crime and punishment*, dated from 1764, Cesare Beccaria had already pointed out that the safest, but at the same time most difficult way of discouraging people from crime is by improving their education and through work. Work and education are the best methods of rehabilitation and could be considered a “passport” towards social reinsertion.

In any event, a prisoner has previously been a full member of society and wishes to return to society having fulfilled their sentence. On returning, it is in the prisoner’s best interest to be able to comply with the society’s laws and to avoid returning to a life of crime, otherwise he may place the safety and well-being of others at risk.

Furthermore, Beccaria acknowledges the reciprocal obligations of citizens and society: “If every individual be bound to society, society is equally bound to him, by a contract which from its nature equally binds both parties. This obligation, which descends from the throne to the cottage, and equally binds the highest and lowest of mankind, signifies nothing more than that it is the interest of all, that conventions, which are useful to the greatest number, should be punctually observed. The violation of this compact by any individual is an introduction to anarchy”.

Apart from the psychological approach<sup>19</sup>, a convict’s reintegration into society is based on our acknowledgement of human rights and the supreme value of justice, because by continuing to punish a person who was already settled their debt with society, for example by not offering alternative paths upon their release apart from an undesirable return to a life of crime, is a clear violation of the ancient principle *ne bis in idem*, of human rights consecrated by constitutional or statute law all over the

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19 SILVA, J. F. da (2012). Psychological discourse in Brazilian criminology. *International Journal of Criminology and Sociological Theory*, vol. 5, nº.3. p. 1016-1035.

world (the “doubled jeopardy clause”), and is in manifest opposition to the broad value of justice.

#### **IV. CENTRAL CONCEPTS: REHABILITATION AND SOCIAL RESPONSIBILITY**

##### **A. The Need of Rehabilitation**

Despite acknowledging the fact that the goal of any sentence is to rehabilitate, the reality in Brazilian prisons, especially in poorer regions, is a sorry one. Overcrowded prisons generally look more like dirty warehouses for the undesirable, and clearly fail to provide any sort of re-socialization. Another issue we need to look at is re-socialization and re-education for people who have never been taught how to act in society or educated when they were at liberty, as prisoners are very often people who were excluded from society even before they were incarcerated; people with few social opportunities, with little education and unable to live with dignity, whose involvement in a life of delinquency is simply the easiest way of life.

Therefore, the real challenge for the Brazilian prison system is to find effective methods of changing prisoners into citizens, so that when they conclude their sentences, they are able to live in society, as law-abiding citizens. As we have seen, work and education are normally held up as exemplary methods of rehabilitating and re-integrating these individuals into society.

##### **B. Work and Education**

According to express provisions of the 1988 Federal Constitution, Brazilian society is founded on the value of work and freedom of initiative, to ensure a dignified existence for everybody, in accordance with the dictates of social justice (article 170).

By acknowledging that work is the driving force behind every society, the State, as the sole holder of the power to punish, is compelled to provide opportunities to prepare convicts in its custody for work, readying them for a return to society and ensuring they can live with dignity. By not putting prisoners on this path, other than simply not qualifying them for their new life outside prison, this attitude puts them back on the tightrope between unemployment, which they are forced to endure because of their lack of qualifications, and a life of crime, which offers them quicker and easier methods of obtaining a livelihood.

The federal law that regulates penalties enforcement (the Prisons

Act<sup>20</sup>, from 1984) states that we have a social duty and a basic condition of human dignity to offer prisoners work, because of the educational and productive aspects of labour (article 28). Through work, we seek to reinsert the prisoner into society, as work is both educational and productive, representing a social duty and helping re-establish human dignity. Failure to qualify prisoners for the job market facilitates their return to a life of delinquency. Excluding prisoners from the job market can be compared to being sentenced to a slow and gradual decay, without any chance of a return to a productive life in society.

Work and study are siblings: educational objectives, which are also set down in law, especially when the prisoner does not display any professional qualifications, are achieved through activities which take place at the prison in order to teach a profession; productive objectives help avoid idleness and generate financial resources for the convict so that he can meet his civil obligations, support his family, cover his personal expenses and even reimburse the government for maintaining him.

Work distances convicts from vagrancy and provides them with an opportunity to recover their self-esteem. Work, whether manual or intellectual, provides the individual with dignity within his social and family circles. However, prison work clearly does not mean simply executing tasks that nobody else wants to do, or making prisoners work in a situation akin to slavery. This is not the goal of work as part of the process of re-socializing prisoners and recovering their dignity. When enabling the prisoner's return to work, the State should give greater emphasis to skills which have already been acquired and strengthened the sense of involvement in society, and avoid giving the prisoner another reason to believe that he is a pariah.

By educating prisoners through work, we must also take market requirements and realities into account, which includes offering educational support for schooling and professional training. Additionally, education is one of the main paths towards man's evolution and dignity, helping people to fully develop at a personal level and preparing them for citizenship. With this goal in mind, we need to strengthen the values of social awareness and the basic educational process.

### **C. Right to Remuneration implies Employability**

According to article 29 of the Brazilian Prisons Act, remuneration from a prisoner's work should be used to indemnify harm caused by their crime, once provided this has been determined by the courts and reparations have not been made through other channels; to support

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20 Known in Portuguese as Penalty Execution Law. It vainly assures humanitarian treatment, the right to health, the right to learn a profession, medical care, legal aid, etc.

the family; for small personal expenses and to reimburse the State for accommodating him in the prison system. It also states that part of any remuneration must be used to create a financial reserve, deposited in a savings account and delivered to the prisoner upon his release. This reserve, which can be redeemed upon returning to society, is a means of covering the cost of the prisoner's basic needs until he can rejoin the job market and sustain himself.

To do that, it is indispensable to level up inmates' employability, marketable skills, thus boosting their possibilities of finding a job after being released.

Beyond remuneration, in Brazil there have been some major initiatives adopted to offer convicts opportunities, including: creating jobs for convicts, agreements between the government and private companies, agreements with educational institutions, greater involvement of society through the Community Boards<sup>21</sup> and even through nongovernmental organizations (NGOs).

#### **D. Social Responsibility and the Private Sector**

The term "social responsibility" has been used with greater emphasis in recent years and is principally an expression that refers to the business ethics and transparency adopted by public or private organizations. It means that the everyday decisions that could have an impact on society, on the environment and on the future of these organizations should be ethical. This idea cannot be prevented from being related to the benefits companies are supposed to arouse in society or even to the participation of private enterprises in the administration of correctional institutions.

From a business standpoint, for example, we can say that something is ethical when the decisions taken by company respect the law and the values and interests of all stakeholders, in this case including common citizens.

#### **E. Business and Social Ethics**

From a wider standpoint, we can say that being socially responsible means acting transparently to meet social expectations, maintaining a coherent link between words and actions. This commitment is used to ensure that there is a good relationship between

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<sup>21</sup> According to Brazilian Prisons Act (article 80), Community Boards are community based groups of citizens, appointed by municipalities, entrepreneur associations, and trial courts, whose main function is to help authorities support and supervise released offenders. Although the law is dated from 1984, many judicial districts have not yet seen their members appointed. They can be compared to Canadian "Citizens Advisory Comittes".



a company and its relevant audience.

To expand on the same example, it is no longer acceptable the position that companies only have a duty to their shareholders. They are also accountable to employees, the media, government, nongovernmental agencies and the environmental sector as well as the communities within which they operate. This is because alongside ethics, we also uphold the principle that companies, as social actors, have an active role to play in social progress.

This creates an opening, or rather a need, for the private sector to take on a proactive, committed and socially responsible stance, to the extent that entrepreneurs have become agents of wide-ranging cultural change, contributing to the construction of a fairer and more united society, especially through acknowledgment of their responsibility for developing such a society. Companies (the market), the State (the politically organized society) and individuals (community) are what make up society, in the widest sense, in which each actor has a responsibility for ensuring social balance.

Therefore, private social investment, one of many facets of social responsibility, can be described as the voluntary and planned use of private funds in public interest projects. And contrary to what many people think, private social investment should not be confused with welfare.

## **F. Private Specific Collaboration: Partnership**

While addressing the polemics relying on private companies managing correctional facilities<sup>22</sup>, we cannot allow prison labour to be

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22 While in Japan the PFI correctional facilities (maintained with private management, for sentenced inmates with low criminal tendencies) seem to be well-grounded, Marialda Lima Justino da Cruz argues that in Brazil “discussion of private ownership of correctional facilities is common. Would it be the solution to all problems? Some people are in favour. They believe that those who are imprisoned should compensate society for their crimes, but, in the end, it is the society itself that bears all the expenses. In Brazil, there is not work for all the inmates in the penitentiary system, so, if the administration of the correctional facilities could become private, and was taken out of the obligation of the State, inmates would form ‘potential workers’, because all the inmates could work and all would leave the prison ready to be reintegrated into society. On the other hand, some people are against this proposal. The Brazilian Constitution provides that correctional facilities must be administrated by the State, so some people think that making the administration private would be an unconstitutional measure, that something pertinent to the State itself cannot be delegated to the private sector. Other options are that the State administrates the correctional facilities but it can give other attributions, such as the supplying of food, clothes, legal aid, medical care, etc. to third parties. The delegation of some activities could be implemented without violating the Federal Constitution, and one of the main forms to make this happen is Public Private Partnership” (*Current Legal Regime of Imprisonment in Brazil and Effective Countermeasures against Overcrowding of Correctional*



used solely for a company's economic benefit. Prison labour should also comply with the dictates of social responsibility and be part of the process that seeks to ensure the prisoner's place in society and recover his self-esteem. Therefore, companies willing to invest in helping to rehabilitate these individuals should account for these actions on their social balance sheet and not simply benefit from possible tax breaks to steal a march on their competitors.

When a company uses prison labour solely to minimize costs and thereby avoid the strictures of market competition, this is not social responsibility; government collusion justifying this type of activity is even more reprehensible.

Because of this risk of prison labour being misused, the State is responsible for oversight and enforcement of companies and individuals willing to become involved in re-socialization actions.

## **VI. REHABILITATION INITIATIVES: THE “BEGIN AGAIN” PROGRAMME**

### **A. Legal Possibilities and Judicial Initiative**

There are several possible avenues for convicts' rehabilitation, which can either be applied during the prisoner's sentence or application of other safety measures (restrictions applied to those who are unable to comprehend the criminal nature of their conduct). They can also be applied upon release from prison, after the sentence has been served and the offender is back on the streets.

Despite all the problems regularly brought up, there are some actions, initiatives and programmes currently underway in Brazil which merit our praise<sup>23</sup>. One of the programmes that must be highlighted is the “Begin Again” (“Começar de Novo”) project being run by the National Council of Justice, the judicial body created by the recent Constitutional Reform in order to improve the Judiciary administration.

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*Facilities*, UNAFEI Resources Material Series n° 80, pp. 73-74). The same discussion occurs in the United States (Cooter, R. & Ulen, T. (2008). *Law and Economics*. 5 ed. Boston: Pearson, p. 537).

<sup>23</sup> Well-known examples are the Association for Protection and Assistance of Convicted Persons (“Associação de Proteção e Assistência ao Condenado” in Portuguese, shorthand APAC) and the Foundation for Support of Prison Released Offenders (“Fundação de Apoio ao Egresso do Sistema Prisional” in Portuguese, shorthand FAESP). Both are philanthropic organizations: the former is connected to the Catholic Church and can have its roots traced back to the 1980s; the latter was created in 1997 in the southern state of Rio Grande do Sul.

## **B. “Begin Again” Programme: Background**

The “Begin Again” project was created by Resolution 96, dated 27 October 2009, issued by the president of the National Council of Justice. As a backdrop to the project, we need to understand that in Brazil, around 60 to 70% of prisoners are re-offenders, according to estimates from prisoner surveys carried out in criminal and enforcement courts. People are very aware that recidivism has a direct effect on public safety (final *Report of the Twelfth United Nations Congress on Crime Prevention and Criminal Justice*, nº 58), so we should use this as a basis for implementing consistent rehabilitation programmes, alongside other measures.

In addition to its preventive and punitive goals, sentencing should also provide a basis for a prisoner’s return to society. Within this context, there is clearly a need for participation and integration involving the government – in this case the National Council of Justice – and society in the sentencing process, specifically its preventive, punitive and social reintegration functions.

The main stakeholders are the prisoners themselves, mainly those who have left the prison system, as well as those serving alternative sentences (for lesser crimes, some criminals are not sentenced to incarceration but lose certain liberties<sup>24</sup>). Secondary stakeholders are public bodies, the Judiciary, organizations involved in public safety, Community Boards, companies, nongovernmental organizations and everybody who wants to see a rehabilitated individual returning to society and who wants to prevent crime and increase public safety.

According to the terms of article 1 of Brazilian Prisons Act, prisons and sentencing law aims to apply the sentence or decision and help those convicted or imprisoned return to society. The act covers a range of issues, not just sentencing but also measures for social rehabilitation as well as a minimum set of rules on how to treat convicts and persons serving alternative sentences.

## **C. “Begin Again” Programme: Framework**

The “Begin Again” programme involves a range of activities to increase awareness in government bodies and throughout society in order to coordinate a nationwide work and professional training programmes for prisoners and those leaving the prison system, in order to establish citizenship programmes and reduce re-offending.

To achieve this, the programme’s initiatives include: (i) a

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24 As weekend limitation (remain at home), temporary rights interdiction (prohibition of going to specific places), rendering of community services (performed for the benefit of hospitals, schools, orphanages, etc.).

mobilization campaign to create a citizenship network supporting re-socialization; (ii) partnerships with industry associations, civil organizations and government bodies, to support rehabilitation activities; (iii) strengthen the Community Boards (“Conselhos da Comunidade”) so that they can fulfil their main legal role – providing social reintegration for prisoners or persons serving alternative sentences; (iv) play a role in social services in order to select project beneficiaries; (v) create a database of professional training, education and work opportunities; (vi) oversee targets and indicators accompanying social reinsertion.

These activities include prison surveys, permanently underway throughout the country, to evaluate the prisoners’ conditions in terms of their sentences, and agreements supposed to be concluded between the prison facilities boards and civic associations or private companies, or even with business and union organizations (e.g. SENAI<sup>25</sup>, SENAC<sup>26</sup>, SESI<sup>27</sup> and FIESP<sup>28</sup>), always to provide prisoners with training and professional relocation. These agreements are core instruments of action proposed by the programme, and the most fruitful among them are expected to be disseminated nationwide by the Council itself.

The programme also created the “Jobs Market” so that the National Council of Justice can centralize job offers from companies wishing to take part in the project. Information on positions open is submitted to the criminal enforcement courts in each state.

Project indicators and targets evaluate prisoners, former prisoners and those serving alternative sentences; the number of prisoners in each state; and the number of jobs offered.

The advertisement of the programme includes films produced for TV<sup>29</sup> and spots for radio<sup>30</sup>, in addition to flyers distributed in courts, police stations, correctional facilities, schools, and stadiums, trying to draw attention to the necessity of the reintegration of ex-offenders in the work market and in society.

#### **D. “Begin Again” Programme: Recidivism as a Main Target**

The level of repeat offenses – the recidivism rates – is periodically calculated based on the percentage of people involved in the project

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25 National Service for Industrial Apprenticeship, “Serviço Nacional de Aprendizagem Industrial” in Portuguese.

26 National Service for Commercial Apprenticeship, “Serviço Nacional de Aprendizagem Comercial” in Portuguese.

27 Industry Social Service, “Serviço Social da Indústria” in Portuguese.

28 Industrial Federation of São Paulo Industries, “Federação das Indústrias do Estado de São Paulo” – the most powerful industries association in Latin America.

29 See <http://www.youtube.com/cnj#p/search/2/jB0ye2qmZGM> (in Portuguese).

30 See <http://www.youtube.com/cnj#p/search/0/yDxbrk8TkWE> (in Portuguese).

who have been imprisoned, indicted or convicted after beginning the course or job.

In the short term, the target is to reduce the recidivism rate to 20% and to maintain this level for a number of years and monitoring figures quarterly. The jobs index is based on the number of courses or job openings offered to the local prison population.

Another major problem that the National Council of Justice has sought to address is the high level of social rejection of former prisoners, who bear the stigma of being ex-convicts. Social prejudice convicts these people for their criminal behaviour, and rejects them when they leave jail, is one of the main drivers behind the high levels of re-offending, creating a situation which favours an increase in violence and general insecurity.

The National Council of Justice has been running campaigns in the media and with public security organizations (the Judiciary, the Public Prosecutors Offices and the Police), to increase society's awareness of this fact and minimize it (Tokyo Rules, nº 18). In 2009 there were frequent spots on TV and radio drawing attention to the "second chance" offenders should receive.

### **E. "Begin Again" Programme: Preliminary Results and Future Directions**

As stressed by Supreme Court Justice Gilmar Mendes at the 10<sup>th</sup> High-Level Plenary Meeting of the *Twelfth UN Congress on Crime Prevention and Criminal Justice*, agreed that criminal justice systems throughout the world faced similar problems, especially in relation to their prison systems. The Brazilian groups that had studied the country's prison situation reported it as "chaotic": there had been great failures in prosecution procedures, wracked by inertia and inefficiency. On the other hand, there is a prevailing sense of impunity amongst common citizens, high rates of recidivism and prison rebellions. The criminal justice system is considered to make excessive use of pre-trial detention.

Another problem is that some courts lack well trained-personnel, with the specific technical knowledge their functions require, and there are not enough defenders to represent the thousands of individuals in custody while awaiting trial. The accurate studies provided by the programme had shown a sort of "prison deficit", with the number of inmates overshooting the actual space in prisons by almost 200,000 places. That number was growing by roughly 7% each year, apart from the fact that there are thousands of arrest warrants still to be executed. Initial efforts to reduce overcrowding by releasing individuals found to be "unduly imprisoned" had helped, as had guidelines issued to rationalize prison expenditure. Those actions had resulted in the

equivalent of 50 midsized prisons in freed-up space.

Justice Gilmar Mendes, however, warned that all those efforts would go for naught unless Brazil moved on to a second stage, in which the prison situation is able to change permanently. To start with, the country would require voluntary to strengthen the already existing task forces, as it would also need a management plan for criminal courts. The central part of the “Begin Again” project (to reduce re-offending) should be expanded, with a view to reducing recidivism to 20% in the first year, reducing the prison population by 10% each year. The programme, which has been seen positively by the public, made provisions to help find jobs for 10,000 ex-offenders in 2010, with the help of civil society and business.

In the mentioned period (2009-2010) the National Council of Justice worked closely on such efforts with various other relevant ministries, including the Ministry of Justice. In addition to modernizing the penal system, the goal is to increase transparency and make procedural processes effective and efficient.

## **VII. FINAL COMMENTS**

The concept behind applying and enforcing convictions aims to remove the convict from society, to avoid further harm, allowing the prisoner to return to society after they have reabsorbed social values. In other words, offenders are considered harmful and are removed from society in order to preserve society’s benefits (life, liberty, property), offering a possibility of social reintegration when they are ready to live according to socially acceptable rules.

Therefore, we need effective mechanisms that support reintegration, so that the former convict can reclaim his status as a citizen who is aware of his dignity as a human being and his obligations to the society in which he will live.

Prisoner re-socialization is a key concept in preventing crime. Re-socialization is in society’s own interests, as the convict will return to society after completing his sentence and, on his return, he must be able to abide by society’s laws and not return to crime, otherwise he may place the security and well-being of other members of society at risk.

The current challenge facing prison systems is finding effective methods of rehabilitating and reintegrating these people into society, so that they are capable of living in society when they have finished their sentences. Work and education are common themes.

Offering work to a prisoner, however, clearly does not mean simply executing tasks that nobody else wants to do, or making him work in a situation akin to slavery. This is not the goal of work as part

of the process of re-socializing prisoners and recovering their dignity.

Prisoner work qualifications are strengthened through professional training and education, taking into account individual skills and capabilities and market requirements, while also instilling a sense of societal participation. The whole of society must share the responsibility for re-socializing the individual: the State, companies and civil society.

From the initiatives we have looked at in Brazil, where the *Twelfth UN Congress on Crime Prevention and Criminal Justice* took place (Salvador, Bahia, April 2010), the “Begin Again” programme, being run by the National Council of Justice, is one of the most promising and merits the attention of everybody interested in new methods of crime prevention, because by re-socializing former prisoners and giving them a second chance, we will have a better chance of building a fairer, more solid and fraternal society, echoing the high priority the *Workshop on Strategies and Best Practices against Overcrowding in Correctional Facilities* called upon since its background papers.

This is not a Sisyphean distraction. Many initiatives of job placement for ex-offenders, perhaps better, have been seen around the world<sup>31</sup>, as the British Business in the Community<sup>32</sup>, whose sound perspective outfits an excellent summary of what this paper tried to focus on: “A good stable job is the single greatest factor in reducing reoffending. Not only does it provide individuals with the necessary resources and self-esteem to improve their lives but benefits all sections of society through reduced levels of crime”. What distinguishes the initiative championed by the National Council of Justice is that it stems from the Judiciary itself, and that is something that deserves special attention.

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31 A good example is given by Yun Young Lee in UNAFEI Resources Material Series n° 82, pp. 66-71: the “Support Comitee for Job Finding and Business Start-ups”, established by the Korea Correctional Service.

32 Steve Pitts clarifies that “Business in the Community (BIC) is an independent business-led charity with more than 830 companies in membership. Through its ‘Unlocking Talent’ programme, BIC aims to develop the skills and talent of the workforce as some of its members work in support of Corporate Social Responsibility. BIC has a specific offender-employment initiative: this work is itself as example of partnership between National Offender Management Service and the private sector: work on employing ex-offenders is sponsored by the Barrow Cadbury Trust” (*The Effective Resettlement of Offenders by Strengthening ‘Community Reintegration Factors’*, UNAFEI Resources Material Series n° 82, p. 18).

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