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PRISON OVERCROWDING IN BRAZIL: WHAT CAN THE JUDICIARY DO?

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Abstract: As a field of study, this paper has the judicial activism regarding prison's public policies. It intends to question if could be possible a judicial control over public policies in the context of Brazilian's overcrowded prisons. The prisons are inhumane, violating the inmates' fundamental rights. This judicial review is grounded in the current separation of powers conception. In addition, the Constitution and the ordinary law of criminal punishment impose to the public administrator the respect about the prisoners' rights and must implement policies to reduce the inmate's overcrowding. In the omission of the Executive, the Judiciary can order that one to build more prisons. However, there are restrictions regarding the discretion of the public administrator, although he must build and restore the prisons, he can choose the way to this end. To reach this conclusion, have been used books, papers, judicial decisions and data about the prison system.

Keyword: Judicial control; Public policies; overcrowded prisons; Separation of powers.

1. INTRODUCTION

In Brazil, the management of prison is a State's responsibility. The overcrowding of inmates in prisons is practically a public knowledge, mainly because of the news about rebellions in these places. The number of inmates is well above its maximum capacity, and the

prisoners there are living in inhumane conditions. Besides, it is known that penitentiaries are, most of the time, ruled not by the government, but by the criminal organizations. Therefore, it is noted that the State does not exercise its power in these situations, either for political disinterest or for not implementing effective policies to improve the prison's unities.

Beyond that, in Brazil, there is a substantial debate about judicial activism when they interfere in the others State's power, like Executive and Legislative. The Judiciary, when doing this, uses the moral or juridical principles to reinterpret the rules, jeopardizing legal certainty and the predictability of law. Regarding the Executive, many times the Judiciary intervenes and determines the public policies to protect certain fundamental rights.

Facing these two scenarios, the main objective of this paper is to discuss the possibility of judicial control of public policies, especially those related to the overcrowding of the prison system and its precarious conditions. For this matter, the first two parts serve to analyze if there are political and normative groundings to allow a judicial control of public policies.

About the political foundations, it is important to talk about the violation or not concerning the separation of powers. After analysis, we will discuss if the 1988's Brazilian Constitution and its fundamental rights allow or not this judicial control. Yet, regarding the prison' situation, it is crucial to know if the ordinary legislator imposes any objective about the matter to the public administration.

In the third part of this paper, realizing if the judicial control of public policies is possible or not, we will investigate if there are any limitations to the Judiciary. Is it allowed to interfere in an unrestricted way? Or does it need to respect the Executive's discretion? In addition, it is important to debate about the reserve of the possible and if it justifies a release of the public manager in not implementing fundamental rights.

It will be used legal literature on the subject, as well as documents and judicial decisions to verify some data. The research is qualitative, because it worries to argue, concluding about the possibility or not of the judicial control in public policies, looking for reuniting and perhaps expanding the ideas brought by the literature.

2. POLITICAL AND CONSTITUTIONAL FOUNDATIONS

One of the main arguments about the impossibility of the judicial control of public policies, that concerns to the groundings of the modern State, is the separation of powers, *i.e*., the existence of an Executive, Legislative and Judiciary. This idea goes back to John Locke in the 17th century, and to Montesquieu in the 18th century, that created

the division in three powers or functions of the State.

In the context of the liberal revolutions of the Modern Age, one of the powers was the most important, that is the Legislative, avoiding the abuses of the dictator or monarch, and creating a law that mirrored the pure reason and obeyed to the letter. Therefore, the Judiciary did not have discretion when judging. It was not allowed to interpret or apply the law in a way that contradicted or was beyond the legal text. In this scenario, the most valuable rights were those in which the State should guarantee freedom, avoiding interference in social life.

With the crisis of the liberal model and the Industrial Revolution at the end of the 19th century, because of the abusive treatment of the disadvantaged classes, it was necessary others types of rights, that needed the State interfering in the private relationships among the citizens. The social rights emerge, which ensure greater equality through the limitation of freedom, in the so-called Welfare State. The Executive gains strength, having to take actions for the purpose of protecting and guarantee these new rights. Nevertheless, these rights were seen as mere policies, objectives, without binding force to the public manager to act.

After The World War II, it was necessary to value the individual and social rights, in order to be more effective, preventing what happened in the Nazism, for example, when the State, trying to achieve social purposes to favour its people, ignored and violated minorities' rights. The human values take an important role and, in a juridical way, is represented by the so called "principles". Then rises the postpositivism, giving the groundings to a neo-constitutionalist politics, *i.e.*, the constitutional rights are not just promises or ordinary programs, but they now have the binding force to all State's power, in a democratic rule of law system. The Judiciary begins to gain importance, leaving the function of only reproduce the literality of the law, by getting to judge also based in moral values, making the adequacy of the legislation with the Constitution.

Therefore, the Judiciary increased its relevance to the people, being its main function to judge cases not only based on the legislation, but also on the constitutional norms. In this matter, emerged the possibility of all the others power's acts of being analyzed by the Judiciary. In other words, the judges could control administrative acts and legislation based on its constitutionality. However, not only the Supreme Court has this role of adequacy through a concentrated control, all the judges can perform this operation in a way restricted to the parties in conflict, through a diffuse control. According to Valentin Cornejo (2002, p. 226), the Judiciary has the role of mediating the legislator's and the constitutional power's will.

In the Brazilian democratic rule of law, the Constitution of 1988 declares the foundations of the republic in the first article, as the

dignity of the human person in item III. In its third article, there are the objectives to be pursued, which, in short, propose a fair society with less inequality that can ensure the development and the good of all. Beyond that, the fifth article of the Constitution brings a wide list of fundamental rights and guarantees of the individual and the collective. The individual rights, *e.g.*, the protection of the prisoner's physical and moral integrity provided by item XLIX, have immediate effectiveness, according to § 1st of the same article. Which means that all the State's powers must drive themselves to ensure these rights. If any of them are disrespected, the case can be brought before the Judiciary so that the violation can be corrected or compensated.

The Brazilian State must pursue these constitutional goals on all fronts, either through general legislation or through public policies that ensure in some way the fundamental rights and seek these goals.

According to the second article of the Brazilian Constitution, the separation of power is flexible. Although the powers are independent, they are harmonious, which means that they have to interact with each other, with the view to avoid abuses. That is the idea of the checks and balances system, which one power can supervise and control the other to some extent.

With the idea of a second and third generation of rights, intending more equality, welfare among people and the collective rights, there is a new perspective from the Judiciary, by being a protector of the fundamental and human rights. This means a transformation of the original separation of powers' concept. In fact, there is only one power, which comes from the people and is divided into functions (ZANETI JR., 2013, p. 48), aiming to optimize the state's activity. This is in accordance with Justice Edson Fachin, from the Brazilian Supreme Court, in his vote for the Extraordinary Appeal 592.581/RS.

For Osvaldo Canela Júnior (2011, p. 85), the Executive, Legislative and Judiciary are merely forms of expression from the people's power, and all of them have to pursue the Republic's goals. Although they are independents expressions, they are harmonious. One can control the main role of the other. The separation of these roles is not an end in itself, but it means to reach the constitutional's objectives. If one of these expressions fails in its task, there will be another to complement it. It will be a due interference since the greater goal is the constitutional's objectives and not the separation of powers.

In this way, the judicial control of public policies would be within the current state logic, according to a modern conception of separation of powers. This argument also derives from the failure of the others Brazilians powers, *i.e.*, in the words of Zaneti Jr. (2013, p. 47), when exists a political dysfunction. The Executive, many times, does not fulfil its role in the implementation of the fundamental rights,

without making public policies for this end. Although it is known that the Executive has the priority in carrying out public policies, it has the accountability about its actions, leaving to the Judiciary to be the last resort to the citizens for the implementation of constitutional and legal policies.

Therefore, the judicial branch has the legitimacy to control the public policies'. This can also occur because of a non-democratic representativeness of others powers, a crisis coming from the Brazilians' disbelief in their politicians, inasmuch as, in general, they seem more concerned with maintaining their power, building patrimony through their mandates, than seeking the interest of those who voted for them. This situation often happens through corruption and favours exchanged with some private companies. Selfishly, these politicians act aiming less at the population and more at their own interests.

Even if it could be said that they fight for the public interest and the good for the people, the elective positions tend to seek the majority's interests. In a democratic rule of law, mainly with the postmodernity, there is a growing difference about moral values inside the same nation. Each group of people can give more importance to diverse values. This situation flows to a social pluralism, which forms groups with different ambitions from the majority.

To the minority remains a Judiciary that can give effect to its rights when the majority does not care about it. Since the citizen does not achieve the effectiveness of his rights through the traditional political system, he seeks the Judiciary. The judges become important in the politics since now they can materialize rights that are forgotten by the other powers (CORNEJO, 2002, p. 257-258), and because they are closer to the people than the traditional politicians in parliament are.

Because of this modification of the society to a plural one, which moral values have different weights, and because legal certainty can often lead to injustice due to the hardness of the norms that do not evolve with society, the Judiciary gain importance. This occurs because it is necessary to give specific rules to each case, instead of having abstract and general rules that do not suit many sectors of the society. The judgement of a specific case by the judge is fit to conceive the peculiarities and give a decision closer to the reality. Therefore, the determination about any norm occurs after considering the specific case, *a posteriori*, and not before it. (CORNEJO, 2002, p. 234).

The judicial control of the public policies is the reflex of the fourth generation rights, *i.e.*, those that ensure citizens their participation in the political choices. At the same time, if they could vote or collaborate with a participative budget, they also can become politically involved after the political choices, questioning, through the Judiciary, the public policies that are or should be created.

Nowadays, the State has also two basic roles, the function of government and the function of guarantee (ZANETI JR., 2013, p. 49-50). Valentin Cornejo (2002, p. 255) brings a similar idea, with different names, calling the first a function of direction, usually carried out by the Executive or Legislative, which have the mandates through people vote to choose the ways of the nation. However, these ways can often offend interests of other groups of people. Therefore, rises the second function of guarantee, to protect the fundamental rights of these groups. The function of direction chooses the moral values that need protection, and then the function of guarantee will act to fulfil this protection. Both functions are connected and are impossible to analyze without a concrete case, in which the judge is the fittest to investigate.

Thus, the judicial review of public policies has a democratic justification, either because the Judiciary must prevent the majority from suppressing the rights of the minority, as for reason that the Judiciary was created through democratic ways, by the Constitution. The Judiciary has as an end to seek the effectiveness of the constitutional rights and goals, as have the other powers. The judicial activism, also called judicialization of politics, is not necessarily bad. In fact, it is a phenomenon that seeks to balance the powers, giving more importance to the Judiciary to control acts of others, rather than just being the mouth of the law and making simply formal assessments.

The Executive, for its own organization, do not have the popular direct representation as one can think. People do not elect most of its staff. In Brazil, the staff people are chosen by the Executive chief or have the jobs through public tendering. The only one who would have this pure democratic legitimacy is its chief, *e.g.*, the president. In this way, unelected people make many of the administrative choices, only being approved by the elected one.

By the political and constitutional point of view, it would be possible to the Judiciary intervene in the Executive's acts, including ones regarding public policies. However, it is necessary that the judges who make this control are also alert to the factual possibilities of the State, which involve, for example, the existence of resources to implement a public policy.

Although the judiciary can intercede, such activity cannot occur in an abusive or disproportionate manner, but rather in a cautious way. The limits will be discussed below, but first, it is necessary to show the legal foundations to the possibility of control regarding the prison overcrowding.

3. LEGAL FOUNDATIONS REGARDING THE PRISONS POLICIES

In relation to establishments that comply with criminal sentences, in the case of the state of Ceará, in Brazil, for example, which ultimately reflects the whole country, there is overcrowding that exceeds half the vacancies available for imprisonment. To be more accurate, according to the Ceará State Penitentiary System Report of the State Security Secretary (2017, online), referring to the month of June 2017, there is a 55% surplus in all establishments. In addition, most of the Brazilian penitentiaries are in a state of pity, according to Justice Ricardo Lewandowski from Brazilian Supreme Court in his vote in the case of Extraordinary Appeal 592.581/RS. The prisons are unhealthy, with garbage exposed in their own cells and in the common areas. The cells are crowded to the point that in some prisons inmates sleep with nets one on top of the other, with no room to move around. It is notorious that such conditions are worthy of medieval dungeons, where there was no concern for illness or a minimum of well-being for the prisoner.

Via the documentary *O Grito das Prisões*, a Portuguese version for The Scream of Prisons, created by Fátima Souza in 2008, which accompanied the visit of federal deputies in prisons during the *CPI do Sistema Carcerário*, that is a parliament investigation about the Brazilian prisons system, one can perceive the enormous precariousness and inhumane treatment of inmates. Such video is easily found on the *Youtube* website (2008, online).

It is noted that the dignity of the human person, already mentioned, is not observed. The same thing happens with respect for the physical and moral integrity of those who are incarcerated, who are often still in provisional custody, confined with those who have already been convicted. The overcrowding of prisons is also a consequence of the lack of action of the Executive, state or federal, for the construction and renovation of prison units. One way of trying to respect the constitutional commandments would be public policies to reform these establishments.

However, as noted by Justice Cármen Lúcia from Brazilian Supreme Court, in the aforementioned case, the construction of prisons is not part of the political agenda of candidates for Executive positions, due to the fact that it does not attract the voter. In addition, for the popular imagination, the more the convicted suffer for a crime, the better. For many, they deserve this unworthy treatment. Nevertheless, a more dignified prison would help the public safety problem, since the prisoners' revolt against the State and society would be softer. Being treated by the State as they are today, the chance of recidivism is higher. Therefore, the prison does not lead to a resocialization, which is one of the main functions of criminal sanction.

As Cesare Beccaria, On Crimes and Punishments (2003, p. 21), taught in the 18th century, if punishment has no practical utility,

which is the prevention of crimes, it ends up being unfair. However, in the Brazilian reality, the penalty has a "disutility" in execution today, contributing to the increase of crimes.

Since the Executive fails to solve one of the reasons for high crime and to treat convicts with dignity, it is necessary for the other powers to control the omission in order to protect the prisoners' rights. In addition, the interests of prisoners are part of the rights of a special minority, one that has its political rights suspended and cannot vote, not having representatives. In this way, there must be some function of the State that protects this minority in which tends to be abused by the majority. The judge must carry out this protection of minorities, even those who have offended society in some way.

The Executive not carrying out its directive or government function in an adequate manner to the constitutional precepts regarding prisons, *i.e.*, not building more of them in order to avoid overcrowding and all other problems caused by this, rises to the function of guarantee, which the Judiciary will act to fill the omission of the public administration.

In addition to the democratic and constitutional foundations for the judge to interfere in public policies aimed at the creation of prisons vacancies, there are still legal foundations. The Legislative itself has already obliged the Executive through the *Lei de Execução Penal*, with number 7210/84, that the only restricted rights of the prisoner would be those provided for in the criminal conviction sentence, as prescribed in article 3. Thus, all other rights, such as physical integrity, health, and moral dignity, should be respected and guaranteed by the State, after all, it imprisons these individuals, and it has the responsibility to guard them. Article 40 imposes this protection.

The same legislation also provides in article 203 that, from the date of promulgation of this bill, which was on July 11, 1984, the public administration would have six months to conform to its dictates, leaving prison establishments in conditions of decent use, without overcrowding. In addition, in article 88, it is predicted that the cells of the units dedicated to the closed regime should be individual, and the health of the place is one of the conditions imposed by law.

The law determines that each prisoner in the closed regime will have his own individual cell. Knowing the number of prisoners, it is possible to know the deficit of vacancies. According to a research made by the *Conselho Nacional de Justiça*, through the *Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas (DMF)*, in 2014 the prison deficit was 354,244 vacancies throughout Brazil.

Justice Celso de Mello pointed out in the mentioned case that the treatment of inmates in prison, which is below the minimum criteria of

dignity, due to the very poor structure of the establishments and by the contempt of the State for this matter, is almost a torture and a deviation of execution. Torture is not allowed under the Brazilian Constitution, according to article 5, item III. A law prohibits the deviation or excess of execution: *Lei de Execução Penal* that, in article 185, states that when there is a violation of rights other than those restricted in the conviction, there will be this excess, which is prohibited. The same law, in article 66, item VII, says that the Judiciary must inspect the prisons, adopting measures for the proper functioning and clarifying responsibilities. Item VIII allows the interdiction of the establishment.

Both the Public Prosecutor's Office, according to article 68, item II, letter "b", and the Public Defender's Office, pursuant to article 81-B, the item I, letter "f", may propose an incident procedure which the judge will determine the measures in order to avoid this excess. This deviation happens in relation to all the prisoners since they are all submitted to degrading circumstances that did not result from a condemnatory sentence. Thus, the effectiveness of a judicial decision is only manifested through obligations directed to the public administrator to carry out the necessary public policies.

Facing the constitutional and legal grounds about the overcrowded prisons, also knowing the number of vacancies required, it is concluded that there is no wide discretion on the part of the public administration regarding construction or expansion of prisons, in order to create new vacancies. The law imposes what should be the prisoners' accommodations, just as both it and the Constitution determine the respect of the prisoner's other rights. There is no room for the public administrator to decide whether to expand the vacancies or not since both the Constitution and Legislative have already decided. The omission of the Executive in this regard is not justifiable. It must simply follow the normative determinations. As for budget constraints, the subject will be dealt with in the next topic.

4. THINKING ABOUT JUDICIAL CONTROL RESTRICTIONS ON PRISON OVERCROWDING

One of the restrictions to the judicial review in a matter of public policies is the reserve of the possible, which concerns the availability of resources for the implementation of rights. These resources can be related to finances, time, intellect, among others situations. Most of the State's expenditure is pointed out in its annual budget, *i.e.*, before starting a new financial year - it is generally known what is going to be spent and where the money will come from. In this way, because its resources are already bound, one can argue that this situation can no longer be modified.

In fact, generally, this condition exists, having to observe the resources available and possible to acquire. However, during the judicial control, the Treasury must prove such circumstance. It has to present to the judge the State budget, showing that there are no resources available for the implementation of the right questioned judicially (PELLEGRINI, 2009, p. 48). Towards this, the argument of the reserve possibly cannot be regarded as absolute and it is unacceptable that the mere indication of this claim automatically removes the State's duty to ensure rights.

In addition, there is the possibility that the judge may determine the allocation of resources in the following year for the realization of the right. According to Ada Pellegrini (2009, p. 48), the State would suffer a double obligation: firstly, allocating resources in the future budget and, secondly, the implementation of the right through that resource. It would be an obligation to reserve and another to use, enforcing the public policy.

This double obligation exists due to the guarantee of immediate application of the fundamental rights predicted in article 5, § 1st, of the Brazilian Federal Constitution. Thus, the judge can, when provoked, enforce a fundamental right through the diffuse control of the constitutionality in actions and omissions of the other powers. Additionally, the article 536, *caput*, of the Code of Civil Procedure, states that the judge, to ensure compliance with the sentence, can take necessary measures. The first paragraph of the same article clarifies that it is an exemplary list because it includes the expression *entre outras medidas*, which means "among other measures". Therefore, the judge could use these devices to compel the reserve of resources to future financial years, as it is appropriate and necessary to protect fundamental rights.

Another problem of judicial control of public policies is that the Judiciary does not have the knowledge, data and time needed to know if it is possible for the State to implement fundamental rights. It is known that the Brazilian Judiciary suffers from a great demand, challenging the judge to make fast but efficient decisions resolving the conflict satisfactorily. The choice regarding public policies requires time to study and for data analysis to learn the possibility of its realization. Public administration generally has trained and specialized personnel in certain areas of knowledge in which public policy will be carried out, and the Executive is the State expression that has the most competence for such studies (CORTEZ, 2013, p.292).

In this way, with the lack of time to study these cases deeply, the judicial command for implementation of rights may end up causing a chain effect that damages other rights, by taking from the administration of human and material resources, allocating them to another right. There is the possibility of competition between rights that the court is unlikely

to foresee (BUCCI, 2006, p. 36).

According to Hermes Zaneti Jr. (2013, p. 58-59), the merely rhetorical arguments about "reserve of the possible" claim that there are no resources available or that is not provided in the budget, is not enough. The same goes for the idea that State activity is very complex to the Judiciary when it can fail to conceive all the data and variables involved in the matter. The public administrator should prove such arguments during the judicial procedure that reviews public policies.

On the other hand, the judge cannot be careless and pronounce decisions that do not fit reality, such as the immediate implementation of a measure that requires planning and resources that do not exist. In addition, the judge, when giving the decision regarding a certain public policy, must supervise the entire process of this enforcement, verifying if its decision is being fulfilled or not.

In the same direction, Maria Paula Dallari Bucci (2006, p. 36) affirms that judicial activism in the control of public policies cannot be carried out in an irresponsible way. Judicial dialogue and coordination are required with the power responsible for implementation. Together they have to choose priority and how the enforcement of rights will be done in a more adequate and safe manner. If the Judiciary decides alone, ignoring the limitations of the Executive, Legislative and their own, there may be a de-structuring of plans already elaborated or in execution.

Moreover, the judge cannot intervene when his own decisions fail to remedy the lack or misuse of the acts of other powers since the Judiciary is often unable to evaluate a particular policy or implement one. Therefore, if the judge himself perceives that the subject is too complex so that he does not have the time or the knowledge necessary to evaluate the situation, he should not interfere or it is necessary that he does it in a more lenient way. His decision may dismantle the State plans or even be useless, leading to disbelief in judicial activity (ZANETI JR., 2013, p. 47).

Now, it is required to bring the issue of the limits of judicial control in public policies to the problem of prison overcrowding. At first, the argument of the reserve of the possible cannot be accepted, since there would be resources available for the expansion of prison vacancies, even partially, for the construction of new prisons, including for semi-open and open regimes or for improvements on existing establishments. These resources are not used properly, according to Justice Ricardo Lewandowski from Brazilian Supreme Court in his vote on the Extraordinary Appeal 592.581/RS. Until 2015, the Penitentiary Fund of the Justice Ministry, part of the Executive, raised R$ 2,324,710,885.64. However, until 2013, only R$ 357,200,572.00 was used.

The complementary law No. 79 of 1994, which established this Penitentiary Fund, includes in its article 3rd all possibilities for the application of resources, which in some way involve prisons and prisoners, victims, crime reduction, or scientific research in the area. From nineteen items, twelve are aimed at the improvement of prisons or for the resocialization of prisoners. Of all of them, item I stands out, which states that the resources of the fund must also be applied to "construction, reform, extension and improvement" of the prisons.

Furthermore, the same law, in its § 5th of the mentioned article, establishes that at least thirty per cent of this fund should be invested for the purposes of item I, that is, from the money available above, it should have been invested, at least, about seven hundred million Brazilian *reais*. In addition, the law, in § 6th of the same 3rd article, prohibits the contingency of the funds from the National Penitentiary Fund, *i.e.*, the Executive cannot delay the application or cease to apply such resources to the destination legally determined.

There are available resources, but still lacking the efficiency from the public administrators by using them, either because they build overpriced constructions, in which the purpose is to support determined groups allied to them, or because of a political apathy, not paying attention to the prison problem. Thus, there is no need to speak in the reserve of the possible.

Even if it were a case of scarce resources, it would be possible, regarding the expansion of vacancies, for the Judiciary determines to the public administrator to allocate money in subsequent financial years and to determine the drafting of a plan to cover the deficit of the penitentiary system.

Note that there is a choice by the public administrator as to what fundamental rights will be enforced. Governments may choose to prioritise some interests instead of others, which is part of the discretion of the Executive in the enforcement of public policies. In fact, there is this margin of choice for the administration, but it is not as wide as one might think, because the Brazilian Constitution already has rights that must be implemented, leaving other interests aside (BUCCI, 2006, p. 9). For example, building more prison units to protect the prisoner's physical and moral integrity would take precedence in building an aquarium, for example.

Similarly, Valentin Cornejo (2002, p. 262) teaches that judicial evaluation of public policies is subject to two parameters. It must comply with certain procedures provided by law and the purposes of public policy must be chosen by the public administration, giving it a margin of discretion. This parameter, paradoxically, also extends the judicial power over public policy, since the Judiciary will be able to analyze whether the ends of public policy are in agreement with

constitutional and legal norms.

The judicial control can choose which right should be prioritized, since the judge demonstrates that, constitutionally, some interests must be guaranteed first than others. The limitation of judicial control is on how this enforcement should take place, *i.e.*, the planning, the schedule, the execution. Therefore, in the case of prison overcrowding, the Judiciary could determine the construction to cover the vacancies' deficit, but the public bidding of a company, the schedule, the materials used and the place is left to the discretion of the public administrator.

Moreover, the judge, in these cases, does not have knowledge of how to carry out the constructions. His decision cannot interfere in the executive stage or the building's plans of increasing vacancies. Respecting the margin of discretion, the judge will only oblige the administrator to prepare this plan within a plausible time, that is, an adequate time for the Executive to do the necessary studies. However, this does not mean that the Judiciary will be inert during planning and execution. If the administration fails to carry out the plan, or does not justify it, the Judiciary may impose a penalties or even hold the public manager responsible for administrative dishonesty, which, according to Ada Pellegrini (2009, p. 51), are the best options for sanctioning and oblige the failing Executive to implement public policies.

Although the manager has a margin of discretion, *i.e.*, being able to choose one or another interest, in this respect, the judge can control if there is an insult or an ineffectiveness in the enforcement of fundamental rights. For example, because of the State's omission, it is ignoring prisoners' fundamental rights, and the judge can determine the obligation of guarantee. Likewise, if there is an excess on the part of the State, *i.e.*, a public policy that seeks to protect one interest, but, consequently, it harms others, it is also possible to complain in the Judiciary.

There is a connection between two prohibitions arising from the proportionality principle, which is the prohibition of insufficient protection and the prohibition of excess (ZANETI JR., 2013, p. 66). According to this principle, the enforcement and protection of fundamental rights must be carried out through measures that can reach their goal. In addition, the measure has to be the least burdensome, pondering the competing rights in the case, that is, to analyze, in face of factual circumstances, which right would be more urgent to be protected. Thus, there must be a positive cost benefit in realizing rights.

In case of State omission regarding penitentiary establishments, there is insufficient protection, which is not allowed by the principle of proportionality, since the essential core of the rights to the physical and moral integrity of the prisoner, which were not restricted by the conviction, are being violated. There is also an offense to the existential

minimum of the human person. The first step to avoid this insufficient protection is increased vacancies through new prisons. This can affect the poor condition of the cells, making them cleaner because of the smaller number of people. For example, less garbage would be accumulated and collected, protecting the health of inmates.

Once again, in regard to administration's discretion, that although it is subject to judicial control, on the other hand, it cannot be so invaded in the hypothesis of how public policy will develop. In summary, the Judiciary can oversee and determine "for what" is the public policy, while the "how" it will be done is reserved for the Executive. Nevertheless, from the moment that the "how" does not fit with the purpose "for what", the interference of the Judiciary is justified.

CONCLUSION

This paper highlighted the main foundations that allow judicial control of public policies, especially in the discussions that affect the overcrowding of penitentiary establishments and their precarious accommodations. The evolution of the conception of the Liberal State to the Social and then to the Democratic Rule of Law demonstrates that in the first two, the Legislative and the Executive had great importance. The Judiciary only came to play a role as relevant in the last state model, in which the principles and fundamental rights provided in the Constitution became part of the goals of a nation, and are parameters to control of the other powers activities.

Since the foundations, objectives of the Republic and the fundamental rights are important to a civilized nation, it is necessary mechanisms for the implementation of constitutional precepts, which are enforced by the Judiciary. In this way, the idea of the separation of powers wears new clothes, being only means to reach the ends mentioned above. It would be possible then a mutual control between the powers, one completing the other whenever there is a fault, by either an abuse, deviation or omission.

The judicial interference in public policies of the public administrator does not violate the separation of powers, because it is a citizen's way of participating in political decisions. The judge ensures the rights of minorities, which tend to be ignored or disrespected by the majority represented by the Executive and Legislative. Giving this competence to the Judiciary is to achieve a balance and harmonization between these functions of the State.

Given that the prisoner's rights are constitutionally established and also in legislation, requiring the Executive to implement these rights, such as physical and moral integrity, the Judiciary can review public policies. It can determine to the public manager to formulate a

plan within a reasonable time, reserve budgetary resources and carry out the construction of new prisons or reforms of existing ones, in order to increase the number of prison vacancies.

Therefore, the management's discretion is respected. The public manager can do the public bidding, choose the materials needed for the construction, and draw up the most appropriate plan. This discretion does not cover failure to enforce the inmate's fundamental rights. In this way, the judge, who does not have the time and the knowledge to do this planning and execution, respects the separation of powers.

This paper results that there is a possibility for the Judiciary reviews public policies, and that the argument of reserve of possible is not enough to remove from the Executive the obligation to implement fundamental rights. It is concluded, therefore, that the judge can determine the elaboration of public policies for constitutional purposes, but he cannot say how this should be done, being left to the discretion of the public manager. However, this does not mean that the role of the Judiciary ends there. The judge should continue to monitor and correct the course of public policy if it deviates from the effectiveness of fundamental rights.

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