

Tarsis Barreto Oliveira

Federal University of Tocantins, Brazil

tarsisbarreto@uft.edu.br

ORCID: 0000-0003-0931-8915

André Ricardo Fonseca Carvalho

School of Judges of Tocantins

andrecarvalho@mpto.mp.br

ORCID: 0000-0003-2926-9794

<https://doi.org/10.26881/gsp.2020.4.14>

Main Effects of Law No. 13.964/2019 (Anti-Crime Package) in Brazilian Criminal Law

1. Introduction

The present work discusses a study on the effects of Law No. 13.964/2019 in Brazilian criminal execution that aims to make substantial changes in the execution of sentences from rules implemented by the new legislation.

In the so-called anti-crime project, several changes in the Brazilian penal legislation were foreseen, including changes in the Criminal Execution Law, especially in the progressive penalty system.

Before presenting the aforementioned amendments, it is essential to analyze the purpose of the penalty and the currents of thought that deal with the subject. In Brazil, a progressive system of penalty enforcement was adopted that had a severe impact with the introduction of Law No. 13.964 of 24 December 2019.

As a result of the new legal system, there has been intense discussion on the constitutionality of the changes implemented in Brazilian criminal enforcement and these discussions merit analysis.

The study is relevant because of the contemporaneity of the matter since the changes in the Criminal Execution Law that have recently come into force have provoked intense debates in view of the profound change in the progressive penalty system in the country.

2. Penalties and their purposes

A penalty is a kind of criminal sanction, a response to the offender of the incriminating rule (crime or misdemeanor), consisting in the deprivation or restriction of certain rights of the individual. The imposition of the penalty necessarily depends on due

legal process, through which the authorship and materiality of a typical, anti-legal, culpable behavior is verified.¹

Throughout history, various currents of thought or theories have emerged to explain the functions of sentencing, with three groups standing out. The first, known as absolute theories, understands that the penalty is a natural consequence of a crime, with the purpose of returning the evil generated. The penalty would have, for the defenders of these theories, the end of mere retribution. The second, also known as relative or utilitarian theories, bases the penalty on the ends that it can achieve (useful to avoid new crimes), looking to the future (*ne peccetur*).² For the theorists of this current of thought, the penalty should serve as general negative prevention; that is, it should act as a deterrent to the commission of new crimes. There is also the purpose of positive general prevention (this is elaborated by Jakobs) in the sense of justifying the penalty in a demonstration of the validity of the law, generating in the community the reinforcement of trust in the State after a crime has been committed.

Another purpose is special prevention, aimed at the offender him- or herself, forming two divisions, consisting of a negative one in which the purpose of the penalty would be to inhibit recidivism, and a positive one aimed at the reintegration and social reinsertion of the offender against the criminal rule.

Finally, there are the so-called mixed theories, which bring together the concepts of absolute and preventive theories, understanding the penalty as retribution for evil, in addition to prevention, general and special.

According to Oliveira,³ instead of denying these two foundations of the penalty (vengeance and prevention), mixed theories seek to correlate the retributive and preventive nature of the criminal sanction. As far as the retributive aspect is concerned, instead of revealing a character of revenge, it corresponds to the necessary measure of proportionality between the penalty and the crime, adapting the general and special preventive functions to the criteria of justice. At the same time, the penalty seeks both a deterrent effect of criminal practices by other members of society and a discouragement to the repetition of criminal actions by the individual already convicted, allowing him or her to be re-socialized and reintegrated into society. Brazil has adopted the mixed or eclectic theory of punishment, also called *mixtum compositum*, covering the ideas of retribution, prevention, and the social reinsertion of the convicted.

If a crime is committed, after due process of law, with the issuance of a sentence, the purpose of retribution and prevention is verified. Through art. 59 of the Penal Code, sentences must be necessary and sufficient to condemn and prevent the crime. Thus, according to our criminal legislation, the penalty must reprove the evil produced by the conduct committed by the agent, as well as prevent future criminal infractions.⁴

¹ R. Cunha, *Manual de direito penal: parte geral*, Salvador 2018, p. 443.

² R. Roig, *Execução penal: teoria crítica*, São Paulo 2018, p. 23.

³ T. Oliveira, *Pena e racionalidade*, Rio de Janeiro 2013, p. 118–119.

⁴ R. Greco, *Curso de direito penal*, Niterói 2016, p. 587.

Criminal execution also has the character of retribution and special prevention, especially positive prevention, referred to by many authors as re-socialization.⁵

Finally, it is verified that the character of social reinsertion of the convicted person is provided for in art. 1 of Law No. 7.210/1984, Law of Criminal Execution: "The criminal execution has the objective of effecting the provisions of sentence or criminal decision and provide conditions for harmonious social integration of the convicted person and the internee."

3. Evolution of the sentence enforcement system

Prison sentences originated in the monasteries of the Middle Ages as a way of punishing members of the religious community who practiced irregularities. These people were sentenced to gather in cells for meditation in order to incite repentance and atonement for sin.

The first occurrence of imprisonment was already connected to the theory of special positive prevention and resocialization, because it induced the prisoner to reflect on the behavior considered wrong, so that he would not make mistakes again.⁶ However, imprisonment as a form of serving a sentence began to be adopted on a massive scale and, a few centuries later, it presented itself globally. In fact, the penitentiary systems originated in the eighteenth century and evolved, with the abandonment of certain practices, the creation of new alternatives, and the maintenance of some characteristics of the old systems that are still in use today. In penal doctrine, three main systems of penitentiary fulfillment are highlighted, known as penitentiary, Philadelphia or cellular, Auburn, and progressive systems. Begun in 1790, under the influence of the Quakers, in the Walnut Street Jail in Pennsylvania, the Philadelphia system was created and later adopted in Belgium.⁷ There was absolute cellular isolation, and the prisoner was taken to his cell, being isolated from the others, besides not being able to work or receive visits. Its main characteristics were the obligation to pray and the impossibility of drinking alcohol, stimulating reflection on the criminal act committed and the consequent repentance of the inmate. It was characterized by the retributive character of the sentence, receiving various criticisms due to the impossibility of communication of the inmates, which did not contribute to the social reinsertion of the condemned, and generating deep psychological and psychiatric disturbances in the inmates. As a way to replace the Pennsylvania system, due to the flaws pointed out, the so-called Auburn system appears. In the penitentiary of Auburn, New York, United States of America, prisoners were isolated and silent at night, and worked during the day, which would resemble the current semi-open Brazilian regime.⁸ This system also

⁵ R. Cunha, *Manual de direito penal: parte geral*, Salvador 2018, p. 444.

⁶ <https://revistas.unifacs.br/index.php/redu/article/view/1835/1394> (accessed 2020.08.01).

⁷ [http://www.depen.pr.gov.br/arquivos/File/DISSERTACAOALEXANDRECALIXTO\[1\].pdf](http://www.depen.pr.gov.br/arquivos/File/DISSERTACAOALEXANDRECALIXTO[1].pdf)

⁸ D. Nardo, *Diagnóstico e proposta de unificação ao regime semiaberto na terceira entrância do estado do Tocantins*, Palmas 2017, p. 45.

had the characteristic of not allowing conversation among inmates, with silence prevailing. However, it was clearly less strict than the penitentiary system.

The second pillar of the Auburn system was the possibility of working during the day while serving the sentence, on the assumption that the work helped the social reinsertion of the convict. This system ended up engendering the exploitation of prison labor by the capitalist system, in view of the exploitation of the fruit of the labor involved. Such circumstances generated clashes with the free working class, and one of the causes of this failure was the pressure of union associations that opposed the development of penitentiary work. Production in prisons represented lower costs and could pose competition with free work. And yet another negative aspect of the Auburn system was the strict disciplinary regime applied.⁹

The third system, known as the progressive system, had some variants, with the English system being abandoned, with three phases of serving a sentence, and the Irish system, with four phases.

The basis of these models was the stimulus for good behavior of the inmate and the incitement for his return to social coexistence, which were benefits granted according to the conduct of the convicts. As a rule, there is a phase of isolation, moving on to a second phase of nighttime isolation and daytime work, for later preparation for social coexistence.¹⁰ The progressive system has spread to countries in Europe and several other countries outside the European continent and is widely adopted today.

Brazil has adopted the progressive system, with some peculiarities. This system was welcomed in our country in the Decree-Law No. 2.848, of 7 December 1940, in the original wording of the general part of the Brazilian Penal Code, foreseeing, in the terms of art. 30, the beginning of the sentence in isolation, for later possibility of common work during the day and night isolation. The convict could also be sent to a penal colony or similar with half of the sentence if it was less than three years or with one-third of the sentence if it was more than three years. There was also the possibility of the convict being co-placed on conditional release, according to art. 60.¹¹

Subsequently, with the enactment of Law No. 6.416, of 24 May 1977, the so-called closed, semi-open and open regimes were provided for, which is the case up to the present moment.

With the introduction of the Criminal Execution Law in 1984, the whole structure of penalty enforcement in Brazil was formatted, and was recently modified by Law No. 13.964/2019.

According to Roig,¹² our country is founded on the progressive system, with the flexibility of the possibility of transfer between regimes. Exactly in this sense, Brazilian Criminal Execution Law establishes that the custodial sentence will be executed in a progressive form with the transfer to a less rigorous regime, to be determined

⁹ C.R. Bitencourt, *Tratado de direito penal: parte geral*, São Paulo 2012, p. 356–357.

¹⁰ A. Bruno, *Das penas*, Rio de Janeiro 1976, p. 58–59.

¹¹ <https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2192353> (accessed: 2020.08.01).

¹² R. Roig, *Execução penal: teoria crítica*, São Paulo 2018, p. 353.

by a judge (art. 112) while also providing for the possibility of regime regression (art. 118). The understanding prevails that the nature of regime progression is a subjective public right that is, therefore, required of the State whenever the objective and subjective requirements for its concession are met. The rule was to establish the fraction of one-sixth for each phase of the sentence, with consequent progression of the regime in fulfilling the objective requirement, as well as the presentation of good behavior, which is the subjective requirement.

According to the provisions of art. 33 par. 1 of the Penal Code, as amended by Law No. 7.209, of 11 July 1984, the closed regime must be complied with in a maximum- or medium-security facility; the semi-open regime in an agricultural, industrial, or similar facility; and, finally, the open regime must be complied with in a simpler, open facility.

The Heinous Crimes Law (Law No. 8.072/1990) introduced a special provision in which the convict should serve his sentence in a fully closed regime. However, the Federal Supreme Court declared the unconstitutionality of this rule in February 2006, in the HC 82959-7/SP judgment.

With this understanding, the National Congress mobilized, culminating in the enactment of Law No. 11.464, of 28 March 2007, which provided for, with a conviction for a heinous crime, progression to a less serious regime at two-fifths of the sentence and, in the event of re-offending, at three-fifths.

4. Changes in criminal enforcement with the introduction of law no. 13.964/2019

It must be recognized that there was, and still is, in Brazilian society a deep dissatisfaction with the national model of penalty fulfillment. There is a clear perception of a general lack of effectively attaining the purposes of penalties, without the observation of the due and proportional punishment to those who commit crimes and with much fewer conditions for the resocialization of convicts. In the years after the enactment of the Law on Penal Executions, legal changes were promoted to give greater rigor to the enforcement of sentences.

In view of the need to better deal with criminal execution, Bill No. 882 of 2019, known as the anti-crime package, was processed, along with other projects dealing with the same issues, and discussions and deliberations were held on various matters relating to Brazilian criminal legislation and criminal procedure, and the criminal execution law.

According to the bill that was approved, Law No. 13.964/2019 makes substantive changes in three main topics of the Criminal Execution Law, which are: a) classification of convicted persons; b) differentiated disciplinary regimes; and c) differentiated percentages for the progression of prison regimes and granting of other benefits.

4.1. Prisoner classification: identification of the genetic profile

The Federal Constitution expressly establishes the principle of individualization of the penalty, through art. 5, item XLVI, establishing that the law will regulate the individualization of the penalty.¹³

The Criminal Execution Law, in this line, has not forgotten to determine that “The prisoners will be classified, according to their background and personality, to guide the individualization of criminal execution.” According to the classification of the convicted, Law No. 12.654/2012 added to the Criminal Execution Law the obligation of those convicted for a crime committed with intent, with violence against a person, or for any of the crimes foreseen in art. 1 of Law No. 8.072, of 25 July 1990 (Heinous Crimes Law), to submit to the identification of their genetic profile by DNA (deoxyribonucleic acid) testing using an appropriate, painless technique (art. 9-A).

According to the position of the Superior Court of Justice, it is perfectly feasible to identify a person by their genetic profile:

CRIMINAL EXECUTION. HABEAS CORPUS. COLLECTION OF GENETIC MATERIAL. A PERSON CONVICTED OF A CRIME OF VIOLENCE AGAINST A PERSON AND A HEINOUS CRIME. FULFILLING THE REQUIREMENTS. ABSENCE OF ILLEGAL CONSTRAINT. APPEAL DENIED. 1. According to art. 9-A of the Criminal Execution Law, those convicted of a crime committed with violence or of a serious nature against a person, or for any of the crimes provided for in art. 1 of Law No. 8072, of 25 July 1990, the identification of their genetic profile shall be compulsorily by the extraction of DNA (deoxyribonucleic acid) using an appropriate, painless technique. 2. In the case under examination, the person is punished for the crimes of homicide, concealment of a corpse, cruelty against animals and irregular possession of a firearm of permitted use, thus remaining satisfied the legal requirements established by the aforementioned provision: conviction for a crime with violence of a serious nature against a person or those listed in art. 1 of Law No. 8.072/1990. 3. Habeas corpus denied.¹⁴

In fact, collecting genetic profiles is an attempt to better identify individuals who commit serious crimes against the law. However, there is intense discussion about the constitutionality of this legal provision, so much so that in view of the number of claims of unconstitutionality, the Supreme Court recognized, in an Extraordinary Appeal, the general repercussion of the matter (Theme 905), and the Constitutional Court has yet to issue a definitive position on the issue.

Law No. 13.964/2019 introduced procedural complements to art. 9-A of the Criminal Execution Law since the amendment approved in the main section of this article was vetoed by the President, which leaves open the possibility of subjecting those convicted of a crime committed with intent and with violence, or for any crimes considered heinous to the procedure of genetic profile identification. In the proposed bill

¹³ <https://www.stf.jus.br/arquivo/cms/legislacaoConstituicao/anexo/CF.pdf> (accessed: 2020.08.01).

¹⁴ HC 536114/MG. HABEAS CORPUS 2019/0290604-2. Rel. Ministro NEFI CORDEIRO (1159). SEXTA TURMA. DJ 04/02/2020. DP - DJe 10/02/2020. Unless stated otherwise, all translations are by the authors.

it was intended that identifying genetic profiles could also occur even before final rulings, but this did not happen. Thus, according to Lima,¹⁵ it should always be kept in mind that identifying genetic profiles is only possible for those convicted (a conviction with a final sentence) of intentional crimes that fall under the provision of art. 9a. Thus, if the individual is in the provisional execution of the sentence for crimes defined in the provision above, there is no provision, nor obligation, to identify him or her by genetic profile, due to the incidence of the constitutional principle of presumption of innocence, in the form of item LVII, of art. 5 of the Federal Constitution.

The new legislation establishes that:

§ 1-A. The regulation should include minimum guarantees of protection of genetic data, observing the best practices of forensic genetics; § 3 The holder of genetic data must be able to access their data contained in the genetic profile databases, as well as all documents in the chain of custody that generated this data, so that it can be contradicted by the defense; § 4 The offender convicted of crimes specified in the heading of this article whose genetic profile has not been identified upon entering the prison shall be submitted to the procedure while serving his or her sentence; § 8 It is a serious infraction for the convicted person to refuse to submit to the procedure for identifying his or her genetic profile.

Recent legislation has also amended Law No. 12.037/2009 to provide for the exclusion of genetic profiles from databases in the event of acquittal or, when there has been a conviction, after twenty years of the sentence is served upon request of an interested parties. In fact, the amendments approved refer mainly to procedural issues. Minimum data protection guarantees must be in place, and the offender is guaranteed access to his or her data contained in the respective databases, to other documents from which these data originated, and are assured the right to contradict them. It should also be noted that, since there is no collection of genetic material from convicts who meet the legal requirements when entering the prison, the collection can be made at any time during the completion of the sentence, even for those who are already in the final stage, for example, in an open regime or enjoying conditional release. This can even extend to prisoners already convicted on a date prior to the enactment of the new legislation, because it is a procedural rule.

The refusal to submit to the genetic profile identification procedure is an act of serious misconduct and, therefore, can lead to consequences provided for in the Law of Criminal Execution, such as regression of regime and revocation of other benefits, such as temporary release and the reduction of working time penalty.

According to Suxberger,¹⁶ the normative option in the Bill brings the Brazilian State closer to other countries that have genetic profile banks with measures to improve criminal investigations. Moreover, if the criminal investigation in Brazil demands ur-

¹⁵ A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 99.

¹⁶ A. Suxberger, "Projeto de lei, anticrime' e as modificações no regime legal da identificação criminal e do banco de perfis genéticos" [in:] *Projeto de lei anticrime*, ed. JusPoProjeto de lei anticrime, ed. Salvador: JusPodivum 2019, pp. 35–36.

gent improvements, either in the data of its ineffectiveness to solve crimes or by the option guaranteeing rights in favor of technical-scientific investigations (instead of the primacy of oral evidence, with all its flaws and problems of meaning and production), the change that prioritizes the technical-scientific aspect is welcome. According to Suxberger, this assertion gains even more importance when it takes into account that material in a genetic profile bank is generally used as a measure of exclusion of authorship and is not necessarily confirmation of a crime, the elucidation of which requires the understanding of its dynamics.

4.2. Differentiated disciplinary regime

The differentiated disciplinary regime (RDD) is considered a modality of disciplinary sanction, the origin of which in the Brazilian legal system occurred in the State of São Paulo through Resolution 26/2001 of the Secretariat of Penitentiary Administration, with the objective of combating organized crime, with provisions for isolating prisoners for up to 360 days that is applicable to the leaders of criminal factions or prisoners engaging in inadequate behavior. The following year of 2002, the State of Rio de Janeiro also instituted a similar measure.

In 2003, because of a strong popular appeal in the face of the country's violent situation, Law No. 10.972/2003 was approved that introduced into the Criminal Execution Law through an amendment to art. 52, a differentiated disciplinary regime. The main characteristic of this was its application to cases of the subversion of internal order or discipline within prison facilities in response to serious misconduct. In the face of the growth of organized crime, several debates have taken place in Brazilian society aiming at improving confronting this type of crime, culminating with the forwarding of the so-called anti-crime project to the National Congress. The concern with organized crime and its profound harm is included in the justification of the bill that was referred:

It is obvious that we are faced with a different type of criminality, which jeopardizes the existence of the State itself through the planning of and executing the death of its agents. Some of these factions even have courts that judge not only their members but also third parties that commit common crimes. The internet shows the action of these agencies in a significant number of states that are deserving of trial in Pirassununga, SP. (<https://www.youtube.com/watch?v=XVs9y1IXfZQ> Accessed on 10/1/2019) and in Porto Alegre

(<http://diariogaucha.clicrbs.com.br/rs/policia/noticia/2016/08/como-funciona-o-tribunal-do-trafico-que-julga-condena-e-executa-desafetos-em-porto-alegre-7297938.html>. Accessed on 10/1/2019).

In both cases there was a death sentence that was executed immediately.

Thus, some topics in the discipline of the differentiated disciplinary regime were included, with the following wording in the Criminal Execution Law:

Art. 52: The practice of an act foreseen as an intentional crime constitutes serious misconduct and, when it causes subversion of internal order or discipline, it shall subject the provisional

prisoner, or sentenced, national or foreign, without prejudice to the penal sanction, to the differentiated disciplinary regime, with the following characteristics:

I – maximum duration of up to two years, without prejudice to repetition of the penalty for further serious misconduct of the same kind;

II – holding in individual cells;

III – fortnightly visits of two persons at a time, to be carried out in facilities equipped to prevent physical contact and the passage of objects, by a person of the family or, in the case of a third party, legally authorized, lasting two hours;

IV – the right of the inmate to leave the cell for two hours daily for outdoor presence, in groups of up to four prisoners, provided there is no contact with prisoners of the same criminal group;

V – interviews always monitored, except those with their defender, in facilities equipped to prevent physical contact and the passage of objects, unless express judicial authorization to the contrary;

VI – inspection of the contents of correspondence;

VII – participation in judicial hearings preferably by videoconference, ensuring the participation of the defender in the same environment of the prisoner.

§ Paragraph 1 – The differentiated disciplinary regime will also be applied to provisional or convicted prisoners, domestic or foreign:

I – who present a high risk to the order and security of the penal institution or society;

II – under whom suspicions of involvement or participation, in any capacity, in a criminal organization, criminal association or private militia, regardless of the practice of serious misconduct, have been founded.

§ Paragraph 2 (Revoked).

§ 3 If there are indications that the prisoner exercises leadership in a criminal organization, criminal association or private militia, or that he has criminal activity in two or more States of the Federation, the differentiated disciplinary regime shall be compulsorily fulfilled in a federal prison facility.

§ 4 In the hypothesis of the previous paragraphs, the differentiated disciplinary regime may be extended successively, for periods of one year, there being indications that the prisoner:

I – continues to present a high risk to the order and security of the penal facility of origin or to society;

II – maintains ties with a criminal organization, criminal association, or private militia, also taking into account the criminal profile and the function performed by him in the criminal group, the persistent operation of the group, the supervening of new criminal proceedings, and the results of penitentiary treatment.

§ In the hypothesis presented in § 3 of this article, the differentiated disciplinary regime shall rely on high internal and external security, mainly with regard to the need to avoid contact by the prisoner with members of his criminal organization, criminal association, or private militia, or of rival groups.

§ 6 The visit referred to in item III in the heading of this article shall be recorded in an audio or audio and video system and, with judicial authorization, inspected by a prison guard.

§ 7 After the first six months of differentiated disciplinary regime, the inmate who does not receive a visit referred to in the main section of this article may, after previous scheduling, have telephone contact, which shall be recorded, with a member of his family two times per month and for ten minutes.

There was a change in the period for which a prisoner can remain in RDD for a limit of two years, with the possibility of repetition in case of new serious misconduct. There can still be a successive extension for one year, even if there is no other serious misconduct, but when there is still high risk to the order and security of the criminal facility of origin or society, or even if it is shown that the prisoner still maintains links with a criminal organization, a criminal association or a private militia under par. 4.

It is clear that the legislator presented a response to social desires, approving the project that establishes a strong limitation to prisoners submitted to the RDD, providing a series of limitations, among the main ones, holding in individual cells, limitation of visits, two hours of outdoor time daily, monitored interviews, and supervision of the content of correspondence.

However, the interview of a lawyer with an inmate is assured, and does not depend on judicial authorization, but the prohibition of physical contact and the delivery of any object to the inmate must be observed.

With the enactment of the Law, a discussion arose over the constitutionality of monitoring the inmate interviews and the content of correspondence, because of the guarantee of the inviolability of correspondence (art. 5, item XII of the Constitution of the Republic).

However, according to Lima,¹⁷ this issue must be overcome:

In these conditions, even though it is claimed that the secrecy of the prisoner's correspondence or his right to intimacy constitute fundamental rights, clauses V and VI of article 52 of the Criminal Execution Law are not unconstitutional since, in the face of the conflict with the rule of fundamental right that gives other individuals the right to life, physical integrity, and security, prisoners' rights may lose strength since the disciplinary regime introduced by Law 13.964/19 is constitutional.

Since the beginning of the institution of RDD in the Brazilian legal system, several criticisms have arisen in the homeland doctrine, with questions about the constitutionality of the institute, under allegations that the established regimes of isolation and rigidity go against the principle of human dignity.

However, the Superior Courts, on several occasions, recognizing the need for the security of the prison and the social order, have systematically recognized the constitutionality of the RDD.

This concludes with the Nucci's¹⁸ observations:

Reality has distanced itself from the law, allowing for the structuring of crime at all levels. But, worse, the marginality within the prison has been organized, which is an inconceivable situation, especially if we think that the prisoner must be, in the closed regime, at night, isolated in his cell, as well as, during the day, working or developing leisure or learning activities. Given these facts, one cannot turn one's back on reality. Therefore, the differentiated

¹⁷ A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 106.

¹⁸ G. Nucci, *Curso de execução penal*, Rio de Janeiro 2019, p. 78.

disciplinary regime has become a necessary evil, but it is far from a cruel punishment. Severe, yes; inhumane, no. In fact, to proclaim the unconstitutionality of this regime, but to close our eyes to the filthy jails into which many prisoners in Brazil are thrown, is an immense contradiction. It is undoubtedly worse to be locked in a collective cell, full of dangerous convicts, with long sentences, many of whom mix with provisional prisoners, without any regimentation in a system that is completely unhealthy, than to be placed in an individual cell, away from violence of any kind, with more hygiene and cleanliness, and in which the prisoner is not subjected to any type of harassment from other criminals.

4.3. Progression of prison regime

Law No. 13.964/2019 brought about profound changes in the Criminal Execution Law and in other diverse legal provisions of a criminal nature and of criminal procedure.

As already highlighted, the Brazilian legal system has adopted the progressive system of sentence enforcement, which provides three regimes: closed, semi-open, and open. There is also the possibility of granting convicts conditional release when the requirements of art. 83 of the Penal Code are fulfilled.

The progression of the prison regime in Brazil is based on the principle of the individualization of the penalty (art. 5, XLVI, CF); the inmate is notified of the time of the penalty and the initial regime of the sentence.

With the progression of the regime, the convict also has the possibility of achieving reintegration into society since there is a return to the external coexistence of the prison in a gradual manner, through the implementation of the fraction of time provided for by law and the merit relating to the convict's self-discipline and responsibility.

Before the entry into force of Law No. 13.964/2019 there were few time limits for the progression of the regime. With the exception of a par. 3 of art. 112 of LEP, which provides special rules for the fulfillment of women's penalties in exceptional situations, such as pregnant women or mothers of children and handicapped people, demanding the fulfillment of 1/8 of the penalty for progression, the penalty is fulfilled, in the objective sense, as follows: a) common crimes – primary or recidivist – time lapse of 1/6; b) heinous and equivalent crimes – primary – 2/5; c) heinous and equivalent crimes – recidivist – 3/5. The new law significantly changes the time requirements for progression of the regime and is established as follows:

Art. 112. The custodial sentence shall be executed in a progressive manner with the transfer to a less rigorous regime, to be determined by the judge, when the prisoner has at least served:

I – 16% of the sentence if the convict is a primary offender and the crime was committed without violence to a person or a serious threat;

II – 20% of the sentence if the convict is a repeat offender of a crime committed without violence to a person or a serious threat;

III – 25% of the sentence if the convict is a primary offender and the crime was committed with violence to a person or a serious threat;

IV – 30% of the sentence if the convict is a repeat offender of a crime committed with violence to a person or a serious threat;

V – 40% of the sentence if the convict is a primary offender who has committed a heinous crime or a similar crime;

VI – 50% of the sentence, if the convict is:

a) convicted as a primary offender of committing a heinous crime or a similar crime resulting in death and conditional release is prohibited;

b) convicted of exercising command, individually or collectively, of a criminal organization structured for the commission of a heinous or similar crime; or

c) convicted of the crime of forming a private militia;

VII – 60% of the sentence if the convict is a repeat offender of a heinous crime or similar crime;

VIII – 70% of the sentence if the convict is a repeat offender of a heinous crime or a crime equivalent to a death and conditional release is forbidden.

§ Paragraph 1. In all cases, the convict shall only have the right to progression of the regime if he displays good prison conduct, attested to by the director of the facility and with respect to the rules that prohibit progression.

§ Paragraph 2. The decision of the judge that determines the regime progression shall always be motivated and preceded by the manifestation of the Public Prosecution Service and the defender, a procedure that shall also be adopted in the concession of conditional release, pardon, and commutation of sentences with respect to the deadlines provided in the rules in force.

§ 5 The crime of drug trafficking foreseen in § 4 of art. 33 of Law No. 11.343, of August 23, 2006, is not considered heinous or equivalent for the purposes of this article.

§ 6 Committing a serious misdeed during the execution of the custodial sentence interrupts the period for obtaining progression in the regime of the execution of the sentence in which case the resumption of counting for the objective requirement is based on the remaining penalty.

Art. 122:

§ 2 The convict serving a sentence for committing a heinous crime resulting in death shall not be entitled to the temporary release referred to in the heading of this article.

With regard to the length of sentences, art. 75 of the Criminal Code was amended to increase the maximum length of custodial sentences by ten years to extend the maximum period of imprisonment from 30 to 40 years.

Article 112 of the Criminal Execution Law was profoundly amended with the introduction of Law No.13.964/2019, with a staggering of the percentages of sentence served in the progression of the regime, with differentiations between primary and repeat offenders, between crimes with or without violence and a serious threat, heinous crimes or crimes similar to these resulting in death, crimes of criminal organization structured for the practice of heinous or similar crimes and the crime of constituting private militias.

In the previous rule, the progression happened with 1/6 of the fulfillment of the penalty, being modified only in cases of heinous or equivalent crimes and, in these

cases, differentiating itself, for the progression, for primary (2/5) and recidivist (3/5) offenders.

There are now eight different percentages, ranging from sixteen to seventy percent of sentences in given regimes, with several variables for applying the corresponding percentages.

The subjective requirement for regime progression is good prison behavior, which continues to be required by the new Law, which the director of the prison facility must attest to (§ 1). In the event of serious misconduct during the execution of the custodial sentence, there is an innovation compared with the previous legal system. In fact, the law introduces the understanding already summarized by the Superior Court of Justice, through Precedent No. 534, according to which the practice of serious misconduct interrupts the counting of the period for the progression of the sentence enforcement regime, which is resumed from the commission of the infraction.¹⁹

As a rule, there will be no retroactivity of this Law, since, in most of the issues provided for, the situation of the convict has worsened, in obedience to the principle of the irretroactivity of the law (art. 5, XL, of the Constitution of the Republic). However, in some points, such as the first fraction of sixteen percent for primary offenders with crimes committed without violence or a serious threat, there is a small decrease in relation to the previous rule of one sixth, which, if transformed into a percentage, would be 16.6%. Thus, in these cases, it is necessary to apply the new rule in view of the retroactivity of the most beneficial law.

An important point of discussion has appeared in relation to the legal nature of the recidivism foreseen in art. 112 of the Criminal Execution Law, whether it is specific or general. The interpretative divergence falls on the percentages foreseen for regime progression. The law provides for the need to serve 40% (forty percent) of the sentence if the convict is convicted of committing a heinous or similar crime, if it is a primary offense (item V); and 60% (sixty percent) of the sentence if the convict is a repeat offender in the commission of a heinous or similar crime (item VII).-Thus, a current of thought has emerged that sustains the same treatment between a primary criminal and a non-specific recidivist, and a second current that defends the thought that specific recidivism is not necessary for the convict to progress with serving sixty percent of the sentence in his regime.

The first doctrinal current of thought assumes the position of the literal interpretation of the provisions, in which it would be required for specific recidivism to apply the highest percentage.

In this line of thought, when commenting on recidivism in cases of crimes with violence or a serious threat, Cunha²⁰ is relevant:

¹⁹ A. Lima, "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020, p. 112.

²⁰ R. Cunha, *Pacote anticrime: lei n. 13.965/2019: comentários às alterações do CP, CPP e LEP*, Salvador 2020, p. 371.

The provision refers to specific recidivism in a crime with violence or a serious threat. But what if the offender is a repeat offender, but only one of the crimes, past and present, was committed with violence or a serious threat? Reading and rereading the article in the commentary, we conclude that we are facing a gap, the integration of which, of course, should observe the principle of *in dubio pro reo*.

On the other hand, it is necessary to make use of other means of interpretation, such as logical, teleological, historical, and systematic. There seems to be no doubt that the so-called anti-crime package aimed at a more rigorous fight against crime, with the purpose of enabling the State to take more incisive action, especially in relation to the practices of heinous and similar crimes.

Moving on to a historical interpretation, we observe that all the discussions that culminated in Law No. 13.964/2019 were in the sense of giving greater robustness in the predictions of regime progression.

From the point of view of systematic interpretation, the conclusion of the requirement of specific recidivism for progression to a less rigorous regime with a reach of 60% of the fulfillment of the penalty sounds contradictory, because it would be recognized, at this point, as an improvement of the convict's situation, including in the application of the retroactivity of the law, bearing in mind that the previous rule for such cases would be more serious. Thus, it is not clear that a law that seeks to promote the fight against organized crime and greater strictness in the execution of sentences could improve the situation of those convicted of heinous and similar crimes, especially repeat offenders.

In fact, there is no mention in Law No. 13.964/2019 on specific recidivism in heinous or equivalent crimes; therefore, we should observe the understanding prior to the enactment of this law, which was consolidated in the sense of the need for specific recidivism for a lack of legal provision; therefore, the occurrence of generic recidivism is not required, which means the previous crime was also heinous or equivalent. It must be taken into consideration that, if the law intends to achieve specific recidivism, it must do so expressly, which does not occur in the present situation. In this sense, Lima²¹ is relevant:

Referring to art. 2, § 2 of Law No. 8072/90, the fulfillment of 2/5 of a sentence if the convict is a primary offender and 3/5 if a recidivist, without making any reservation as to the type of recidivism, it is concluded that the legislator refers to the generic recidivism of art. 63 of the Penal Code. After all, when the law wishes to refer to specific recidivism, it does so expressly. By the way, it is enough to see the example of art. 83, item V, of the Penal Code, included therein by virtue of Law No. 8072/90, which expressly mentions specific repeat offenders in crimes of a heinous and similar nature. Similarly, when dealing with the replacement of a custodial sentence by a restriction of rights, art. 44, § 3, *in fine*, of the Penal Code makes express reference to recidivism operated by virtue of the practice of the same crime. Therefore, in view of the silence of the Law – art. 2, § 2 of Law No. 8.072/90 refers generically to recidivism – it is not given to the interpreter to include different requirements under penalty of violation

²¹ R. Lima, *Legislação criminal especial comentada: volume único*, Salvador 2019, p. 256.

of the principle of legality. Therefore, if someone commits a heinous or similar crime, after having already been irrecoverably convicted of another crime, heinous or not, in the last five years, he may progress only after serving 3/5 of the sentence under the previous regime.

There are already judicial questions about the controversy, and some courts have already consolidated the above position that specific recidivism is unnecessary. The Court of Justice of São Paulo recently decided on this subject:

Criminal execution. Progression to a semi-open regime. Recidivist criminal. Allegation of the defense that the requirement of 60% (3/5) of the sentence, from Law 13.964/2019, applies only to specific recidivists. Appeal not granted. The new law was instituted with the objective of repressing in a more severe way those who commit crimes through criminal organizations, violent crimes, heinous crimes, and those equivalent to heinous, with differentiated treatment to the hypothesis of recidivism. The intention of the legislator that must be observed by those who apply the Law. The impossibility of being admitted the requirement of 3/5 of the penalty (currently 60%) only for specific recidivists. The maintenance of the calculation presented, which considered a reduction of 3/5 for the progression of the sentence of the recidivist sentenced, even if it is not specifically for a heinous crime. Decision maintained. Appeal not accepted.²²

5. The constitutionality of the new rules on the progression of the system of the enforcement of penalties

The 1988 Constitution of the Republic introduces guidelines for Brazilian criminal execution that are established in the clauses of art. 5 that present the treatment of penalties, as follows:

XLVI – the law will regulate the individualization of the penalty and will adopt, among others, the following: a) deprivation or restriction of liberty; b) loss of property; c) fines; d) alternative social benefits; e) suspension or prohibition of rights; XLVII – there will be no penalties: a) death, except in case of declared war, under the terms of article 5. 84, XIX; b) perpetual; c) forced labor; d) banishment; e) cruel; XLVIII – the penalty will be served in different facilities, according to the nature of the crime, the age, and the sex of the convict; XLIX – prisoners are assured respect for physical and moral integrity; L – prisoners will be assured conditions so that they can remain with their children during the period of breastfeeding.

There is a current of thought that defends the unconstitutionality of these changes with the allegation that this violates the progressive system of serving sentences. It also postulates the possibility of increasing the permanence of prisoners in the re-

²² TJSP: Agravo de Execução Penal 0001822-18.2020.8.26.0521; Relator (a): Otávio de Almeida Toledo. Órgão Julgador: 16ª Câmara de Direito Criminal; Sorocaba/DEECRIM UR10 – Unidade Regional de Departamento Estadual de Execução Criminal DEECRIM 10ª RAJ; Data do Julgamento: 26/05/2020; Data de Registro: 26/05/2020.

spective prison facilities, which will subsequently lead to increased public spending on prisoners and the failure to uphold the principle of human dignity.

There is also the argument that the Supreme Court already declared in an analysis of a precautionary measure, the state of unconstitutional affairs in the penitentiary system in Brazil (ADPF No. 347), which was not taken into account by the ordinary legislator.

A second current of thought defends the rigors of the execution of the sentence, but also adheres to the guiding principles of criminal execution, as well as the individual rights of prisoners. This line of thought emphasizes the right to the security of the community in art. 6 of the Constitution of the Republic as one of the social rights presented there, so that public security is also considered a right of society. It is also argued that prison is a school of crime and that the custodial sentence is bankrupt. However, there is no point in sustaining non-compliance with the law. If the law were served faithfully, in all likelihood the penalty would not be bankrupt.

Criminal enforcement and the changes promoted by Law No. 13.964/2019, especially the new rules of progression of the regime, must be analyzed in terms of constitutional principles, which are the legal standards *par excellence*. Based on this assumption, the principle of legality must be observed, which achieves a high level of activity in the determination of penalties and security measures, extending to disciplinary sanctions. The principle of adversarial procedure cannot be forgotten, with the right of the parties to be informed of all procedural acts, in conditions of parity, allowing for a broad defense, both self-defense and technical defense. The individualization of the penalty should be the rule, with the appropriate facility for the fulfillment of the measure, and the appropriate classification of prisoners. The principle of humanity enshrines the need to respect the person who serves the sentence or security measure with protection of their physical and mental integrity.²³

Indeed, the exceedingly difficult issue of a possible conflict of constitutional principles must be resolved by the so-called balancing of interests. This arises from the various ideas inserted in the Constitution since it is presented through the insertion of values from various social groups within a territory.

In the weighing of interests we must first analyze the constitutional principles that are in conflict. Afterwards, we must determine the weight that the system gives to these principles and, finally, we must analyze the weight that each principle has in that specific case, and the principle that has more specific weight over the one that has less must prevail. Thus, to achieve this restriction of interests it is necessary to use the elements of the principle of proportionality, and the weighing of interests must be based on the principle of the dignity of the human person in the final analysis.²⁴

This analysis indicates that the ordinary legislator did not disrespect the constitutional precepts of human dignity by bringing, as a rule, more rigorous treatment

²³ <https://bd.tjmg.jus.br/jspui/handle/tjmg/8598> (accessed: 2020.08.01).

²⁴ https://www.emerj.tjrj.jus.br/paginas/trabalhos_conclusao/1semestre2012/trabalhos_12012/viniciussobreira.pdf (accessed: 2020.08.01).

in Brazilian criminal execution. The legislative changes are compatible with constitutional precepts, with important emphasis on the principle of the individualization of penalties, with attention to different time limits for the progression of the regime according to the seriousness of the crime and the personal conditions of the convict. According to Nucci²⁵ regarding the individualization of the penalty, there are three aspects to consider: a) first, the legislator, if responsible for individualizing penalties, after all, when designating a new crime the type of penalty (simple detention or imprisonment) and the amount of penalty must be established, among other aspects; b) in the judicial sentence the judge must establish the penalty, choosing the appropriate amount, between the minimum and the maximum, abstractly provided for by the legislator, in addition to opting for the enforcement regime of the penalty and the possible benefits (alternative sentences, conditional suspension of the penalty, etc.); c) the third stage of the individualization of the penalty develops in the stage of criminal execution.

The legislator's wisdom in presenting more serious treatment only to convicts who have committed serious crimes and who have other previous convictions is thus noted. It should be noted that with primary offenses and crimes without violence or a serious threat, there is a reduction in the time frame of the progression of the regime.

Thus, using the principle of proportionality in the weighing of interests, it is concluded that the legislative changes are proportional to the seriousness of crimes and the personal conditions of convicts, and they are also proportional to the offense suffered by people in general through the lack of security in the country.

Therefore, it is stated that the changes brought about by Law No. 13.964/2019, which changed the rules for the progression of the regime throughout the serving of sentences, are constitutional.

6. Conclusions

Law No. 13.964/2019 profoundly changed the Brazilian criminal execution process, and effected important changes in the legal framework, especially with innovations to the classification of convicts, new rules for the differentiated disciplinary regime, and for the progression of the prison regime and other benefits throughout the sentence. After the presentation of the purpose of the sentence, the systems provided for its fulfillment were addressed, until the progressive regime of penalty was adopted in Brazil.

Due to the general discontent in society about the fulfillment of penalties in Brazil, the legislator opted to ensure, in the approval of the new law, the social right of security. Thus, the legislator rightly presented more rigorous treatment to those convicted of violent crimes or those committed by repeat offenders. It was then important to increase the conditions of the differentiated disciplinary regime and to improve the system of collecting genetic material from convicts.

²⁵ G. Nucci, *Curso de execução penal*, Rio de Janeiro 2019, p. 2.

As has been demonstrated, the principle of individualization of the sentence has been obeyed, and the recent alterations to the Brazilian Criminal Execution Law are constitutional.

Literature

- Bitencourt C.R., *Tratado de direito penal: parte geral*, São Paulo 2012.
- Bruno A., *Das penas*, Rio de Janeiro 1976.
- Cunha R., *Manual de direito penal: parte geral*, Salvador 2018.
- Cunha R., *Pacote anticrime: lei n. 13.965/2019: comentários às alterações do CP, CPP e LEP*, Salvador 2020.
- Greco R., *Curso de direito penal*, Niterói 2016.
- Lima A., "Alterações promovidas pela lei anticrime na lei de execução penal: lei 7.210/84" [in:] *Lei anticrime comentada*, ed. J.H. Mizuno, Leme 2020.
- Lima R., *Legislação criminal especial comentada: volume único*, Salvador 2019.
- Nardo D., *Diagnóstico e proposta de unificação ao regime semiaberto na terceira entrância do estado do Tocantins*, Palmas 2017.
- Nucci G., *Curso de execução penal*, Rio de Janeiro 2019.
- Oliveira T., *Pena e racionalidade*, Rio de Janeiro 2013.
- Roig R., *Execução penal: teoria crítica*, São Paulo 2018.
- Suxberger A., "Projeto de lei 'anticrime' e as modificações no regime legal da identificação criminal e do banco de perfis genéticos" [in:] *Projeto de lei anticrime*, ed. Salvador: JusPodivum 2019.

Summary

Tarsis Barreto Oliveira, André Ricardo Fonseca Carvalho

Main Effects of Law No. 13.964/2019 (Anti-Crime Package) in Brazilian Criminal Law

The present work analyzes the main changes in Brazilian criminal execution following the entry into force of Law 13.964/2019 (an anti-crime package), with a study of the principles and characteristics of criminal execution in the country. The legislation introduced several changes into the system of the execution of sentences, mostly with stricter rules. In turn, the constitutionality of the amendments in view of the 1988 Brazilian Constitution is demonstrated. The descriptive and comparative methods for examining past and current legislation is appropriate for the analysis of this study. The results of the study show that the legislator was right about the changes made in the Criminal Execution Law (Law No. 7.210/1984).

Keywords: Penal execution, legislative change, constitutionality

Streszczenie

Tarsis Barreto Oliveira, André Ricardo Fonseca Carvalho

Główne skutki ustawy nr 13.964/2019 (pakiet przeciwdziałania przestępczości) w brazylijskim prawie karnym

Artykuł został poświęcony analizie głównych zmian w egzekucji karnej po wejściu w życie ustawy 13.964/2019 (pakiet przeciwdziałania przestępczości) w Brazylii, a także analizie zasad i cech egzekucji karnej w tym kraju. Ustawodawca dokonał zmian dotyczących wykonywania wyroków, wprowadzając bardziej restrykcyjne zasady. Autorzy wskazują jednak, że poprawki te były zgodne z Konstytucją Brazylii z 1988 r. Przedstawiona analiza została dokonana w oparciu o opisową i porównawczą metodę badawczą, obejmując zarówno obecny, jak i wcześniejszy stan prawny. Wyniki badania wskazują, że zmiany wprowadzone przez ustawodawcę w prawie karnym egzekucyjnym (ustawa nr 7.210/1984) były uzasadnione.

Słowa kluczowe: egzekucja karna, zmiana legislacyjna, konstytucyjność