LUMEN ET VIRTUS

The effects of recidivism on criminal enforcement

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ABSTRACT

The main purpose of the article is to analyze the effects of recidivism in the context of penal execution, when prison task forces are carried out. In order to develop the study, the starting point will be the understanding of the functioning of the task forces and, then, the legal analysis of the issues related to recidivism. The general objective of the study is to analyze what are the effects of recidivism on penal execution and, in order to achieve the desired proposal, the following are the following specific objectives: to understand the functioning of a prison task force; reflect on the importance of the prison task force; understand the position of the STJ with regard to the process of calculating penalties for cases of recidivism. To this end, as a technical procedure, a bibliographic, descriptive research and deductive approach method will be carried out.

Keywords: Task Force, Prison, Recidivism, Resocialization.

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INTRODUCTION

The proposal presented in this study is directly related to the finding of cases of recidivists (people who incur in a new criminal type), when prison task forces are carried out in several prisons in the districts of the State of Paraíba.

In this way, while reading the article, the reader will be able to follow the modus operandi of a prison task force and, in particular, what is the great legal and social function of this process, in the context of penal execution.

In order to be able to carry out the development of the text, it was decided to follow as a general objective to analyze what are the effects of recidivism in the penal execution and, in order to achieve the desired proposal, the following specific objectives are: to understand the functioning of a prison task force; reflect on the importance of the prison task force; understand the position of the SJT with regard to the process of calculating penalties for cases of recidivism. To this end, as a technical procedure, a bibliographic, descriptive research and deductive approach method will be carried out.

SOCIAL AND LEGAL ASPECTS OF PRISON TASK FORCES

After more than 10 (ten) years carrying out prison task forces in several prisons in the Judicial Districts of the State of Paraíba, serving re-educating for various crimes, many of them recidivist, that "etymologically, the term recidivism, from the Latin recidere, means relapse into a new crime", it was observed the need for a deepening of the study of recidivism, whether specific or not, and its effects on penal execution.

The prison task forces are carried out in alphabetical order, with the presence of a Judge, a Prosecutor and a Public Defender, all working in penal execution, and has had a double effect, granting benefits to inmates who have already reached the objective and subjective requirements, and giving the right to listen to those who are incarcerated and often, without proper assistance.

During the task forces, it is a fact that several inmates return, either due to the difficulty of staying out of prison, some after several years incarcerated, which makes it difficult to get a job, mainly due to the use of the electronic anklet, in the face of existing prejudice and many because they are part of factions and generally comply with orders and new crimes are committed.

And if they are already convicted, a final and unappealable sentence, with the practice of a new crime, comes recidivism, which aggravates the situation of the re-educating, and in the face of some understandings, the aggravation is greater, and it is about the effects of recidivism in the penal execution that this article deals with.

Currently, the Penal Code regulates recidivism through arts**.** 61, 63 and 64. See:

> These are circumstances that always aggravate the penalty, when they do not constitute or qualify the crime:

> I – recidivism.
> Recidivism is an aggravating circumstance and at the time of sentencing it must be analyzed at the time of the application of the penalty, as we will see later.
> Article 63 of the same law defines recidivism:
> Recidivism occurs when the agent commits a new crime, after the final and unappealable sentence that, in the country or abroad, convicted him of a previous crime. (BRAZIL, 1940)

And then, article 64 regulates the time in which the effects of recidivism will prevail

> For the purpose of recidivism:
>
> I – The previous conviction does not prevail if between the date of completion or extinction of the sentence and the subsequent offense a period of time greater than five (5) years has elapsed, including the probation period of suspension or conditional release, if there is no revocation. (BRAZIL, 1940)

As can be seen, for recidivism to occur, three factors are necessary: the commission of a previous crime; the final and unappealable judgment of the conviction and the commission of a new crime. And making a brief historical analysis, recidivism has been part of the Penal Code since the time of the Empire. Let's see in Carrazzoni's lesson (2005, online):

> Recidivism in Brazil has been present since the Criminal Code of the Empire of 1830 (article 16, § 3) and in the Penal Code of 1890 (article 40); in both diplomas it was considered an aggravating circumstance, in relation to the "new" crime, as long as it was of the same nature as the antecedent (specific recidivism). It was only in the 1940 Code that the legislator simultaneously adopted generic and specific recidivism (articles 46 and 47), but in perpetuity. In 1977, with the advent of Law 6.416, the Brazilian legislator changed the criterion for applying recidivism, imposing a limit on the time lapse (5 years) and abolishing the specific form of the institute under analysis. (Carrazzoni, 2005 online)

The Penal Code of 1940 made a distinction between specific and generic recidivism, in article 46, which provided as follows:

> Article 46 – Recidivism occurs when the agent commits a new crime, after the sentence has become final, which in the country or abroad, has convicted him of a previous crime.
> Paragraph 1 – Recidivism is said:
> I – Generic, when the crimes are of a different nature;
> II – Specific, when the crimes are of the same nature.
> Paragraph 2 – Crimes of the same nature are considered to be those provided for in the same legal provision, as well as those that, although provided for in different provisions, present common fundamental characteristics due to the facts that constitute them, or for their determining reasons.
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> Article 47 – Specific recidivism matters:
> I – the application of the custodial sentence above the minimum with the maximum;
> II - the application of the most serious penalty in quality, among those alternatively committed, without prejudice to the provisions of no. I. (BRAZIL, 1940)

With the entry into force of Law No. 6,416, of May 24, 1977, the Penal Code was amended, imposing a limit of 05 years and abolishing the specific form. In the Penal Code of 1940 the effects of recidivism were perpetual, no matter how long the crime was committed, it would always exist, which was corrected, imposing the limit of 05 years, however, only with the reform of 1984, which

took place on July 11, 1984, Law No. 7,209, which completed 40 years this year, recidivism is now dealt with in arts. 63 and 64, of the Penal Code, but maintaining the maximum period of 05 years, counting from the extinction of the punishability.

It is worth mentioning that in that year, 1984, we had a prison population of 258,503 prisoners, for a population of 134 million inhabitants. And according to a report released by the National Secretariat for Penal Policies (SENAPPEN) through the 15th Cycle of Penitentiary Information Survey of the National Penal Information System (SISDEPEN) with data for the second half of 2023, the prison population is 650,822 prisoners in physical cells and 201,188 under house arrest, for 203,080,756 million inhabitants, data updated on 12.22.2023, from the last Census of 2022 (BRASIL, 2022).

The prison population in these 40 years has only grown. And many of those who left, returned, demonstrating, in theory, a greater dangerousness, since the one who is a repeat offender is not always the most dangerous. It may be that the individual is a repeat offender in a crime of bodily injury and a primary offender in a crime of rape, and certainly, the crime of rape demonstrates greater dangerousness. But many have always thought that recidivism was a cause of greater danger and that is why the legislator sought a way to punish more severely those who commit more than one crime. The one who leaves the prison unit and then returns, often leaves serving his sentence in the semi-open regime, commits a new crime and returns. And if the final judgment has already occurred, is not serving a sentence with a provisional collection slip, it will be, in case of a new conviction, configured as recidivism.

The Penal Execution Law, 7.210/84, admits, in its article 2, sole paragraph, that it is possible that a re-educating person is serving a sentence and is not subject, if he commits a new crime, to the effects of recidivism, due to the absence of res judicata.

Recidivism is considered an aggravating circumstance of the penalty, it must be evaluated in the 2nd phase of dosimetry, and cannot be included in the judicial circumstances, under penalty of incurring bis in idem, and thus, the issue was summarized – Precedent 241, of the STJ: "***Criminal recidivism cannot be constituted as an aggravating circumstance and, simultaneously, as a judicial circumstance."*** (emphasis added).

Recidivism can be recognized by the court of criminal executions, regardless of the prosecuting court. And in the beginning, where it was understood that it was not possible to recognize recidivism if it had not been recognized by the sentencing court, we, judges of criminal execution, did not apply it when preparing the calculations for the issuance of the certificate of sentence to be served, and consequently, in the granting of benefits. And this understanding lasted for a long time, and with the change, it caused a lot of controversy due to the fact that there were scholars who understood that it violated res judicata, however, from the judgment of the Motion for

Clarification of Divergences in RESP No. 1.738.968 – MG (2018/0104698 – 0) whose rapporteur was Justice Laurita Vaz, of the Superior Court of Justice, the discussion was resolved and recidivism was recognized even if it had not been recognized in a sentence, in the criminal execution phase.

This decision generated a lot of impact in the scope of Penal Execution. Let's look at the menu:

> 'MOTION FOR CLARIFICATION OF DIVERGENCE IN THE INTERLOCUTORY APPEAL IN THE SPECIAL APPEAL. CRIMINAL EXECUTION. FAILURE TO RECOGNIZE RECIDIVISM BY THE SENTENCING COURT. PROCLAMATION BY THE EXECUTION COURT. POSSIBILITY. INEXISTENCE OF **REFORMATIO IN PEJUS**. MOTION FOR CLARIFICATION GRANTED. 1. The individualization of the penalty is carried out, essentially, in three moments: in the commination of the penalty in abstract to the legal type, by the Legislator; in the criminal conviction, by the Court of Knowledge; and in criminal execution, by the Court of Executions.2. The intangibility of the final criminal conviction does not remove from the Criminal Execution Court the duty to adapt the fulfillment of the criminal sanction to the personal conditions of the defendant. 3. 'In the case of a criminal conviction, the execution court must stick to the content of the aforementioned *decision*, with regard to the quantum of the penalty, the initial regime, as well as the fact that the custodial sentence has been replaced or not by a sentence that restricts rights. However, the personal conditions of the patient, such as recidivism, must be observed by the execution court for the granting of benefits (regime progression, conditional release, etc)' (AgRg no REsp 1.642.746/ES, Rel. Minister MARIA THEREZA DE ASSIS MOURA, SIXTH PANEL, judged on 08/03/2017, DJe 08/14/2017). 4. Motions for divergence granted in order to upset the embargoed judgment, grant the interlocutory appeal, grant the special appeal and, thus, also annul the judgment under appeal and the decision of the first instance, and the Court of Executions must promote the rectification of the certificate of sentence to record recidivism, with all the resulting consequences."

And several interpretations emerged, and understanding that these are different attributions, Masson (2024 p. 410) discusses the subject well:

> Recidivism may be admitted by the court of criminal executions for analysis of the granting of benefits, even if not recognized by the court that handed down the conviction. The recognition of recidivism in the phases of cognizance and criminal execution produces different effects. It is incumbent upon the court of cognizance to apply the aggravating circumstance of article 61, item I, of the Penal Code, for the purpose of aggravating the reprimand and setting the initial regime for serving the sentence. Secondly, the recognition of this personal condition for the purpose of granting benefits of criminal execution is the responsibility of the Criminal Execution Court under the terms of article 66, item III, of the Criminal Execution Law. Thus, even if not recognized in the conviction, recidivism must be observed by the Execution Court for the granting of benefits, and the allegation of reformatio in pejus or violation of res judicata is unreasonable, as they are distinct attributions. (Masson, 2024 p.410).

And in view of the matter having been much debated, and with the decision of the Superior Court of Justice, cited, when deciding on a benefit to be granted in the context of criminal execution, the judge must observe the issue of recidivism, which can be specific or generic. And this issue of the distinction of recidivism, which had been excluded from the Penal Code of 1940, continued to be observed in the decisions in the application of the penalty and even in the execution of penalties.

With the entry into force of the Anti-Crime Package, Law No. 13,964/2019, the criteria for regime progression were modified, repealing article 2, paragraph 2, of Law No. 8,072/90, which

provided for regime progression in heinous or equivalent crimes. And from then on, specific recidivism began to have a connotation of further aggravating the period for obtaining benefits.

Commenting on the subject, Lima (2024 p.97), in his work Manual de Execução Penal, states as follows:

> ″Then comes the Anticrime Package, introducing new objective requirements for regime progression, relatively more severe, depending on the specific case. Considering that Law No. 12,964/19 also revoked article 2, paragraph 2, of Law No. 8,072/90, which, at least until then, provided for the progression of the regime for heinous or equivalent crimes, it is necessary to conclude that the new system contained in article 112 of the LEP, with distinct and specific criteria and percentages for each group, it is applicable even for such crimes. Take, for example, the specific recidivist in a heinous crime or equivalent to resulting in death: if, until the entry into force of Law No. 13,964/19, progression was conditional on the fulfillment of 3/5 (three fifths), that is, 60% of the sentence – revoked paragraph 2 of article 2, of Law No. 8,072/90 -, henceforth, read in relation to crimes committed as of the effectiveness of the Anticrime Package (01.23.2020), such convict will have to serve at least 70% (seventy percent) of the sentence. (Lima, 2024 p.97)

Recidivism can be generic or specific. In the generic one, the crimes committed are of different criminal types, and in the specific one, the crime must be of the same criminal type, of the same or similar type. In the case of a heinous or similar crime, without the result of death, if you are convicted of a new crime of this kind, a specific recidivist, the progression will only occur if you serve 60% (sixty percent), which was previously a single threshold, 2/5 or 40%.

Because recidivism is a condition of a personal nature, there are understandings that in a sum of penalties, it should be levied on the total sentence, which has generated a very large increase so that re-educating recidivists can obtain new benefits, which I disagree with this understanding because I understand that it is not a fair criterion, and I accept the understandings that, Although it is a personal condition, it should not be levied on the sum, and each penalty should correspond to the respective percentage. Let's see some judgments:

> "INTERLOCUTORY APPEAL IN HABEAS CORPUS. CRIMINAL EXECUTION. **RECIDIVISM**. **PERSONAL CONDITION** THAT AFFECTS THE TOTAL OF **THE PENALTIES.** IMPOSSIBILITY OF **CONSIDERING** THE REPRIMANDS INDIVIDUALLY IN ORDER TO APPLY DIFFERENT PERCENTAGES FOR EACH ONE. PRECEDENTS OF THIS COURT. APPEAL DISMISSED. 1. The contested judgment was rendered in line with the understanding of this Superior Court, which was consolidated in the sense that **recidivism** consists of a **personal condition**, relating, therefore, to the person of the convicted person and not to his convictions considered individually. As such, **recidivism** must follow it throughout the penal execution, and there is not even mention of offense to the limits of res judicata, when not found by the Court that handed down the conviction, but recognized by the executing Court. 2. Corroborating this understanding, the Superior Court of Justice understands that "the **condition** of recidivist, once acquired by the sentenced person, extends over the totality of **the sentences** combined, and the isolated consideration **of each conviction is not justified,** nor the application of different percentages for each of the reprimands" (HC 307.180/RS, Rel. Minister FELIX FISCHER, FIFTH PANEL, j. 16/4/2015, DJe 13/5/2015). 3. Regimental appeal not granted." (STJ – Regimental Appeal in Habeas Corpus – AgRg no HC 711428 – SC 2021/0393 046 – 1 – Published on 06.14.2022).
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> "SPECIAL APPEAL. CRIMINAL EXECUTION. UNIFICATION OF **PENAS. SPECIFIC RECIDIVISM** IN A HEINOUS OR EQUIVALENT CRIME. **CONDITION** OF

> PERSONAL CHARACTER. EXTENSION OVER ALL **PENAS.** REPERCUSSION ON THE CALCULATION OF ENFORCEABLE BENEFITS. POSSIBILITY. 1. **Recidivism** is a circumstance of a **personal** nature that must be considered in the execution phase, when the **sentences** are unified, extending over the total of **the sentences** added together, with repercussions on the calculation of the executory benefits. 2. Under the terms of the legislation governing the matter, there is no justification for the **isolated consideration** of each conviction, nor for the application of a different percentage to each of the reprimands. 3. Special appeal granted." (STJ – Special Appeal – REsp 1957657 MG 2021/0281875-1 – Published on 11.26.2021).

The above-mentioned decisions impose on the convict, in the face of a sum, that until the first conviction, when he was a primary offender, he be considered a repeat offender, aggravating the entire sentence unfairly. Recidivism generates an increase in the penalty due to the practice of a new crime, and if recidivism is applied to a penalty where the convict was primary, including if it is a common crime and the second crime, heinous, the first conviction will be aggravated and the calculations that will follow will be a heinous crime.

In this sense, Giamberadino (2020, p. 230) points out that:

> ″In this case, such a circumstance would be applied to the execution of a sentence that did not even receive such an aggravating factor, because at the time the convict was primary. There is no legal authorization for such a procedure. It is, in effect, a kind of review of the pro societate penalty that is not protected by any legal basis" (Giamberadino, 2020, p.230)

It was a way that the adherents of this understanding found to aggravate the time of imprisonment, and although it is the majority current to affiliate with this line of thought, the STJ – Superior Court of Justice has been changing the understanding, and what is gathered is a fairer criterion, allowing it not to be, recidivism considered in the whole sum. See:

> "HABEAS CORPUS. CRIMINAL EXECUTION. REGIME PROGRESSION. CONVICT WHO IS A REPEAT OFFENDER IN A HEINOUS OR SIMILAR CRIME. PERSONAL CONDITION IN THE EXECUTION OF THE SENTENCE. CHANGES PROMOTED BY THE ANTI-CRIME PACKAGE. SPECIFICATION OF THE NATURE OF THE OFFENSE. IMPOSSIBILITY OF INDISCRIMINATE APPLICATION OF RECIDIVISM. HABEAS PARTIALLY GRANTED. 1. According to the consolidated jurisprudence of the Superior Court of Justice, "the Criminal Execution Court is not restricted to the use given by the Court of knowledge to the criminal records that would give rise to the recidivism of the convict, so that, despite the fact that such annotation has not been recognized in all the convictions of the convict, nothing prevents its use to evaluate the personal conditions of the convicted person with regard to the granting of enforceable benefits such as, for example, conditional release" (AgRg in REsp n.1.721.638/RO, Rel. Minister Rogerio Schietti, 6th T., DJe 10/29/2019). Precedents: AgRg in HC No. 476.422/MG; HC n.378.985/ES; HC No. 379.007/RS; and AgRg in HC No. 511.766/MG.2. Although recidivism is widely recognized, as a personal condition, as an institute proper to the execution of the sentence, its current application requires the observation of recent legislative changes, promoted by Law No. 13,964/2019, regarding the thresholds required for the measurement of regime progression. 3. The Anti-Crime Package implemented a more complex scenario regarding the re-educating person's recidivism, since now it is not just a matter of simply examining the nature of the crime (whether common or heinous) and the existence of records capable of characterizing the (generic) recidivism of the convict, but rather a more accurate incursion into the examination of the criminal record of the incarcerated individual, it will gain wide relevance whether it is a crime committed with or without violence to a person or serious threat, a heinous or equivalent crime, or even a heinous or equivalent crime resulting in death. 4. In the hypothesis, the convict serves a sentence for circumstantial robbery and two other drug trafficking offenses, that is, it is perceived that the re-educating person is, then, a specific

> recidivist in the practice of a heinous or equivalent crime, however, a generic recidivist as to crimes committed through violence to a person or serious threat. Consequently, as for drug trafficking crimes, considering the personal nature of recidivism, it is mandatory to comply with 60% of both sentences imposed, since it is recidivism of the same nature – namely, recidivism in a heinous or equivalent crime. However, such logic does not apply to common crime, since the sentenced person is a primary offender in the commission of a crime with violence to the person or serious threat, so that the lapse provided for in article 112, III, of the Penal Execution Law, which requires the fulfillment of only 25% of the sentence in order to investigate progression to a less severe regime, applies to the species. 5. Habeas corpus partially granted to determine the rectification of the calculation of the progression of the sentence related to the conviction of the patient for the common crime, in accordance with the conclusion of the vote." (STJ - HABEAS CORPUS No. 654.870 - MG (2021/0089333-0) RAPPORTEUR: MINISTER ROGÉRIO SCHIETTI CRUZ - Judged on 09.20.2022).

A fair criterion that it is possible to equate legal interests in the context of penal execution is, in fact, to apply the sum of the penalties by performing the calculations, but always taking into account the percentages applicable to each conviction, applying recidivism only in the penalties in which he is actually a repeat offender.

Thus, it is observed that during the prison task forces, many of the inmates assisted are considered recidivists and when moving on to the calculations of the benefits, a recidivism even when it was primary, in the first conviction, is to impose an increase that, depending on the sentence, can be considered as a new sentence, and in no way contributes to rehabilitation.

CONCLUSION

The study included the analysis of issues related to the calculation of benefits in cases of recidivism of re-educating inmates. Thus, it is observed that during the realization of the prison task forces, the re-inmates served, who are considered recidivists when they go through the calculations, must take into account the process of resocialization of the individual and, not only, consider it as a new sentence, without anything contributing to the process of rehabilitation.

It is necessary that, even when it comes to the execution of the sentence, one does not lose sight of the fact committed, its time, especially when the Anti-Crime Package brought several fractions to obtain benefits in the penal execution, otherwise, it would lose meaning in a sum of penalty.

Finally, the STJ must move towards consolidating the understanding that for each crime, the respective fraction corresponds, with the recidivism applied in the convictions that it really is and not in an interpretation of personal condition, aggravating the entire sum of the penalty.

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