PREVENTIVE DETENTION UNDER BRAZILIAN AND CZECH LEGISLATIONS.

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Abstract. The institute of preventive detention as a measure to secure criminal procedures is a highly debated topic in the legal field, since there are many concerns regarding the respect of Human Rights during a penal trial, specifically bearing the presumption of innocence in mind. Around the world, many norms have been incorporated to the countries' legal systems in order to try to preserve the considered to be most valuable personal rights. This article will, then, analyze the law regulating the prisons under preventive measures in both Brazil and the Czech Republic, to point out the differences and similarities in the legislation, under the light of Human Rights institutes integrated to these countries legal systems.

Keywords. Preventive Prison, Preventive Measures, Criminal Law, Criminal Procedure, Human Rights, Brazil, Czech Republic.

1. Introduction

The international conventions and charters take upon themselves to regulate some of the most valuable rights a person can hold. With such task in mind, it is much justified that the source of basic Human Rights guarantees is in them found, naturally with some differences depending on the systems in which they are meant to be integrated, but usually also with many similarities in the approach.

For that matter, in the subject of the law regarding criminal procedures, it is one's freedom the topic of bigger interest, for the consequences of a criminal offense can often lead to imprisonment and detention. While the penal sentencing is a very large topic to be dived in upon, in this article the focus will be put on what comes before the sentencing, during the pre-trial moment – the preventive measures considered essential for the normal occurrence of the penal procedure.

To begin with, the term "preventive prison" will here be used with the legal definition of a measure imposed to someone who has been formally accused of a crime, but has yet not been sentenced. This type of detention is justified by the understanding that that person might either commit another illegal act before their condemnation or that they might create difficulties to their legal persecution.

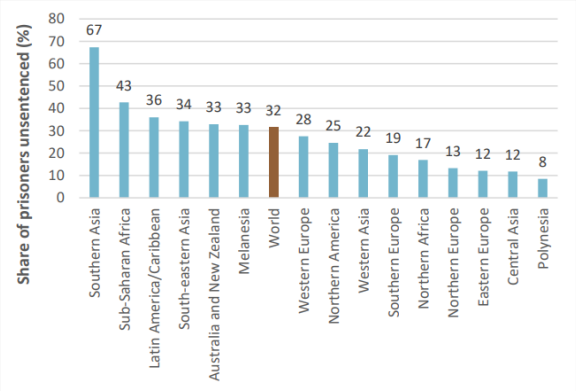
In Britannica Encyclopedia's words, it is "the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society—specifically, that they would be likely to commit additional crimes if they were released. Preventive detention is also used when the release of the accused is felt to be detrimental to the state's ability to carry out its investigation" (NORTON, Jerry).

While seemingly well justified in the legal doctrine, it is not rare to see that institute being criticized when seen through the Human Right's legislation. And that is specifically because the principle which states that a person cannot be considered guilty without a proper trial is considered to be one of the most basic premises of modern law, so it is natural that some might see the determination of a person's detention as an infringement to their right of freedom.

That situation is very clear when the numbers on overpopulation in prisons around the world are alarming. The United Nations Office of Drugs and Crime has published a study demonstrating that 1 in every 3 persons incarcerated are being held without any criminal trial.

And the same data study shows the big difference when the same situation is compared within the continents, making it clear that underdeveloped countries face a much more concerning scenario.

Figure 9: Share of prisoners unsentenced, by sub-region (2019)



Source: UN-CTS. Eastern Asia and Micronesia are excluded dure to limited data coverage on uncentenced detainees.

As it is a multifaceted topic debated internationally, it's incorporation in a country's legal system can be done with various considerations and different practical applications, especially when comparing the realities of a small European country with the largest one in Latin America.

In this study, the aim is to compare the Brazilian and the Czech approaches on the institution of preventive detention to determine each country's considerations in respect of Human Rights during the application of such measure.

2. The Brazilian legislation on preventive measures

One of the first mentions on the legal guarantee against arbitrary imprisonment before the trial can be traced back to the French Revolution. The Declaration of Human and Civic Rights, from 1789, brought to surface, along many liberal ideals, the specific right a person holds to not be prematurely judged guilty and that, in case a detention is necessary, it has to be conducted in a way to preserve one's integrity to the maximum.

In verbis:

> 9. As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law.

Such piece, even thought it might be considered outdated when compared to the present legislations, already points out some of the most relevant characteristics in a preventive detention: the consideration that the arrest has to be a necessity in order to be made and, also, that they must not mean an implication of guilt.

When specifically analyzed the Brazilian take on the matter, the incorporation of the American Convention on Human Rights (ACHR) in 1992 once more ties the application of the preventive prison to a necessity of every decision in order to deprive someone from their personal freedom be done with restrict respect to their innocence presumption.

The convention's article 8.2 states:

> 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

So, with that, it becomes even clearer that the determination of a preventive prison may never be motivated by an anticipation of a person's criminal punishment. Therefore, in the same sense, the Brazilian Federal Constitution dictates as a primary guarantee, assured to all:

> "Article 5, LXI – no one shall be arrested unless in flagrante delicto or by a written and justified order of a competent judicial authority, save in the cases of military transgression or specific military crime, as defined in law".

While the general underlines of the preventive prison are primarily based on the right everyone holds to be presumed innocent, there are also more specific legislation on how and when such cautionary measure can be undertaken.

The Criminal Procedure Code brings in its 312th article the demand that, being the most rigid form of preventive measure, the preventive imprisonment of a person can be imposed as serving as guarantee of public order, economic order, for the convenience of the trial, or to ensure the application of the law, and that only when gathered sufficient proof that the person might put those in danger.

Furthermore, according to the 313th article, the detention can happen when regarding a willful crime in which the maximum penalty surpasses 4 years of prison; when the person has already been condemned on another willful crime; when the crime involves domestic violence; or when there is doubt on the person's civil identity. Beyond that, still in the same article it is reinforced that this species of detention must never serve the purpose of an anticipation of the punishment.

With that, it is possible to state that the Brazilian legislation covers greatly the subject, especially when concerning the Human Rights internationally firmed.

But when seen the number of people going through this type of measure, that is supposed to be used only when there is a great need for it to preserve the criminal procedure and also when there is no other way, with

any other less brutal measure, it is clear that it is not the case.

From the data collected in 2016 by INFOPEN, Brazil had the 3rd largest incarcerated population, with 718.118 stripped from their freedom. And within those, an alarming number of 241.090, that representing over 40% of that population, has not been sentenced.

It is visible that the country has been using the preventive detention as a mean to punish people even before the trial. And it is so despite the fact that the legislation very strongly dictates how and when this measure should be uses: only in extreme necessity.

3. The Czech legislation on preventive measures

With a very recent international document treating the matter, the Czech Republic adopts The Charter of Fundamental Rights of the European Union, which mandates the primary guaranteed to be assured by the EU nations regarding personal freedoms and rights.

> 1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.

With a succinct phrasing on the article 48, under the subtitle of "Presumption of innocence and right of defence", the Charter brings the same idea mentioned on the American convention, that being of a necessity of a fair trial before anyone can be punished for a criminal offence.

And for the Czech specific criminal procedure, as in the Brazilian one, the pre-trial detention can take place when the person accused gives indication that they might put in check the carry out of the procedure itself, commit another crime or compromise evidence.

In Section 67, "Reasons for Custody", it is expressed:

> "The accused person may be taken to custody only if his actions or other specific circumstances lead to a reasonable belief that he shall:
>
> a) escape or hide to avoid criminal prosecution or penalty, especially if he cannot be identified at the moment, if he does not have a permanent residence or if he faces a high penalty;
>
> b) influence witnesses or co-accused persons that have not yet been heard or in other ways thwart clarification of circumstances substantial for criminal prosecution, or;
>
> c) repeat criminal activity he is prosecuted for, perpetrate an attempted crime or commit a crime he has been preparing or threatened with,
>
> and circumstances so far ascertained indicate that the act, which the criminal prosecution has been initiated for, was committed, has all attributes of a criminal offence, there are evident reasons to belief that the offence was committed by the accused person and with regard to the his character and to the nature and seriousness of the offence the purpose of custody cannot be reached by other means at the time of making the decision on custody".

With that, it becomes quite noticeable that the redaction of the law is very similar to the one present in Brazil, both of them bringing a sense of factual necessity being the only legal cause to the preventive detention of a person.

But, while in Brazil the factual reality derives in a great manner from the legislation itself, in the Czech Republic it seems to be less aggravated scenario. As it is possible to see in the table in here included, the Easstern European percentage of unsentenced prisoners is only 1/3 of the one in Latin America.

4. Conclusion

With the comparisons here made, it is worth mentioning that the two legislations bring very similar guarantees to the criminally prosecuted individual. With strong international and constitutional basis, both countries have laws that seek to ensure no one shall be prematurely judged or considered guilty without a proper trial.

But even though the norms themselves cover in a satisfying way the person's guarantees, it is impossible to not see the great differences in the application of the law on the day-to-day.

While Brazil has one of the most numerous incarcerated populations, according to 2021's World Prison Brief, which can be vastly associated with the imposition of too many preventive detentions, the Czech Republic is far from suffering from the same problem. It is, of course, possible to trace parallels that go through all the social problems and differences in each of these countries, but it is also very tangible to assume that the approach undertaken in them specifically regarding preventive detentions might be very distinct.

5. References

[1] EUROPEAN UNION. "Charter of Fundamental Rights of the European Union." *Official Journal of the European Union C83*, Vol. 53, European Union, 2010, p.380.

[2] INFOPEN. *Levantamento nacional de informações penitenciárias:* Atualização – junho de 2016. Brasília, Ministério da Justiça e Segurança Pública. Departamento Penitenciário Nacional, 2017.

[3] MENDONÇA, Andrey Borges de. *Análise crítica da prisão preventiva na Lei 12.403/2011: proposta à luz de modelos estrangeiros e da Convenção*

Americana de Direitos Humanos. 2014. Tese de Doutorado. Universidade de São Paulo.

[4] NINO, Michele. European Arrest Warrant; Preventive Detention: Judgment No. 4614 of 5 February 2007. *The Journal of Criminal Law*, v. 71, n. 6, p. 501-505, 2007.

[5] NORTON, Jerry. "preventive detention". *Encyclopedia Britannica*, 10 Nov. 2011, Abailable on <https://www.britannica.com/topic/preventive-detention> Accessed 02 April 2022.

[6] UNITED NATIONS OFFICE ON DRUGS AND CRIME. UNODC Reserch. Data matters, 2021. Available on <https://www.unodc.org/lpo-brazil/pt/frontpage/2021/07/uma-em-cada-tres-pessoas-estao-presas-globalmente-sem-julgamento--enquanto-a-superlotacao-coloca-os-presos-em-risco-de-contrair-a-covid-19--diz-a-primeira-pesquisa-global-do-unodc-sobre-prisoes.html>. Accessed 02 April 2022.

[7] WORLD PRISON BRIEF. *World Pre-trial/Remand Imprisonment List.* 4th Edition, 2021. ICPR, Institute for Crime and Justice Policy Research.