



## Between right, duty and exploitation: labour relations in the Brazilian prison system

*O trabalho no cárcere brasileiro: entre direito, dever e exploração*

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**Abstract:** In 2016, the Brazilian prison inmate population reached 726 thousand. It is estimated that a quarter of them work inside or outside the prisons. The activities offered have low technical qualifications and they take place in poor working conditions. The central proposal of this article is to establish connections between incarceration and the labour relations that exist inside the Brazilian prison system, to point out the existence of an established *penitentiary industry* in the country. Through the constitutional analysis on the issues involved, as well as the analysis of article 28 of Law 7,210 / 84 - which provides for the non-insertion of prison labour under the protection conferred by the *Consolidation of Labour Laws* - it seeks to demonstrate the acquiescence of the Brazilian State to the overexploitation of labour under its prison system.

**Keywords:** Criminal Law. Prison System. Labour Relations. Exploitation.

**Resumo:** Em 2016, a população carcerária brasileira atingiu a cifra de 726 mil detentos. Estima-se que, dentre estes, um quarto trabalhe dentro ou fora dos presídios. As atividades oferecidas são de baixa qualificação técnica e se dão em péssimas condições laborais. O presente artigo tem como proposta central estabelecer conexões entre a questão carcerária e as relações trabalhistas lá estabelecidas, com vistas a apontar a existência de uma *indústria penitenciária* estabelecida no país. Através da análise constitucional dos temas envolvidos, bem como do artigo 28 da Lei 7.210/84 - o qual dispõe sobre a não inserção do trabalho penitenciário na proteção conferida pela *Consolidação das Leis do Trabalho* - buscar-se-á demonstrar a aquiescência do Estado brasileiro com a exploração do trabalhador preso.

**Palavras-chave:** Direito Penal. Sistema Carcerário. Relações de Trabalho. Exploração


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### 1 INTRODUCTION

In June 2016, the Brazilian prison population reached 726,000 detainees, the third largest in the world. Of these, approximately 12% work, which corresponds to more than 96,000 people nationally. One-third of those convicted undertake work that acts to support the prison in activities such as cleaning and food preparation, most of them

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unpaid<sup>1</sup>. Of the paid activities, the preponderant work is manual, requiring little or no technical qualification (VARELLA, 1992).

Even though poor conditions are characteristic of this work, it is irrefutable that the current situation has improved when compared to the treatment of prisoners in the past. Major (2000) points out that, over a long period of history, the work of prisoners was viewed as a form of additional punishment, which extended to those defeated in battle and prisoners of war who were enslaved or forced to work as a result of their imprisonment.

Before entering into the specifics of the legal/sociological debate on labour relations in Brazilian jail, it is necessary to first address the main features of its founding conditions: the restriction of freedom and, in some cases, forced labour as a punishment for individuals who violate social norms.

According to Foucault (2004), the current punitive model originates in the late mid-eighteenth century. This was the time when the sentences based on deprivation of liberty became the norm, replacing the previous method, which was limited to the corporal punishment of violators. This paradigm set down that disciplined work should be one of the forms of penalisation for offenders. In addition to preventing idleness, work was to be imposed on the detainee so that they should be self-sustaining and not cause further harm to society.

As early as the early nineteenth century, the Italian positivist school had linked criminal punishment to work. The innovation proposed by them concerns how work activities can contribute to resocialisation. This is the origin of the roots that regulate matters nowadays (MAIOR, 2000).

However, the differences between the idealised situation set out in various penal treaties and the reality are not disputed, especially in a country like Brazil, where social inequality is systemic and profound. In this sense, the considerations of Karl Marx (1818-1883) regarding the role of criminal law for the equilibrium of capitalist social relations have not lost their validity. Marx teaches that, through the separation of capital-labour and the consequent exploitation of one social class by another, tensions between them are set up within the social core. As an antidote and to cushion such conflicts, the State formulates and enforces regulations and sanctions to broadly protect private property and other institutes and agencies of bourgeois society. And among these regulations, one of the most relevant are the imprisonment penalties (Marx, 1987).

When it comes to prison labour activities, the relations between the execution of custodial sentences and the capitalist production/exploitation relations are even clearer. In addition to the hypo-sufficiency common to other workers, the convicted are exposed to higher levels of exploitation of their work, a situation that refers to one

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<sup>1</sup> According to data available on Infopen (BRASIL, 2017). This is the statistical information system of the Brazilian penitentiary system, linked to the Ministry of Justice, and which official synthesises information on the Brazilian prison population (BRASIL, 2017).

of the central themes of this article: the existence of the so-called penitentiary industry. On the subject, Mello (2009) states:

The said worker [the convict] is punished twice; first, by the formal deprivation of liberty, often exposed to inhumane conditions of survival; second, by the merciless attack of capitalist fury that does not respect the gates and bars of these correctional establishments (MELLO, 2009, p. 4).

Guided by this reasoning and the results of bibliographical research carried out while studying for a degree in Law, the article presents the treatment by the Brazilian penal and labour laws of issues related to penitentiary work. Firstly, the juridical nature of the work done by the prisoners will be discussed, especially regarding questions about the obligatory nature and the unconstitutionality of the rule that prohibits the inclusion of the prisoner's work in the Consolidation of Labour Laws (CLT). Then, we seek to present, through statistical data provided by the Brazilian government, the conditions, characteristics and the current state of labour relations in prisons and the related remuneration.

The text focuses on the arguments that work is a social right of prisoners and not an integral part of their punishment. Then we move on to more specific questions such as the discussion of whether, in theory, prison labour should or should not be protected by the Consolidation of Labour Laws. Finally, in an antithetical way, the work of inmates will be linked to overexploitation in the context of capitalist production.

## **2 LABOUR RELATIONS IN THE BRAZILIAN PENAL SYSTEM**

On the relevant legal facts regulated by Labour Law regarding contemporary production relations Maior (2008) says:

Initially, labour legislation meant a strategy for boosting and maintaining capitalist exploitation over the work of others. Over time, however, this legislation has taken on the form of a branch of specific law, the purpose of which has gone far beyond its initial intentions (MAIOR, 2008, p. 15).

Marked by the specific points in the quote, the labour issue becomes even more complex when looked at in the context of criminal law. There are a significant number of approaches that, based on the statistics indicating the class origin of the Brazilian prison population, attest to the fact that the penitentiary system is an important and effective tool for both social control and overexploitation of work<sup>2</sup>. These are, therefore, analyses linked to the critical perspectives of law, which relate social class and incarceration.

At the same time, however, there are analyses - many of which also cast a critical eye over the issue - that problematise the fact that the punitive method used in Brazilian prisons is based on reducing the individual activities of those incarcerated, as there are few penitentiaries that allow to the detainee the right to work (VARELLA, 1992).

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<sup>2</sup> As stated, for example, in the article by Domingues (2003).

This backdrop helps to explain, at least in part, the data presented in the first lines of this text: 78% of the prison population does not work. Such a situation - at least for inmates who express a desire to work - is contrary not only to current legislation, but also to the doctrine and jurisprudence of the country as regards the relevance and effectiveness of labour relations as one of the central elements for the effective implementation of the re-socialising perspective of punishment. It is a recurrent theme within the bibliographic analysis, that work should not be considered a mere instrument of discipline and internal order, but a means by which the state discharges its duty to value and rehabilitate prisoners<sup>3</sup>. By this understanding, the effective organisation of penitentiary work is not only a gesture of benevolence, but proof of administrative probity and compliance with the law.

Given this scenario and demonstrated by the multifaceted character of the theme, which is characterised by the intersection of the fields of Law, Sociology and Political Science, the discussion about labour relations experienced by inmates deserves to be carefully and thoroughly considered.

## **2.1 THE OBLIGATORY NATURE OF PRISON WORK**

Mirabette (1996, p. 148) states: “Penitentiary work today means the activity of prisoners and detainees, in or out of a penal establishment, with equitable remuneration and equivalent to that of free persons regarding safety, hygiene and social security rights”.

The core of the legal debate on the subject lies in Chapter III of the Law on Criminal Execution (LEP - Law No. 7.210 of 11 July 1984). In the caput of article 28, the following is laid down: “The work of the condemned, as a social duty and condition of human dignity, shall have an educational and a productive purpose” (BRASIL, 1984, non-paginated) and in the second paragraph of the same article: “The work of the prisoner is not subject to the regime of Consolidation of Labour Laws” (BRAZIL, 1984, non-paged).

To a large extent, literature on the subject interprets such guidelines from the synthesis put forward by Guimarães (1996):

The prisoner's work is carried out as a result of a penalty or an administrative security measure. That is why it is a public provision of services and not private, although it is not outside of social and legal protection[...] So, there is no individual contract of work, but a legal relationship of an administrative nature, since only with the permission of the processing Judge or the Director of the Penitentiary is it possible to provide services inside and outside the prison (GUIMARÃES, 1996, p.45).

The above argument gives rise to a complex discussion about the legal nature of prison labour: is this a right or an obligation imposed on the inmate?

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<sup>3</sup> To this end the following articles stand out, Figueiredo (1996), Zackseski (2002) Leal (2004) e Domingues (2003).

Here a brief historical digression on the social function of labour in the context of jail must be made. Prison labour emerged as an ancillary penalty, i.e. it was imposed, along with the deprivation of liberty, as a form of punishment. These productive activities are to be a further way for the prisoner to repay society. This model has resulted in extreme abuse. Even today, there are few nations where the state enjoys the labour of prisoners without payment.

This situation, given the severity of its implications, has been the subject of discussions and agreements at the United Nations (UN). In common with the legal stance adopted by most contemporary criminal law, mandatory prison work has been enshrined as one of the “Minimum Rules for the Treatment of Prisoners” (number 71.2). In the words of OLIVEIRA (2005):

In line with the document issued by the UN, it has been determined that all prisoners should be obliged to work. The document also states that prison work should be regular and with the purpose of occupying the prisoner during the regular working day and that the maximum number of hours of prison work should be fixed based on local customs related to the employment of free workers (OLIVEIRA, 2005, p. 23).

Once regulated by the UN, the issue came to represent a legal duty that transcended the foundations of national law and projected itself as an international principle. Most Brazilian criminologists, therefore, maintain that a prisoner's labour activities do not correspond to the constitutional right to free enterprise in labour relations. It would be an obligatory activity necessary for the fulfilment of the legal duty to safeguard the human dignity of the inmate and be tailored to meet the educational and productive needs of the process of their rehabilitation.

To this end, Casella (1980) affirms that:

[...] the provision of work by the prisoner is part of the regime of the execution of the penalty (of the penal sanction) concomitantly as a right and a duty, without, therefore, constituting in itself a frequent penalty in past times (works (CASELLA, 1980, p. 145).

In turn, Fragoso (1995) reports that “[...] work has always been considered an essential element in prison treatment, as it is a social duty and a condition of human dignity” (FRAGOSO, 1995, p. 13). The author regrets the fact that the reality of Brazilian prison does not offer the necessary conditions for most inmates to work. He argues not only for the necessity, but also, implicitly, for the legality of the obligation of prison work.

However, at the same time, certain questions began to emerge regarding the constitutionality of compulsory prison labour. An example of this argument is contained in Barros (2001) who, by invoking article 5 of the Federal Constitution (BRAZIL, 1988), specifically item XIII (which states that “[...] the exercise of any work is free, office or profession, having regard to the professional qualifications that the law establishes [...]”) and item “c” of item XLVII (which expressly prohibits forced labour as a penalty), peremptorily states that the work of must be optional. It is up to the

state, as part of the process aimed at the social reintegration of the prisoner, to offer the opportunity to work. "However, this can only be an offer that he is free to accept or not" (BARROS, 2001, p. 89). In a footnote, the author concludes that "compulsory labour with which the prisoner does not consent is undoubtedly forced labour" (BARROS, 2001, p. 89).

It is necessary to add other elements to this argument that make the debate even more complex. To this end, Leal (2004) correctly adds:

It may be added that, under Democratic Rule of Law, the prisoner, even if his physical freedom of movement is curtailed, has the freedom of self-determination to work or not within the penal establishment. [...] In this line of reasoning, it can be stated that the obligation of prison work is inadmissible, because the prisoner can choose to serve his sentence inside his cell, without causing any problem for prison discipline (LEAL, 2004, p. 59).

However, it is necessary to challenge such an understanding, since, as previously stated, the practice of forced and deregulated labour as an integral part of the penalty has been removed. In fact, this practice, at least in Brazil, no longer occurs. The idea that compulsory prison labour is equivalent to the practice of forced labour does not seem reasonable.

The Federal Constitution addresses this challenge. According to the Magna Carta, one of the fundamental principles that must govern the social order is precisely the social value of work. In the same vein, Article 170 expressly establishes, as the foundation of the economic order, the value of labour. In addition, article 193 states that "[...] the social order is based on the primacy of labour" (BRAZIL, 1988). Therefore, work, as regulated by the national legal system, is more than just labour activities. It has a structural role in the consolidation of society, as the social order is founded on it. And, of course, such a relationship includes the prisoner.

Having presented the controversy regarding the precept that makes prison work compulsory, it is then necessary to examine another important reverberation of the current Brazilian regulation on labour relations as exercised in prison: the exclusion of these activities from the Labour Laws Consolidation (CLT).

## **2.2 THE EXCLUSION OF PRISON WORK FROM THE CLT**

The explanatory memorandum to the National Prison Law (NPL), in item 57, provides the following justification for the wording of its article 28, paragraph 2 (the legal provision that expressly excludes prison labour from the employment regime):

Seeking to reduce the differences between prison life and life at liberty, the proposed texts apply to work, both internal and external, the organisation, methods and precautions related to safety and hygiene, although this form of activity is not subject to Labour Laws Consolidation, given the lack of a fundamental condition, that the prisoner was stripped of by conviction: the freedom to form a contract (BRAZIL, 1984, non-paged).

Our argument, however, is associated with a contrary interpretation, which holds that there is no legal case for not including these activities in the labour laws. We challenge the assertion which reasons that a criminal sentence effectively deprives the freedom of the convict to form a contract.

Confronting the question starts from the interpretation of item XLVI of the Federal Constitution that lists the following among the possible penalties applicable to infractions of the law: the deprivation or restriction of liberty, the loss of property, a fine, an alternative social benefit and the suspension or interdiction of rights. The infra-constitutional regulation of the precept enshrined in the Magna Carta regarding the penalty as a form of suspension or interdiction of law is in article 92 of the Brazilian Penal Code. It provides for the statutory criminal law on cases liable to this type of punishment: the violation of Public duty by its employees would lead to the loss of the right to employment in civil service. Also, the right of parenthood would be removed from any person who committed a crime against his own child. Finally, anyone who uses a vehicle as a means of committing a crime should be banned from driving.

It is clear, therefore, that, for specific situations, the legislator was concerned to relate the nature of the crime committed with the specific effects of the conviction. Regarding the theme of this research, it should be emphasised that the list contained in article 92 of the Penal Code is silent when it comes to the suspension of the ability to enter into employment contracts as a form of punishment (in this case, loss of or suspension of rights).

In addition, one should also consider what is established by article 54 of the Penal Code: "[...] the restrictive penalties of law are applicable [...] in place of the deprivation of liberty" (BRASIL, 1940, no page numbering). Consequently, when the custodial sentence is applied, restrictive rights punishments cannot be applied, except in the case of the prohibition of rights as specific effects of the sentence (article 92 of the Penal Code).

In the light of this, it is fair to conclude that criminal law, when it wants to fix the interdiction of law as an integral part of the penalty, does so expressly. This is not the case with penitentiary work. Arruda Alvim (1991) states; "Is this an assertion totally devoid of legality, since when has a criminal conviction 'deprived' the condemned of his civil capacity, under the right of obligation? Since never!" (ARRUDA ALVIM, 1991, p. 39).

If, in addition, a position was established that the work is both a duty and a right of the prisoner, as argued in the previous section, "[...] its performance could be considered as a manifestation of free labour, which would lead to its inclusion in labour law." (MIRABETTE, 2005, p.262).

In the same sense, Maior's understanding (2008, p. 64-65) on the subject is striking:

There is no point in saying that the inmate's lack of free will in work impedes job formation. The freedom to enter into an employment relationship as an employee is never full, given that the system itself does not provide many options for survival for those without capital. Legislative confusion allowed a simple alternative to cheap labour to be seen in the work of the prisoner, which serves the interests of both the state (which, in this respect, acts as if it were defending an interest of society) and of private enterprise, for a development of lower cost capitalist relations (MAIOR, 2008, p. 64-65).

If one moves from this branch of the law and focuses on the fundamental principles that guide Brazilian labour law, it is possible to see that, theoretically, the argument is reinforced. In this field, there are five essential requirements for the establishment of the employed labour relationship: continuity, subordination, burden, alterity and personality<sup>4</sup>. Of these only the latter has some controversy regarding the hypothesis developed so far, namely, by the inclusion of prisoners' labour activities in the CLT.

Regarding the controversy over the (supposed) lack of personality in the labour relationships established within the prison environment, it is important to consider that the establishment of a labour contract *intuitus personae* is a prerequisite. That is, the contract is formed by a certain and determined person. The agreements that make it possible to work inside or outside the prisons are not signed individually between a prisoner and a company/state. However, it can be inferred that such a situation occurs precisely because the NPL expressly denies convict-workers the right to enter recognised employment.

This argument gains strength when supported by Figueiredo's thesis (1996), for whom:

The consent of the prisoner is a manifestation of agreement. Legal or lexically, we are dealing with a typical contract... It cannot therefore be seriously argued that a criminal conviction implicitly entails the loss of the convict's right to contract under the Labour Laws Consolidation (FIGUEIREDO, 1996, p. 488).

Considering the criticisms and theses (penal and labour) summarised here, it can be inferred that there is a direct relationship between the treatment of inmates sentenced under the national legal system and the opportunity this offers to companies and the State to take advantage of said incarceration to pay even less for work and thereby increase profits. Moreover, this is about the important political economy dimension of the debate on prison labour relations, as set out below.

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<sup>4</sup> Requirements for the forming of a Contract of Work, according to Martins (2007, p. 93-95).



### **3 THE CONSEQUENCES FOR POLITICAL ECONOMY ARISING FROM PRISON LABOUR ACTIVITIES**

When analysing the various contributions in the field of “critical criminology” on labour relations in prison, the conviction that the prison establishment and the dynamics of the labour market are strongly related is consolidated. Since the conclusions drawn by Rusche and Kirchheimer (2004), the link between the labour market and criminal policy has been investigated and, largely, demonstrated. The authors wish to emphasise the importance and weight of economic issues in shaping criminal policy practices to, in this context, enable new forms of organisation of production and, above all, the exploitation of the prison workforce.

This article seeks to bring us up to the present day, in order to point out ways in which the foundations and principles of the current *modus operandi* of the capitalist system - the neoliberal model<sup>5</sup> - are present in the legislation that defines the labour situation of Brazilian prisoners.

According to the provisions of article 33 of the NPL, prison work should not be less than six hours nor more than eight hours daily, with rest on Sundays and holidays. The legal provision expressly requires that the work of inmates should be remunerated.

In addition, the first paragraph of Article 29 of the NPL states that the remuneration is intended to fulfil the following obligations; (1). Indemnity of the damages caused by the crime, if this is determined in court and not provided for by other means; (2). Assistance to the family; (3). The cost of small personal expenses of the detainee; (4). The reimbursement to the State of expenses incurred maintaining the convict, in a proportion to be fixed and without prejudice to the destination provided for in these situations previously.

In addition, Federal Decree 44.184 of 2005, in annex I, establishes the percentages of the destination of income from penitentiary work: 50% of the amount earned should go to the prisoner for personal expenses and assistance to his family; another 25% of the total amount is due to the State, as compensation for expenses related to the convict's stay in the Penitentiary System. Finally, the remaining 25% to be deposited in a savings account available to the detainee upon his release. The caput of the same provision states that the minimum amount to be received by the sentenced shall be three quarters of the minimum wage in place at the time of the performance of the labour activity.

When compiling the various norms that regulate prison labour, we observe the following; these are labour relations that, by legislative decision, are not covered by the CLT and, therefore, do not give the sentenced person any rights expressed therein (paid leave, thirteenth salary, among others). Beyond this, the legislation allows the

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<sup>5</sup> The purpose of this article is the detailed examination of the characteristics of the neoliberal model. In general, it joins the interpretations that understand neoliberalism as a new “form of regulation” of capitalist production (DUMÉNIL; LÉVY, 2006) in the Latin American context (BOITO JR., 1999).

working hours of the inmates to be paid at three quarters of the current minimum wage.

Such factors undoubtedly favour companies that become state partners by hiring inmates as workers. More alarmingly, it favours the state itself, because much of the work performed by inmates is related to activities supporting the cleanliness and the functioning of the penal establishment itself<sup>6</sup>.

So, due to the attractiveness of the considerably cheaper labour force, a true penitentiary industry in Brazil has been established over the years (JINKINS, 2013). According to the most recent data released by “Infopen” (June 2016), there were 95,919 people deprived of their liberty undertaking labour activities, representing 15% of the entire Brazilian prison population.

The analysis of the official data, contained in Table I and consolidated from the information provided by the Federative States, points to the reality and indicates a situation of exploitation of the work performed by inmates.

**TABLE I**  
**REMUNERATION OF INMATES IN LABOUR ACTIVITIES IN PRISON**  
**(July 2016)**

Federal State	Not receiving remuneration	Less than 25% of Minimum Salary	Between 25% & 1 Minimum Salary	Between 1 & 2 x Minimum Salary	More than 2 Minimum x Salary
CEARÁ	82%	15%	3%	0%	0%
SERGIPE	78%	1%	18%	4%	0%
MARANHÃO	77%	10%	13%	0%	0%
ESPÍRITO SANTO	18%	12%	31%	39%	0%
PERNAMBUCO	14%	4%	64%	15%	3%
<b>BRAZIL</b>	<b>33%</b>	<b>41%</b>	<b>22%</b>	<b>3%</b>	<b>0%</b>

**Source:** From data available on the “Infopen”<sup>7</sup> database.

<sup>6</sup> The national legislation stipulates that labour relations in prison may be made possible by the State itself, through management of direct administration or by Foundations or Public Enterprises, or it may also be established through agreements between the State and the private sector (Article 34 of the NPL).

<sup>7</sup> Complete data set is available in Santos (2017).

Some important information should be added to this data: although expressly guaranteed by the NPL, and contrary to the provisions of the Federal Constitution which in article seven (items IV and VII) established the minimum monthly wage, most Brazilian inmates do not receive it. This is because 75% of them do not receive remuneration or receive less than three-quarters of the minimum monthly wage.

The rates of pay vary from state to state, but even those with rates that are less removed from what the law requires, such as in the cases of Espírito Santo and Pernambuco, are still far below what would be correct. When analysing the most serious cases, such as the states of Ceará, Sergipe and Maranhão, almost all inmates working in the prison system are not paid at all or receive below the rate stipulated by legislation.

Other consequences of the data described above - only 15% of inmates perform work activities - as well as being undisputedly illegal, as it is the duty of the State to guarantee the right to work for inmates, also ends up contributing to the severe overcrowding that characterises Brazilian prisons<sup>8</sup>. Article 126 of the NPL provides that, “an inmate who is serving a closed or semi-open sentence may redeem part of the sentence for his work” and such conditions effectively preclude this.

Inmates can, while working, pay off part of their prison sentence. The exchange is at the rate of one day's reduction of sentence for three days of work. As discussed above, the incarcerated citizen maintains his right to work. In view of this situation, it is the duty of the State to protect and enable the regular exercise of such a right, as Rodrigues (2001) points out, “As for the legal regime of prison work, the right to work, constitutionally enshrined as a positive right to obtain work, is not restricted due to imprisonment. In contrast, the state has a duty to provide work for prisoners.” (RODRIGUES, 2001, p. 97).

#### **4 CONCLUSIONS**

From forced labour in the colonial period, to labour that is now legally binding and regarded as a prisoner's right, the interpretation of national criminal law has moved in the direction of common sense and the consolidation of mechanisms that enable the effective attainment of the objectives of the sentence, as regards the social reintegration of the inmate.

In the same vein, this text seeks to characterise the Brazilian prison population as markedly vulnerable and, at least in the labour field, unaided. Such a situation is, at the very least, a nonsense, as the State, in theory, should ensure full respect for the fundamental rights of citizens in custody, and in particular, enforce the primary

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<sup>8</sup> The non-governmental organisation *Human Rights Watch* estimates that the national prison system can only accommodate half of the current detainees. There are less than 400 thousand vacancies available. Because of overcrowding, unhealthy and even inhuman situations are established. Full data are available in; Muñoz (2017).

objective of the most radical sentence (loss of freedom), namely, the resocialisation of the individual.

In addition, it argues that the State, when it deprives citizens of their freedom, assumes responsibility for providing the necessary conditions for the successful return of the citizen to social life. Specifically, the rationale points to the relevance of work as one of the essential instruments in complying with said obligation (MINHOTO, 2002).

In this regard, this article has sought to draw attention to the manifestly unfair situations generated by the interpretation and application of the provisions of criminal and procedural law in force in Brazil. Especially negative is the second paragraph of article 28 of the NPL, which expressly prohibits the inclusion of prison work in the CLT. The discrimination in the NPL is incompatible with the norms regarding the social value of work and contrary to the constitutional provisions that favour equality between citizens.

In view of the apparent conflict between the constitutional norms and the NPL provisions, this article states an understanding that it recognises as a good interpretation of the issue, namely that, as Magna Carta is the hierarchically superior rule, it should prevail over the specific rule (normative hierarchy).

From the specific point of view of labour law, the rights of incarcerated workers are clearly being denied, in so far as the principle of worker protection is clearly being set aside as the role of employment in labour relations is removed. At the same time, another labour principle is being affronted, that of the primacy of reality, which says that material truth measured in practice, that is, through the concrete analysis of the provision of services, must prevail over formal data. There is no doubt that, in practice, the labour relations entered into by inmates are analogous to labour relations in place outside prison. Therefore, if all the requirements of the employment bond are met - as is the case in the employment relations within the Brazilian prison system - it is not right, nor should it be a norm, to discount its effects.

Through this approach, based on labour hermeneutics, we conclude that article 28, paragraph 2 of the NPL has no constitutional weight, and neither does the caput of Decree 44.184 of 2005. If the flagrant unconstitutionality of important provisions governing the standardisation of labour relations in Brazilian prison were not enough, the reality experienced in Brazil in relation to this issue is even worse, insofar as in three quarters of cases work activities are, illegally, paid below the minimum or, even worse, not paid at all.

In this sense, Correia (2007) affirms that, “[...] reason, in law, must always tend towards equality - so much so that the great theories of justice always relate to the discussion of equality.” (CORREIA, 2007, p. 117). Thus, we should dismiss the current application of the provisions in question and provide for the employment and constitutional guardianship of the inmate worker. Only in this way will it be possible to re-socialise those leaving the penitentiary system without affronting their dignity, understood in the broadest terms possible.

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