FEMALE IMPRISONMENT: AN ANALYSIS IN LIGHT OF THE CONSTITUTION, THE LEP AND HC 143.641/SP

ENCARCERAMENTO FEMININO: UMA ANÁLISE À LUZ DA CONSTITUIÇÃO, DA LEP E DO HC 143.641/SP

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RESUMO

O presente trabalho aborda o encarceramento feminino no Brasil sob uma perspectiva de gênero, com enfoque na análise crítica da situação das mulheres presas à luz da Constituição Federal de 1988, da Lei de Execução Penal (LEP), dos tratados internacionais de direitos humanos e da jurisprudência do Supremo Tribunal Federal, especialmente a decisão proferida no Habeas Corpus 143.641/SP. O estudo, de natureza qualitativa, exploratória e bibliográfica, tem como objetivo geral analisar os desafios e as perspectivas para a garantia dos direitos das mulheres em privação de liberdade, considerando suas especificidades e vulnerabilidades. A pesquisa destaca a insuficiência estrutural e normativa do sistema prisional brasileiro em atender às necessidades femininas, principalmente no que se refere à maternidade, à saúde, à convivência familiar e à dignidade da pessoa humana. A decisão do STF no HC 143.641/SP é apresentada como um marco no reconhecimento da proteção à maternidade e à infância no cárcere, alinhando-se ao pensamento filosófico de Hegel sobre a centralidade da família e do bem-estar social. O trabalho também discute os limites dessa decisão, por não alcançar as mulheres condenadas em regime fechado ou semiaberto, e propõe a ampliação das penas alternativas e políticas públicas voltadas à reinserção social das mulheres presas. Conclui-se pela necessidade de reestruturação do sistema penal brasileiro, com enfoque em justiça social, igualdade de gênero e efetivação dos direitos fundamentais.

Palavras-Chave: Encarceramento Feminino. Direitos Humanos. *Habeas Corpus* 143.641/SP.

ABSTRACT

This study addresses female incarceration in Brazil from a gender perspective, focusing on a critical analysis of the situation of imprisoned women in light of the 1988 Federal Constitution, the Law on Penal Execution (LEP), international human rights treaties, and the jurisprudence of the Federal Supreme Court, particularly the decision issued in Habeas

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Corpus 143.641/SP. The research is qualitative, exploratory, and bibliographic in nature, with the general objective of analyzing the challenges and prospects for ensuring the rights of women deprived of liberty, considering their specificities and vulnerabilities. The study highlights the structural and normative shortcomings of the Brazilian prison system in meeting the needs of women, especially regarding motherhood, health, family life, and human dignity. The STF's decision in HC 143.641/SP is presented as a landmark in recognizing the protection of motherhood and childhood in prison, aligning with Hegel's philosophical perspective on the centrality of the family and social well-being. The paper also discusses the limitations of the ruling, as it does not extend to convicted women in closed or semi-open regimes, and proposes the expansion of alternative penalties and public policies aimed at the social reintegration of incarcerated women. The study concludes with a call for the restructuring of the Brazilian penal system, focusing on social justice, gender equality, and the realization of fundamental rights.

Keywords: Female Incarceration. Human Rights. *Habeas Corpus* 143.641/SP.

INTRODUCTION

Female incarceration has grown significantly worldwide, raising questions about the specific conditions and challenges faced by women in the prison system. In Brazil, the situation is no different, with a significant increase in the female prison population in recent years. Given this reality, it is crucial to analyze female incarceration from a gender perspective, considering the specific needs and vulnerabilities of women deprived of their liberty.

The Federal Constitution of 1988 and the Criminal Enforcement Law (LEP) guarantee fundamental rights to women prisoners, such as the right to have their children with them during the breastfeeding period and the prohibition of cruel punishments. However, the reality of the Brazilian prison system still presents several challenges, such as the lack of adequate infrastructure to meet the specific needs of women, overcrowding, and difficulty accessing health care and education.

In addition, female incarceration often leads to the breakdown of family ties, especially in the case of mothers, which directly impacts the lives of children. In this sense, the decision of the Federal Supreme Court in the Habeas Corpus 143.641/SP, which granted house arrest to women in preventive detention who are pregnant, have recently given birth, or are mothers of children up to 12 years of age, represents an important milestone in the protection of motherhood and childhood in prison.

Hegel, in his work “Principles of the Philosophy of Law” (1997), highlights the importance of the family as a fundamental institution for the development of the individual and society. According to him, the family is the foundation of society and the State, and its well-being is essential for the well-being of all. The decision of the STF to prioritize the protection of motherhood and childhood in prison resonates with the thinking of Hegel, contributing to the preservation of the family and the development of the child.

This research is characterized as a qualitative, exploratory, and bibliographic investigation, focusing on the critical analysis of female incarceration in Brazil in light of the national legislation, international human rights treaties, and the jurisprudence of the Federal Supreme Court, especially in the Habeas Corpus 143.641/SP.

The qualitative approach was chosen because it allows for an in-depth understanding of the subjective, social, and legal issues surrounding the deprivation of liberty of women, especially with regard to gender, motherhood, and vulnerability. According to Minayo (1994), qualitative research seeks to interpret phenomena in their specific contexts, valuing meanings and symbolic relationships.

The technique used was bibliographic and documentary research, with analysis of doctrinal works, national legislation (such as the Federal Constitution of 1988, the Criminal Enforcement Law, and the Code of Criminal Procedure), international human rights treaties (such as the Universal Declaration of Human Rights and the Bangkok Rules), as well as judicial decisions, especially the HC 143.641/SP.

The main objective of the research is to analyze female incarceration in Brazil, addressing the challenges and perspectives for guaranteeing the rights of women deprived of their liberty, in light of the Federal Constitution of 1988, the Criminal Enforcement Law, and the STF decision in the HC 143.641/SP, in order to contribute to the construction of a more just, humane, and inclusive prison system.

1 PRISON AS A MODALITY OF PENALTY IN THE COMTEMPORARY SOCIETY AND THE CURRENT RELEVANCE OF FEMALE IMPRISONMENT

With the evolution of the Western society and models of the State, the treatment of crime has also undergone several transformations, moving away from a regime of torture and cruel punishments to a model in which punishment is synonymous with imprisonment.

In his exhaustive assessment of the phenomenon of punishment and the emergence of prisons, Michel Foucault (1994, p. 20) explains that "punishment was no longer centered on torture as a technique of suffering; it took as its object the loss of a good or a right."

The reduction in the severity of penalties was interpreted by many as a quantitative phenomenon, that is, "less cruelty, less suffering, more softness, more respect, and more humanity" (Foucault, 1994, p. 20). For Foucault, changes in the punishment process over the centuries should not be viewed exclusively from the perspective of reduced criminal severity, but rather from the change in the object of punishment.

It is understood that there has been a shift in the target of the penal system, which has migrated from the body, which was subject to capital punishment and excessive punishment, to the soul, taking the form of restrictions on will, desires, feelings, and autonomy. In the words of Foucault (1994, p. 22), "the expiation that triumphs over the body must be succeeded by punishment that acts deeply on the heart, the intellect, the will, and dispositions."

Prison is, therefore, the means that succeeds corporal punishment. Foucault, however, recalls that "the general form of a device for making individuals docile and useful, through precise work on their bodies, created the institution of prison, before the law defined it as the punishment par excellence" (Foucault, 1994, p. 207).

> Regarding the evolution of the punitive system and the adoption of prison as a means of punishing crimes, Menegat points out that O problema político do direito de punir, retomado pelo liberalismo em uma perspectiva de fundamentá-lo sobre novas bases, na segunda metade do século XVIII não tinha a intenção apenas de mudar as formas de punição, mas também articulava as novas formas com um novo tipo de Estado, que se legitimaria mais pelo convencimento do que pelo medo e pela força (Menegat, 2010, p. 212)

In addition, in the words of Beccaria (2000, p. 45), prison "would act more on souls than on bodies". Imprisonment was the way that classical liberalism found to preserve punitive law as much as possible, legitimizing the role of the State in containing the masses with methods that were more humane and soft than those previously adopted by the absolutist regime (Menegat, 2010, p. 213).

Hegel (1997) argues that punishment should not be seen as mere revenge or retaliation, but as an act of justice aimed at restoring social balance. According to him, punishment is not only for the criminal, but also for society. Prison, according to his thinking, should be seen as a way to educate the criminal and reintegrate them into society, and not just as a way to punish them. On this issue, the author states:

> Mas o Estado contém em si a exigência de uma cultura e de uma inteligência mais profundas e carece da satisfação da ciência. Além disso, depressa aquele gênero de pensamentos por si mesmo cai, quando considera, 1 de perto, a pena não como um castigo, mas como uma oportunidade para o criminoso de se reconciliar consigo mesmo e com o conceito de liberdade que violara. […] Assim, a pena deixa de ser uma vingança ou retaliação e passa a ser um meio para a educação do criminoso. Não se trata apenas de retribuir o mal que ele causou, mas também de promover a sua reinserção social e de restabelecer a harmonia entre ele e a comunidade (Hegel, 1997, p. 24).

Deprivation of liberty, in this sense, would serve to allow individuals, separated from social interaction, to reflect on their actions and return to society with a new perspective, aware of their duties and obligations. In the words of Hegel (1997), punishment should be seen as an opportunity for the criminal to reconcile with the law and the community, and not as a way of excluding or marginalizing them.

Marildo Menegat (2010, p. 214) points out that prisons have fostered a myth of fair and equitable punishment for any type of crime, "thereby maintaining the necessary articulation with the fulfillment of the law that every member of a rational society must be treated as a rational being, that is, not be subjected to brutal treatment involving physical violence.".

The belief in proportionality and balance in imprisonment as a form of punishment was exhausted with the first signs of authoritarianism that preceded World War II. The persecution and death of subversives and concentration and extermination camps were the means of punishment appropriate to the interests of the capitalist state, while criminal law and criminal procedure legitimized and instrumentalized the achievement of these punitive objectives of the State (Menegat, 2010, p. 219).

Based on the ideas of the welfare state that emerged after the horrors of World War II, scholars of criminal policy began to assert the decline of prison sentences. However, this did not happen; on the contrary, prison became "the great instrument of criminal policy throughout the world," with a hardening of penalties and a disproportionate increase in the global prison population. (Abramovay, 2010, p. 9).

Vera Malaguti Batista (2010, p. 30) states that "neoliberalism led governments to dismantle the welfare state in order to prioritize the criminal administration of human rejects, leading the urban sub proletariat to a bitter marginalization."

With regard specifically to the prisons of women, there is not much information available. It is known, however, that since the 16th century there have been regulations determining the separation of men and women within prison establishments, which only

occurred in Brazil with the Decree-Law No. 2,848, of December 7th, 1940, which instituted the Penal Code. (Pereira, 2010, p. 7).

Many institutions, in order to comply with separation regulations, began to place women in specific areas within male prisons, without giving any thought to their condition as women. Today, this situation still persists, because few prisons are built with women in mind.

Just as there has been an increase in the global prison population, even more alarming are the rates of incarcerated women. This raises the issue of gender and what measures should be taken in the treatment of female prisoners.

2 INTERNATIONAL LEGISLATION RELATED TO IMPRISONMENT AND THE LEGAL REGULATION OF FEMALE IMPRISONMENT

With the evolution of the punitive system and the adoption of imprisonment as the main instrument of criminal policy, principles and norms inherent to human dignity have been integrated into the prison management system through the accession and ratification of international instruments by countries.

In this regard, the Universal Declaration of Human Rights (UDHR) is a milestone in the history of human rights, being an international document from which other treaties on the subject derive. Proclaimed by the United Nations General Assembly on December 10th, 1948, the Universal Declaration of Human Rights solemnly recognizes, in its preamble, the dignity of the human person as the foundation of freedom, justice, and peace in the world, establishing positive (commands to act) and negative (commands to refrain) obligations on peoples and countries with the aim of promoting and protecting the human rights and freedoms of groups or individuals.

Bonavides (2008) emphasizes that the Universal Declaration of Human Rights is a document that represents both a convergence and a synthesis of interests and thoughts. According to the author:

> Convergência de anseios e esperanças, porquanto tem sido, desde sua promulgação, uma espécie de carta de alforria para os povos que a subscrevera, após a guerra de extermínio dos anos 30 e 40, sem dúvida o mais grave duelo da liberdade com a servidão em todos os tempos. [...] Síntese, também, porque no bronze daquele monumento se estamparam de forma lapidar direitos e garantias que nenhuma Constituição isoladamente lograra ainda agregar ao redor de um consenso universal (Bonavides, 2008, p. 574).

Specifically with regard to the criminal justice and prison systems, the articles provide for the guarantees of presumption of innocence (Article XI – 1), legality (Article XI – 2), and

prohibition of torture, that is, the application of cruel, inhuman, and degrading punishment and treatment (Article V) (ONU, 1948).

In turn, the International Pact on Civil and Political Rights (ICCPR), adopted on December 16th, 1966, at a session of the United Nations General Assembly, was ratified by Brazil on July 6, 1992. It is an international treaty that established the right to enjoy civil and political freedoms for individuals, even in the territory of a foreign state, ensuring the self-determination of peoples, reinforced by the idea of freedom of economic, social, and cultural development (Article 1, 1). With regard to prison treatment, the international standard stipulates that "everyone deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person" (Article 10, 1) (UN, 1966).

Also at the international level, the treaty adopted by the 1st United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, established the Standard Minimum Rules for the Treatment of Prisoners. In its 96 provisions, the treaty establishes principles and rules for improving the organization and management of prisons and the treatment of prisoners. (ONU, 2015).

Among the provisions set forth in the document, the separation of prisoners by category stands out, taking into account gender, age, criminal record, reasons for imprisonment, and the type of treatment that should be applied to the prisoner (Articles 8 and 67 to 69). With regard to incarcerated women, the treaty establishes that, whenever possible, they should be held in separate facilities. If it is essential for men and women to be held in the same facility, the area designated for women must be completely isolated (Article 8, 'a') (UN, 2015).

Article 23 provides that, in prisons for women, there must be special facilities to care for pregnant prisoners or those with health problems, whether related to pregnancy or not. It also suggests that births should preferably take place in a civilian hospital; if the birth occurs in a prison, this fact may not be recorded on the birth certificate. With regard to children of incarcerated mothers, if they are allowed to remain in the institution with their mothers, daycare centers should be organized so that they can be cared for by qualified professionals while they are not with their mothers. (art. 23, 2) (ONU, 2015).

Furthermore, in the international legislation on human rights, it is necessary to mention the American Convention on Human Rights or Pact of San José, Costa Rica (ACHR). Signed on December 22nd, 1969, in San José, Costa Rica, the American Convention

on Human Rights or Pact of San José, Costa Rica is an international treaty adopted by the member countries of the Organization of American States (OAS)

The express purpose of the Convention, as stated in its preamble, is the consolidation of the American continent, with the ideological goal of strengthening democracy in the signatory countries through a regime of personal freedom and social justice, all based on respect for fundamental rights (OAS, 1969).

The American Convention on Human Rights clearly reiterates the norms set forth in the Universal Declaration of Human Rights, highlighting the specific characteristics of the signatory countries, especially with regard to the ideal of democracy. In the field of criminal law, among other guarantees, the American Convention on Human Rights provides for the principles of personal responsibility of the convicted person (Article 20 5, 3); principles of legality and anteriority (Article 7, 2); presumption of innocence (Article 8, 2); impossibility of arbitrary detention or imprisonment (Article 7, 3); right to appeal – double degree of jurisdiction (Article 7, 6) and judicial guarantees (Article 8). (OEA, 1969).

On December 10th, 1984, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by the United Nations General Assembly and ratified by Brazil on September 28th, 1989.

Based on the theoretical and ideological frameworks established by the United Nations Charter, notably the principles of human dignity and freedom, this instrument consolidated rules to curb torture and other cruel, inhuman, or degrading treatment or punishment throughout the world, establishing the Committee against Torture at the United Nations (UN, 1984).

The United Nations General Assembly was undoubtedly one of the bodies responsible for issuing most of the international documents on the treatment of prisoners. So much so that, on December 9th, 1988, it approved the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. (UN, 1988).

Under the premise that persons subject to imprisonment must be treated humanely and with respect for their dignity (Principle 1), it establishes rules concerning imprisonment measures, which can only be decreed by order of a competent authority (Principle 2), and prohibits the subjection of prisoners to torture, cruel, inhuman, or degrading treatment or punishment (Principle 6). The international treaty also provides that persons in custody have the right to communicate with their lawyer (Principle 18), receive visits from their family members or maintain communication by other means (Principle 19), remain in an institution

close to the residence of their family (Principle 20), and receive adequate medical care (Principle 24) (UN, 1988).

In August and September of 1990, at the United Nations Congress for the Prevention of Crime and the Treatment of Offenders, held in Cuba, a new international treaty was published, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. The special provisions of the international treaty provide, among others, specific rules for the treatment of incarcerated people, which also apply to women prisoners (UN, 1990).

At this point, the agreement stipulates that the use of force by law enforcement officials can only occur in exceptional situations and when it is indispensable for the maintenance of security and order in prisons. In turn, the use of firearms should be restricted to cases of self-defense (whether by the employee or a third party) and to prevent detained evasion (UN, 1990).

Finally, the United Nations General Assembly adopted at a conference held in Thailand in 2010 the United Nations Rules for the Treatment of Women in Prison and Non-custodial Measures for Female Offenders, also known as the Bangkok Rules. Such rules are the ones that most address the situation of the imprisoned woman, coming out of the generality of the other norms. This is an international document addressed to the signatory countries, the prison authorities and criminal justice agencies (including Legislative, Executive, Judiciary, Public Prosecutor's Office, and agents who act in the prison system directly or indirectly), which regulates the treatment of women prisoners on the premise that they represent the most vulnerable part of the prison population with specific needs and requirements (ONU, 2010).

In the work preceding the final document, it was concluded that the Minimum Rules for the Treatment of Prisoners adopted in 1955 do not meet the needs of the female incarcerated population, evidencing the need to adapt the treatment of this portion of the prison population that has been increasing significantly today.

Indeed, the Bangkok Rules seek to guarantee the dignity of women prisoners by providing provisions related to the specific needs of the female gender, especially with regard to the health of women, their social reintegration and maintenance of family ties, as well as the protection of the fundamental right to motherhood and childhood (UN, 2010).

3 NATIONAL LEGISLATION ON FEMALE INCARCERATION

In Brazil, the existing specific regulations regarding female incarceration are still scarce, especially when it comes to the issues of physical structure consistent with the condition of women, the material needs of the motherhood and the permanence of children with their mothers in penal institutions and family life.

It is important to mention that the existing legislation in the country, as a rule, deals with the issue of incarceration broadly, establishing rights and obligations for both the prison population and the State, an effective approach to female imprisonment that aims to protect the needs of women in prison is not observed.

The specific predictions about the imprisoned woman, when they exist, mostly concern the issue of motherhood and the permanence of the children during breastfeeding, omitting the norms as to the other mechanisms that may allow the realization, in a satisfactory and healthy way, the fundamental guarantees referred to above.

The Constitution of the Federative Republic of Brazil of 1988 (CF/88), in its art. 5th, in addition to listing the fundamental rights and guarantees, ensures fundamental precepts in favor of the convicted person, among which stand out: the prohibition of the use of cruel punishments (item XLVII, letter "e"); the execution of the sentence in separate and appropriate establishments (item XLVIII); respect for the physical integrity of the prisoner (paragraph XLIX); the right of the prisoners to have their children with them during the period of breastfeeding (paragraph L); the obligation to report the arrest of any person to the judicial authority and to the family or person indicated by the prisoner (paragraph LXII); and the right of the prisoner to be informed about his rights (item LXIV) (Brazil, 1988).

These rights, in addition to those provided for in conventions, pacts and treaties of which Brazil is a signatory, are described in the Brazilian Criminal Enforcement Law (Law no 7.210, of July 11th of 1984), main legislation that regulates the regime of execution of sentence applied to the sentenced person throughout the national territory.

With regard to the issue of women arrested, the Brazilian Criminal Enforcement Law (LEP) establishes in the art. 19, paragraph only, that the convicted woman will have professional education appropriate to her condition. In the art. 117, paragraphs III and IV, the collection of the beneficiary of the open scheme in private residence was admitted when it is a convicted person with a minor child or mentally ill and a pregnant convict.

In turn, the § 1o of the art. 82, amended by the Law no 9.460 of June 4th, 1997, stipulates that the woman (as well as everyone over 60 years old) will be collected in a place suitable to their personal condition.

An important change was introduced by the Law no 11.942, of May 28th of 2009, ensuring to the mothers arrested and to the newborns medical accompaniment and determining that the penal establishments for women are endowed with nurseries, in order for incarcerated mothers to take care of their children and breastfeed them until 6 months of age.

Mentioned Law, amending the art. 89 of the LEP, also determines that the penitentiary for women must have a section for pregnant and parturient, as well as a daycare center to house children over 6 months and under 7 years of age.

Also in 2009, the Law no 12.121 of December 15th of 2009 was published, which determines that, in penal institutions intended for the female prison population, the internal security force is carried out only by female agents.

Finally, Law no 13.769 of 2018 included the § 3rd to the art. 112, providing differentiated rules of regime progression for pregnant women or mothers or guardians of children or people with disabilities.

In the Brazilian Code of Criminal Procedure (Decree-Law no 3.689, of October 3rd, 1941), there are also provisions about imprisonment, having the Law no 13.769, of 2018, brought changes in this particular, when it introduced the art. 318-A to determine the substitution of preventive detention imposed on pregnant women or mothers or guardians of children or persons with disabilities, provided that they have not committed a violent crime or serious threat to the person and have not committed the crime against their child or dependent. This legislative change occurred by virtue of the decision of the Supreme Court in HC 143641/SP, which will be the subject of analysis in the following topic.

In addition to the mentioned provisions, it is important to mention that, with regard to children and adolescents, it is necessary to observe the Law 8,069 of July 13th of 1990 (Statute of the Child and Adolescent (ECA)), which provides for the full protection of minors.

Advancing on the national legislation, it is mentioned that the National Council of Criminal and Penitentiary Policy (CNPCP), a body whose competence is delimited in the Penal Execution Law, has been issuing resolutions to set rules for the treatment of prisoners, including women.

Well, the existing documents in Brazil about the deprivation of liberty of women deal with the subject - repeat - comprehensively, there is little specific legislation aimed at the situation of the woman arrested. Almost all the documents published in this sense are composed of recommendations without normative force.

4 CHANGE OF PARADIGM ABOUT THE TREATMENT OF INCARCERATED WOMEN - THE DECISION OF THE SUPREME FEDERAL COURT IN THE HABEAS CORPUS 143.641/SP

The incarcerated woman, despite the years of state omission, began to be treated differently with paradigmatic decision of the Supreme Federal Court, in the Collective Habeas Corpus no 143.641, Requested by the Public Defender's Office of the Union in favor of women in preventive detention who are pregnant, puerperal or mothers of children up to 12 years old, as well as on behalf of the children themselves.

Under the supervision of Minister Ricardo Lewandowski, the Constitutional Court, based on constitutional and principled precepts, granted the replacement of pre-trial detention by house arrest to all women in pre-trial or mothers of children and people with disabilities, except in cases of violent crimes against their descendants.

The emblematic decision gave rise to profound reflections on the interpretation given to existing national and international norms regarding the imprisonment of women, as well as on the protection of fundamental rights, especially in the context of motherhood in prison.

Well, the decision rendered by the Supreme Court shows from the beginning a rich and multifaceted argumentation process that goes beyond the mere application of rules, seeking the realization of fundamental rights in a context of extreme vulnerability.

In the wake of the Theory of Legal Argumentation proposed by Atienza (2006), the decision rendered in HC 143.641/SP emphasizes the need to overcome the "[...] reasoning produced in the elaboration of legal dogmatics and in the interpretation and application of the Law" (Atienza, 2006, p. 213), exercising the Judiciary an active role in guaranteeing constitutionally protected individual rights.

Indeed, Atienza dismisses the law in a strict sense as limiting legal discourse, stating that such thinking leads to believe that [...] rationality in the application of the Law depends on rationality in legislation; that the reasoning of the judge, of the parties to the proceedings or dogmatic is not independent of what occurs in parliament or administrative bodies that produce valid legal rules (Atienza, 2006, p. 213).

From this perspective, "[...] the resolution of legal problems is very often the result of a mediation or negotiation, which does not consist only in applying legal norms, although, naturally, legal norms continue to play an important role" (Atienza, 2006, p. 214).

Thus, in the absence of a specific rule that effectively guarantees the right of pregnant women and mothers - since the art. 318 of the CPP relegated to the granting of house arrest to

judicial discretion -, the Supreme Court used a series of arguments to justify the granting of house arrest for pregnant women or mothers of children provisionally imprisoned, intertwining principles, national and international standards, demonstrating the complexity and sensitivity to the situation of the female prison system in the country and the disability of the State to initiate processes to minimize long-standing problems.

Even for the admissibility of the Habeas Corpus can be seen the sensitivity of the Superior Court, which recognized the importance of this instrument to protect the rights of vulnerable groups in situations of systematic injuries, overcoming the traditional view of the Habeas Corpus as an individual remedy.

In addition, it was highlighted in the vote that, although complex identification, this was possible, having some states attended order of presentation of relationship of pregnant women and mothers of children (understood these up to 12 years incomplete, according to the art. 2 of the Statute of the Child and Adolescent), making it clear that any difficulty could not prevent the analysis of the central theme.

Minister Ricardo Lewandowski highlighted that, "consistent with this reality, the Federal Supreme Court has admitted, with increasing generosity, the most diverse institutes that manage to deal more adequately with situations in which the rights and interests of certain collectivities are at risk of suffering serious injuries" (HC 143641/SP) (Brazil, 2018, p. 15).

He further emphasizes that "with this, moreover, it will be honoring the venerable legal tradition of the homeland, embodied in the Brazilian doctrine of the Habeas Corpus, which gives the greatest possible amplitude to the heroic remedy, and found in Ruy Barbosa perhaps its greatest defender. According to this doctrine, if a fundamental right is violated, there must be in the legal system a procedural remedy commensurate with the injury" (HC 143641/SP) (Brazil, 2018, p. 16).

And already by the admissibility of the Habeas Corpus is that one begins to recognize the innovation of every decision made, because in its merit there is recognition, without a shadow of doubt, the precariousness of the female prison system and the lack of respect by the State for existing national and international legislation on the imprisonment of women.

The decision, anchored in basic principles of the Constitution, such as the dignity of the human person, the protection of motherhood and childhood, and the absolute priority of the rights of the child, demonstrates the centrality of these values in the Brazilian legal order

and the need for its implementation, even in situations of conflict with other values such as public security and the principle of legality in criminal matters.

The picture of structural deficiency is evident and serious, as mentioned in the vote of the minister Marco Aurélio in the Notice of Non-compliance with Fundamental Precept no 347 MC/DF, which was quoted by the rapporteur:

> A ausência de medidas legislativas, administrativas e orçamentárias eficazes representa falha estrutural a gerar tanto a violação sistemática dos direitos, quanto a perpetuação e o agravamento da situação. A inércia, como dito, não é de uma única autoridade pública – do Legislativo ou do Executivo de uma particular unidade federativa –, e sim do funcionamento deficiente do Estado como um todo. […] A forte violação de direitos fundamentais, alcançando a transgressão à dignidade da pessoa humana e ao próprio mínimo existencial justifica a atuação mais assertiva do Tribunal (Brasil, 2018, p. 22).

By the decision previously decided in the Habeas Corpus was evident the non-compliance of fundamental precepts, which do not concern only women prisoners, but also their children, who by cross-ways are serving the sentence with their parents, which, besides being absurd, It violates all the rules about child protection.

The rapporteur also highlighted, in the situation of women prisoners, the need to enforce the basic principles of human dignity and the absolute priority of children's rights, which should guide criminal and penitentiary policy. The vote is transcribed:

> As narrativas acima evidenciam que há um descumprimento sistemático de regras constitucionais, convencionais e legais referentes aos direitos das presas e de seus filhos. Por isso, não restam dúvidas de que "cabe ao Tribunal exercer função típica de racionalizar a concretização da ordem jurídico-penal de modo a minimizar o quadro" de violações a direitos humanos que vem se evidenciando, na linha do que já se decidiu na ADPF 347, bem assim em respeito aos compromissos assumidos pelo Brasil no plano global relativo à proteção dos direitos humanos e às recomendações que foram feitas ao País (Brasil, 2018, p. 34).

The decision, based on fundamental principles and values, in an attempt to build a more just and equitable justice system, built the principled foundations for the introduction of the art. 318-A to the Code of Criminal Procedure by the Law no 13.769, of 2018, which grants all women in preventive detention house arrest, except cases where he has committed a crime with violence or serious threat to the person or has committed the crime against his child or dependent.

It is noted that the Court held that the replacement of preventive detention by home, for pregnant women, puerperals and mothers/ guardians of children or disabled people, should be the rule, not an exception, using as main arguments the priority to the protection of motherhood and childhood, the inadequate conditions of the prison system and the presumption of innocence.

Minister Ricardo Lewandowski has built a powerful and moving narrative that connects the concrete situation of women prisoners to the proposed legal solution, demonstrating the reasonableness and fairness of granting house arrest, and sensitizing society to the urgency of the issue. It can be mentioned that the decision was based on data and studies that reveal the precariousness of the female prison system and the devastating impact of prison on the lives of mothers and their children, demonstrating the need for a judicial intervention to protect the dignity and rights of these women and children, and highlighting the importance of social reality in the trial (Brazil, 2018).

Well, the Supreme Federal Court (STF), in order to ensure the protection of maternity and childhood and weighing the various principles and rules at stake, demonstrated how the judiciary can act proactively in the protection of fundamental rights, overcoming structural challenges and promoting a more human and inclusive justice system, a situation that had repercussions in the legislative sphere with the amendment of the Code of Criminal Procedure a few months after the paradigmatic decision.

Furthermore, in order to restrict judicial discretion in the application of the order granted in HC 143.641 and, consequently, the incarceration culture that permeates the Brazilian Penal System, The Superior Court established clear parameters for granting house arrest to pregnant women, mothers or guardians of children or disabled, becoming the rule, and no longer an exception (Brazil, 2018). From this point, therefore, the judicial discretion is removed, with the requirement of specific reasoning for the denial of the house arrest.

The HC 143.641/SP represented an advance and an important precedent in the Brazilian jurisprudence, by recognizing the need for differentiated treatment for incarcerated women, considering their specific needs and vulnerabilities, especially with regard to motherhood.

The decision of the STF, when considering the specific situation of the imprisoned woman and her social function as a mother, finds resonance in the thought of Hegel about the importance of the family as a fundamental institution for the development of the individual and society. This author recognizes the importance of the family in the moral and ethical formation of the individual, and argues that the State should protect and promote the family, ensuring the necessary conditions for its development. In his work 'Principles of the Philosophy of Law', he states that the family is the basis of society and the State, and its well-being is essential for the well-being of all, let us see:

> O elemento natural, a unidade substancial em que a pessoa se encontra em si mesma como gênero e como individualidade natural, em que a consciência de si é apenas

> sentimento, e a realidade objetiva apenas existência imediata, é a família. A família, como pessoa moral imediata, é especificamente caracterizada pelo amor, que é o sentimento da minha unidade com outrem, de tal modo que não sou pessoa para mim, mas renuncio à minha personalidade, e só na unidade da pessoa comigo é que sou eu mesmo. Amor significa, pois, em geral, a consciência de minha unidade com outrem, de modo que não sou para mim, mas ganho meu autoconhecimento somente ao renunciar a minha independência e saber que sou somente nesse outro e somente por meio dele (Hegel, 1997, p.40).

In this sense, the decision of the STF, by prioritizing the protection of maternity and childhood in prison, contributes to the preservation of the family and the development of the child, in line with the thought of Hegel.

The granting of order in the heroic remedy contributed to the resumption of the debate about the construction of a more humane and fair prison system that respects the fundamental rights of all citizens, regardless of their social or legal status, especially for women prisoners, that from the beginning have always been inserted within a patriarchal prison system and thought only of males.

Therefore, although it is necessary to recognize the importance of protecting maternity and childhood in the context of the prison system, aligning itself with the perspective of feminist criminology, it can be said that a portion of the female prison population remained outside the cover-up of house arrest or the imposition of alternative measures.

And how are women in prison convicted pregnant or mother of children who continue to serve sentences in the Brazilian prison system? This system is admittedly flawed by the State in the scope of all its powers, namely, legislative, executive and judicial. At this point, it is also necessary to address the situation of women sentenced not covered by the decision of HC 143.641/SP and the guidance of the courts about the application of this new paradigm in the context of definitive imprisonment.

5 THE DECISION OF THE SUPREME FEDERAL COURT IN THE HABEAS CORPUS 143.641/SP AND REPERCUSSION ON FEMALE INCARCERATION AS A WHOLE - THE ROLE OF THE JUDICIARY IN PROTECTING HUMAN DIGNITY IN CONTEXTS OF EXTREME VULNERABILITY

It can be seen that, although there have been some advances, and here we highlight the emblematic decision made in the Habeas Corpus by the STF, regarding the imprisoned woman, the penitentiary policy applied to incarcerated women, in the 21ST century, remains discriminatory and sexist (Kent, 2007, p. 35).

This is because women continue to be inserted in institutions designed only for male inmates, unable to enjoy environments appropriate to their needs, suffering even more with prison.

According to Kent (2007, p. 35), the particularities of the prisons for women entail situations of extreme discrimination that imply a more suffered and cruel sentence for women in comparison to men.

In a study conducted in Brazil regarding the gender perspective, more precisely in the state of Espírito Santo, Fernandes and Miyamoto (2003) reaffirmed the male supremacy of the criminalization process, indicating that women continue to be seen as an inferior being for not being their transgressions interpreted in the same way as those of men. Cite the authors:

> No contexto de criação do sistema penal, a mulher não era sinônimo de perigo, logo, não fazia sentido puni-la. O estereótipo feminino girava em torno da fidelidade, castidade e gestação (dos herdeiros, no caso das mulheres das classes dominantes; da futura mão de obra barata, no caso das mulheres das classes subalternas).
> Enquanto ao homem, era reservado o estereótipo de trabalhador, racional, forte, ativo e com potencial para cometer delitos. Em suma, ao homem foi reservada a função de produção, e à mulher foi reservada a função de reprodução (Fernandes, Miyamoto, 2003, p. 100).

The mentioned authors maintain that the criminalization process tends to bipolarize gender in the criminal system, understanding women as things, as passive agents, commonly victims of crimes, and not perpetrators.

Gender bipolarity is a recurring theme in the works of Vera Regina Pereira de Andrade, who pays attention to male activism (the guy) and female passivity (the thing), according to the patriarchal and sexist society standards, which is also important as a basis for the verification of the treatment of women entering the prison system. It is extracted from the work of the author:

> O sistema penal existe sobretudo para controlar a hiperatividade do cara e manter a coisa no seu lugar (passivo). Na bipolaridade de gênero, não é difícil visualizar, no estereótipo do homem ativo e público acima referenciado, as potencialidades do seu próprio outro, a saber: o anti-herói socialmente construído como o criminoso, que será tanto mais perverso quanto mais temida a biografia de seu desvio; também não será difícil visualizar na mulher encerrada e seu espaço privado o recato e os requisitos correspondentes à estereotipia da vítima (Andrade, 2012, p. 143).

What can be concluded is that the penal system, based on a patriarchal perspective and male values, was not designed for women, nor when women are victims, much less when perpetrators of crimes.

Since the needs of the female prison public are omitted or only partially mentioned in the norms and laws that refer to the protection of the incarcerated population, it is advisable

an active action of the Judiciary, as occurred in HC 143.641/SP do STF, in the preservation of the dignity of pregnant women, mothers or guardians and, consequently, their children affected by the stigma of imprisonment.

In this sense, there is controversy about the application of the decision of HC 143.641/SP to cases of definitive fulfillment of the sentence of the pregnant woman or mother sentenced to closed or semi-open regimes, positioning the STF restrictively on that point, as follows:

It is not possible to grant house arrest to a pregnant convict or a mother who is responsible for children or people with disabilities and there is already a conviction that it has become final, and it does not meet the requirements of the art. 117 of the LEP. STF. 1st Class. HC 177164/PA, Rel. Min. Marco Aurélio, tried on February 18th, 2020.

If the arrest results from the execution of the sentence (not being a procedural arrest), it is inapplicable to the guidance signed by the STF in the judgment of HC 143.641/SP. In case of definitive execution of the sentence, the house arrest must comply with the provisions of the art. 117 of LEP. It does not apply what the STF decided in HC 143.641/SP, nor the art. 318-A of the CPP, which refers exclusively to preventive detention. STF. 1st Class. HC 185404 AgR, Rel. Rosa Weber, tried on November 23rd of 2020.

The Superior Court of Justice, in turn, has been extending, although exceptionally, the application of HC 143.641 and art. 318-A of the Code of Criminal Procedure to the final prisoners, according to the decision issued in the RHC no 145.931/MG, by the rapporteur minister Sebastião Reis Júnior, of March 16th of 2022.

As it turns out, based on the inefficiency of the State in making available a vacancy in prison proper and adequate to their personal condition, through the weighting of principles, the STJ has authorized that convicted persons who are in the closed or semi-open regime may have the right to house arrest, privileging the dignity of the human person and the rights of childhood so expensive in the Brazilian constitutional system.

It is reiterated, therefore, that it is necessary to extend some positions and enable women convicted prisoners greater application of alternative or substitute sentences, especially those who have children at their charge, since very little has been done structurally in the prison system.

In addition, it is feasible and prudent to apply a greater number of alternative sentences to women, since, according to studies carried out in the country and cited in HC 143641/SP, the vast majority of crimes are committed without violence or serious threat,

usually linked to drug trafficking, leading to the replacement of segregation by lighter punishments.

The application of alternative sentences to women sentenced aims to ensure their role in society of today and their obligations related to the family, since it is known that, although currently seeking equality between the sexes, the responsibility of the woman for her offspring is much greater than that of the man.

Thus, the imprisonment of women has a harsher impact on the family bosom than that of men, since it ends up disrupting the family, since, in most cases, the father does not assume the family responsibilities.

Given the importance of the role of women in the family, specifically with regard to children and in order to avoid the perpetuation of violence and the transfer of stigmatization from mother to child, it should also be applied to convicted women, especially pregnant women with children, a greater number of alternative sentences.

It is important to mention that the gender movement, which was undoubtedly taken into account by the Federal Supreme Court, in addition to defending the application of alternative sentences to prison, also argues that we should think about the eventual decriminalization of some behaviors, which would make it possible to minimize the serious prison problems that exist in prisons.

The trial represents a milestone in the struggle to guarantee the rights of women in the Brazilian prison system, demonstrating the importance of extensive and guaranteeing interpretation of the law for the protection of motherhood and childhood.

However, it is crucial to recognize that the decision, although commendable, does not cover all women incarcerated, leaving out women convicted pregnant, mothers or guardians of children or disabled, a situation that still finds restrictions in jurisprudence, with incipient measures for its effective protection.

The reality of the female prison system in Brazil is still marked by deep inequalities and violations of rights, perpetuating a patriarchal and discriminatory model that punishes women more severely and disproportionately, there is no reason to restrict protection measures also to the portion of women definitively sentenced framed as pregnant, mothers or guardians of children or disabled.

Overcoming this reality requires a joint effort by all social actors, including the legislative, executive and judicial powers, to build a more just, humane and inclusive prison system that respects the dignity and rights of all people, regardless of your gender.

It is essential that the Brazilian State recognizes the need to invest in public policies that promote the re-socialization and social reintegration of women prisoners, offering opportunities for education, work and professional training, as well as ensuring access to health, to social assistance legal.

The struggle to guarantee the rights of women in the prison system is an ongoing challenge that requires the mobilization of civil society, the feminist movement and all those who believe in a fairer and more egalitarian Justice System.

CONCLUSION

In conclusion, the analysis of female incarceration in Brazil reveals the need for an attentive look at the specificities and vulnerabilities of women in deprivation of liberty. Brazilian legislation, although it presents advances in guaranteeing fundamental rights to women prisoners, still lacks effective measures to guarantee the dignity and resocialization of this population.

The decision of the STF in HC 143.641/SP, by granting house arrest to women who are in preventive detention who are pregnant, puerperal or mothers of children up to 12 years old, represents an important step in protecting motherhood and childhood in prison, in line with the thinking of Hegel about the importance of the family for the development of the individual and society.

However, it is crucial that the Brazilian State goes beyond specific measures and promotes a restructuring of the prison system, with investments in public policies that guarantee access to health, education and work for aiming at their social reintegration and the preservation of family ties.

The realization of the rights of women in deprivation of liberty requires a joint effort by the Judiciary, the Legislature and the Executive, in dialogue with civil society and the feminist movement, to build a fairer penal system, human and inclusive, that recognizes the dignity and value of each individual, as advocated by Hegel in his philosophy of Law.

That this work can contribute to the reflection and debate on female incarceration in Brazil, inspiring actions that promote social justice and gender equality in the prison system.

REFERÊNCIAS

ABRAMOVAY, Pedro V. **O grande encarceramento como produto da ideologia (neo)liberal**. In: ABRAMOVAY, Pedro V., BATISTA, Vera M. (org). Depois do Grande Encarceramento. Rio de Janeiro: Revan, 2010.

ANDRADE, Vera Regina P. de. **Pelas Mãos da Criminologia – O controle penal para além da (des)ilusão**. Rio de Janeiro: Revan, 2012.

ATIENZA, Manuel. **As razões do direito: teorias da argumentação jurídica**. 3. ed. São Paulo: Landy, 2006

BATISTA, Vera M.. **Depois do Grande Encarceramento**. In: ABRAMOVAY, Pedro V., BATISTA, Vera M. (org). Depois do Grande Encarceramento. Rio de Janeiro: Revan, 2010.

BONAVIDES, Paulo. **Curso de Direito Constitucional**, 23ª ed. atual. e ampl., São Paulo: Malheiros, 2008.

BRASIL. Supremo Tribunal Federal (STF). **Habeas Corpus n. 143.641/SP**. Relator: Min. Ricardo Lewandowski. Julgado em: 20 fev. 2018. Disponível em: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=7531930. Acesso em: 14 jun. 2025.

FERNANDES, Luana S., MIYAMOTO, Yumi M. H. A (in)visibilidade da perspectiva de gênero no sistema Penitenciário Capixaba. **Tribuna Virtual do Instituto Brasileiro de Ciências Criminais**. Ano 01, Ed. 3, abr. de 2003.

FOUCAULT, Michel. **Vigiar e Punir: nascimento da prisão**. Tradução de Raquel Ramalhete, 11ª ed. Petrópolis: Vozes, 1994.

HEGEL, Georg Wilíelm Friedrich. **Princípios da filosofia do direito**; tradução Orlando Vitorino. - São Paulo : Martins Fontes, 1997.

KENT, Jorge. **La Criminalidad Feminina. ¿Madres e hijos em prisión? La degradante complejidad de uma atribulada problemática**. Argentina: AD. HOC, 2007.

MENEGAT, Marildo. **Prisões a Céu Aberto** In: ABRAMOVAY, Pedro V., BATISTA, Vera M. (org). Depois do Grande Encarceramento. Rio de Janeiro: Revan, 2010.

ONU. **Declaração Universal dos Direitos Humanos,** de 10 de dezembro de 1948. Genebra: 1948.

___. **Conjunto de Princípios para a Proteção de Todas as Pessoas Sujeitas a Qualquer Forma de Detenção ou Prisão**. Genebra: 1988.

___. **Convenção contra a Tortura e outros Tratamentos ou Penas Cruéis, Desumanas ou Degradantes**. Genebra: 1984.

___. **Pacto Internacional sobre Direitos Civis e Políticos**, 16 de dezembro de 1966. Genebra: 1948.

___. **Princípios Básicos sobre a Utilização da Força e de Armas de Fogo pelos Funcionários Responsáveis pela Aplicação da Lei**. Havana: 1990.

___. **Regras das Nações Unidas para o Tratamento de Mulheres Presas e Medidas não Privativas de Liberdade para Mulheres Infratoras (Regras de Bangkok)**. Bangkok. 2010.

___. **Regras Mínimas das Nações Unidas para o Tratamento de Presos (Regras de Mandela)**. Resolução A/RES/70/175, aprovada em 17 de dezembro de 2015. Nova Iorque: ONU, 2015.

___. **Regras Mínimas Para o Tratamento de Prisioneiros**. Genebra: 1955.

OEA. **Convenção Americana de Direitos Humanos**, de 22 de dezembro de 1969. San José de Costa Rica, 1969.

PEREIRA. Letícia G. **Mulheres Presidiárias e sua Vivência da Maternidade**. Monografia de Especialização. Universidade Católica de Brasília, 2010.