

The Cost of Prisons

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Law 12.403 is not going to open the doors of the prisons, freeing thousands of detainees, nor is it going to pave the way to impunity.

An English friend used to tell me that it was difficult to understand the saying in Brazil that there are laws that “take” and those that “don’t take.” A law is a law, he argued, and should be respected whether one likes it or not. Well now we face the serious risk that Law 12.403, which entered into force on the 4th, will be discredited, and the National Council of Justice (CNJ), created to supervise that actions of judges, will have to redouble its efforts to avoid the situation in which people are unduly detained, especially when they are indigent and poor, and can’t afford to hire a good lawyer.

In the first place, we should clarify that Law 12.403 will not throw open the doors of the country’s prisons, freeing thousands of prisoners – some report the potential release of 100,000 to 200,000 people – nor will the law set us on the road to impunity. While Brazil has approximately 200,000 people in pretrial detention, or 44% of the total incarcerated population, this does not mean that all pretrial detainees will head for the streets, because the majority of these don’t qualify for release under the law. In reality, those who will be freed shouldn’t be in prison in the first place.

The principal virtue of Law 12.403 is the creation of alternative measures that substitute for the use of pretrial detention (among others bail and electronic monitoring) and the requirement that first-time offenders accused of non-violent crimes which, if convicted, would carry a maximum penalty of up to 4 years in prison, should not be held in detention awaiting trial. At the same time, it’s important to note that this possibility already existed before the passage of Law 12.403, but many judges were unaware of it.

With the new law it is clearer than ever: we cannot maintain in prison, awaiting trial, men and women who, if convicted, would receive a non-custodial sentence, such as community service.

Poor and inhumane conditions of detention are the rule for pretrial detainees in Brazil. Overcrowded facilities hold prisoners who commit petty non-violent crimes, people who wait months, sometimes years in prison, which has already been shown by the CNJ. At the end of it all, these people receive sentences that do not include incarceration.

According to the Ministry of Justice, as of December 2010, Brazil had 496,251 prisoners in facilities designed for 298,275 people. There is no space available for more than half of the prison population. We have invested millions in order to increase the capacity of our prison system, but the rise in the number of prisoners always outstrips any attempts to reduce overcrowding. In the last 15 years, the prison population has more than tripled – moving from 148,760 in 1995 to 496,251 in 2010. Brazil has the fourth largest prison population in the world.

To address such an increase in numbers, creating more spaces isn't a worthwhile approach. The numbers have to come down. Maintaining in prison those who commit non-violent offenses, who aren't dangerous and don't pose a concrete threat to society, is foolish and wastes taxpayers' money.

The United States, which has relied on mass incarceration as a strategy to control crime, is now revising its position. The Supreme Court mandated that the state of California reduce, over the next two years, its prison population by 33,000. The conditions of incarceration in California prisons were determined to be degrading and cruel. Other states are also revising their penal legislation.

Douglas Hurd, a former Minister of Justice in England, argues that prison is an expensive way to make people worse. Many agree with him. Bruce Western, a professor at Harvard and author of books and articles on the negative impact of mass incarceration, argues that the extraordinary increase in the number of prisoners in the USA (which is today the country with the highest prison population) only explains 2-5% of the decrease in crime rates in the country. And this, he reminds us, cost the taxpayer between 1993 and 2000 approximately \$60 billion in additional expenses for new prisoners. A question that US policy-makers should be asking themselves, contends Western, is the following: could we have spent these billions of dollars in a more positive manner, investing in programs in support of poor families, in reducing the damage caused by drug addiction, creating jobs, improving the health care and education systems, and have gotten better results? Western believes the results would have been even better. I agree. And we're not alone in thinking this.

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