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**PUBLIC-PRIVATE PARTNERSHIP AND PRISONS IN
BRAZIL**

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TABLE OF CONTENTS

| | |
|--|-----------|
| 1. INTRODUCTION..... | 3 |
| 2. BRIEF HISTORY OF WORLD PENITENTIARY SYSTEM..... | 5 |
| 2.1 HISTORY OF THE BRAZILIAN PENITENTIARY SYSTEM | 8 |
| 3. THE CURRENT PENITENTIARY SYSTEM..... | 8 |
| 4. PRISONERS RIGHTS | 13 |
| 5. PUBLIC-PRIVATE PARTERSHIP AND PRISON - ORIGIN... | 15 |
| 6. THE BRAZILIAN EXPERIENCE | 17 |
| 6.1 MODALITIES OF PRIVATE PRISONS..... | 19 |
| 6.1.1 PRISON OUTSOURCING..... | 20 |
| 6.1.2.1 THE STATE OF PARANÁ..... | 24 |
| 6.1.2.2. THE STATE OF CEARÁ..... | 27 |
| 7. OBSTACLES TO PARTERSHIPS..... | 27 |
| 7.1 ETHICAL OBSTACLES | 28 |
| 7.2 JURIDICAL OBSTACLES | 30 |
| 7.3 POLITICAL OBSTACLES | 32 |
| 8. ADVANTAGES OF THE PUBLIC-PRIVATE PARTNERSHIPS AND ITS APPLICABILITY FOR THE PENITENTIARIES | 33 |
| 9. CONCLUSION..... | 36 |
| 10. BIBLIOGRAPHY: | 39 |

1. INTRODUCTION

One of the most concerning topics in Brazil and throughout the world is the privatization of prisons, industrial or otherwise. Imprisonment is a service that has always been the responsibility of the State, since it is a subject related to public security. The privatization of these prisons requires deep changes and therefore great discussions on the economical, juridical, and ethic fields.

The overpopulation of the penitentiary houses to unbearable levels, the increasing of criminality and the lack of construction of new prisons by the Brazilian State have led the Public Administrators to wonder seriously about delegating such imprisonment service, characteristic of the State, to the private sector. Such delegation does not, however, imply the sacrifice of decision-making power concerning the execution of the penalty. Despite the criticisms of the most conservative ideologists, there are currently several private industrial prison facilities operating in the states of Paraná (Guarapuara), Bahia (Valença) and Ceará (Cariri). In the United States, England and France, such a model, with slight variations, has already been adopted in approximately 10% of the prison units.

Brazil would need to invest R\$1.2 billion in the penitentiary system to overcome the deficit of 3,500 monthly occupancies existing within the system. However, the National Penitentiary Fund (FUNPEN) only has R\$ 200 million available to spend in

2004, of which only R\$ 120 million has been allotted to the construction of new prisons. In 1992, Brazil had 74 prisoners per 100 thousand inhabitants (0.07% of the population). By 2003, the rate had drastically increased to 308 prisoners per 100 thousand inhabitants (0.18% of the population), demonstrating an increasingly elevated curve, further rising over the long run, and highlighting the necessity of vacancies.

It is undeniable that the State will fail to make the necessary investments required by the prison system, resulting in overcrowded jails and rebellions which threaten the social peace. As a solution to the problem of overpopulation, many judges have been adopting much lighter positions concerning the sentencing of convicted criminals. The State issues indults, resulting in the release of many prisoners long before they have effectively completed their sentence term. Many soon return to prison, thus lacking an accompaniment turned to re-socialization. This consequently generates an increasingly high cost to the State, as well as having negative social and economical ramifications caused by the repetition of the crime.

On the other hand, the lack of the prisoners' manual labor contribution to the workforce is a waste of useful resources, contributing to the idleness and psychological stress of the prisoners, who have the ability to reduce their sentence through the completion of labor (for every three six-hour days of work completed, their penalty is reduced by one day).

However, with the approval of the Law 11.079/04, on December 30th, 2004 by President Luis Inácio Lula da Silva, who has made a preview of contracts of public-private partnership. The Brazil has gained a modern and quick instrument that will allow investments in the prison system, consolidating the tendency adopted by the State to delegate some prison services to the private sector.

2. BRIEF HISTORY OF WORLD PENITENTIARY SYSTEM.

Until recently, the commit of a crime was punished with death, banishment, forced work, corporal punishment, and in some countries, this forms still exists. The origin of prison punishment is cited in the penitence of the Ecclesiastic law, of the XVI century.

During the Roman Empire, prisons existed, but not as a punishment or penalty, but as the payment of a debt, then called "prison for debt¹." The objective was to "keep" the men and not to punish them, until the final debt had been received. Also, prisons were used as a way to ban the accused until judgment for which penalty was either punishment (lashing, member amputation and other forms of corporal punishment) or death².

But, in those times, the prison system did not have the sense it has today. It was simply used to keep the accused until the best sentence had been determined.. There is no consensus between history experts about when the punitive character of prison began, but most authors point to the XVI century, when houses for the confined were first built.

According to Mayarink³, the first prison house was founded in 1552 in London, and was called House of Correction of Bridwell, aimed mainly at the confinement of vagabonds and having the characteristic of a security establishment. The prisoners

1 In Brazil, there still exists imprisonment for debt, in the case of not paying child support, which can last for up p to 90 days, generally served in local jails (low security level).

2 In the United States the death penalty is still applied in many states. Only recently the Supreme Court has banned the death penalty for those less than 18 years old.

3 COSTA, Álvaro Mayrink da; Criminologia, p. 136

were obligated to work. Afterwards, other “work houses” were founded in England, and were called “Bridwells”. In 1596, the famous Rasphuis Correction House was created, where work was hard and monotonous and discipline was obtained under severe and varied punishment. In 1595, in Amsterdam, a new prison was opened establishment for men (Tuchhuis) and in 1596 for women (Spinhuis). The example was imitated in Germany (Brewen-1609; Osnabruck-1621; Hamburgo-1629 and Danzing-1629). In Italy, facing influence, prisons were created which were festinated to young people, vagabonds and delinquents. Filippo Franci founded the hospice of São Felipe Néri, in Florence, in 1667.

The modern prison system as penalty resulting from judiciary sentence has its origin in the end of the XVIII century and after the French revolution, with the Criminal Code of France of 1791, when the corporal punishment and death were being substituted with imprisonment.

In the United States, the prison system began in 1682, with the Quaker activity, directed by Willian Penn, establishing that most crimes should be punished with forced work.

John Howard, in 1726, was nominated Sheriff for the County of Bedfor, in the state of Pennsylvania. Following his nomination, state of the English prisons where there was little separation with regards to gender, health and insanity confined in same degrading conditions. Howard dedicated his life to improve prisons visiting prison facilities in many countries like Belgium, Germany, Italy, Portugal, Spain, Netherlands and France.

Through his experience in prison facilities, Howard developed new ideas about how the prison system should operated. He proposed an increased isolation of prisoners during the night by sleeping separated from each other. Howard believed prisoners

would have greater silence to reflect and regret their crimes. He saw religion as a mechanism of moral reform and incorporated these values into the prison system to encourage self-improvement and rehabilitation. With these reforms, the old system of simple confinement came to an end.

In Pennsylvania, following the France Revolution, new prisons started to integrate a more elaborate system that was geared towards rehabilitation rather than simply confinement. From this new system emerged the following three models: the Pennsylvania model, and the subsequent Auburn and progressive models. two other, Auburn model, and Progressive model.

In the Pennsylvanian model, there was a total isolation of the confined who were expected to work within their jail cell, and who were not allowed any communication with the outside world. The only allowed reading was the Bible. Such total isolation drove many people to insanity.

In the Alburnian system, which had its beginning in Alburn in 1816, there was daily work along with the others in a silent form with night isolation.

In 1840, there was another advance in the development of the progressive system, which is the basis for the current system adopted in Brazil. Within this system, the degree of the penalty for a prisoner depended on their behavior during the time served. At first, the penalty was initiated with total isolation, followed by work in silence and night isolation, and finally by the possibility of parole.

This model began to influence the penitentiary system in many countries and in the Penal Congress of Prague, held in 1930, where there was a consensus regarding the disapprove of the absolute isolation as a form of penalty execution.

2.1 HISTORY OF THE BRAZILIAN PENITENTIARY SYSTEM

Up until the year after the proclamation of the Republic of Brazil in 1890, prisons had the simple function of holding their confined until judgment, when if condemned, they were subjected to the death penalty or corporal punishment. The executions often performed in a public square.

With the Penal Code of 1890, the death penalty was abolished. New prison facilities were created, including prisons with obligatory work, discipline prisons, cell prisons and prisons of reclusion.

At that time, the law had been established, only been created, with no improvement regarding health and the number of bed spaces in the facilities, since at that time, a problem of overcrowding was already evident.

Afterwards, the new Penal Code of 1940 was enacted, as well as the reform of 1984 and the Law of Penal Execution (7210/84).

Laws have finally been passed, but bed spaces to meet the demand have not, and this still remains a serious problem today.

3. THE CURRENT BRAZILIAN PENITENTIARY SYSTEM

Brazilian prisoners are too often forced to endure appalling daily living conditions in the country's prisons, jails and police lockups. Because of overcrowding, many of them

sleep on the floor of their cells, sometimes in the bathroom next to the hole that serves as a toilet. In the most crowded facilities, where there is no free space even on the floor, prisoners sleep tied to the cell bars or hanging in suspended hammocks. Most penal facilities are physically deteriorated, some severely so.¹

Forced to provide their own mattresses, bedding, clothing and toiletries, many prisoners are dependent upon the support of their families or others outside the prison. The struggle for space, and the authorities' failure to provide basic provisions in many facilities, leads to prisoner-on-prisoner exploitation, as prisoners who lack money and family support are victimized by others

In 1992, Brazil had 74 prisoners per one hundred thousand citizens (0.07% of the population) and currently has 182 per one hundred thousand (0.18% of the population) a growth of 71.7%. There were 147,000 prisoners eight years ago and are now 308,304 fighting for space in 1,430 prisons and police departments, with bed spaces for a total of 179,489 prisoners.²

It is important to observe that from these 308,304 prisoners, 68,101 are confined in overcrowded jails in police lockup due to the lack of space in penitentiaries. Such prisons would only be for temporary usage, but would result in the mixing of those awaiting trial with condemned prisoners, sometimes forcing first offenders or suspects to be confined with other prisoners who have committed more serious crimes; This constitutes, as we later see, an open violation of international rules, and serious risks.

For purpose of comparison, the imprisonment rates in Chile, Colombia, Mexico, Venezuela and in the United States for 1997 were, respectively: 173, 110, 108, 113 and 645 prisoners per 100,000 citizens.

¹ Information from <http://www.hrw.org/reports98/brazil/Brazil-06.htm>

² Information from Departamento Penitenciário Nacional (DEPEN). <http://www.mj.gov.br/depen>

By the end of 2003, the United States had a surprising 1,479,045 prisoners confined in federal and state prisons. Moreover, in local county prisons, there were an 762,672 prisoners among the ones waiting for judgment, as well as others serving shorter sentence and not going to penitentiaries. On average, 3.2% of the American population is under some form of state control, including individual involved with probation and parole. This number is much higher than in Brazil, but the lack of space is much less. ¹

According to the national penitentiary census (CNPC), there is an average of two prisoner rebellions per day. Some of them, often of a large proportion, as in Carandiru, São Paulo, resulted in the deaths of more than 100 prisoners.

The Carandiru penitentiary was built to have 2200 bed spaces. By 1981, it had been occupied by 6,600 prisoners, and in December 1996, its jail population was 9,400 equal to the population of a small city.

Anibal Bruno prison, in the city of Recife, also went through a strong rebellion in 1997. The initial capacity of the prison had been projected to be 400 prisoners yet there were 4,000 prisoners when the rebellion took place.

¹ Data available at: <http://www.ojp.usdoj.gov/bjs/> - Bureau of Justice Statistics. In 2003, 6.9 million people were on probation, in jail or prison, or on parole at yearend 2003 -- 3.2% of all U.S. adult residents or **1 in every 32 adults**. State and Federal prison authorities had under their jurisdiction 1,470,045 inmates at yearend 2003: 1,296,986 under State jurisdiction and 173,059 under Federal jurisdiction .Local jails held or supervised 762,672 persons awaiting trial or serving a sentence at midyear 2003. About 71,400 of these were persons serving their sentence in the community. Overall, the Nation's prison population grew 2.1%, which was less than the average annual growth of 3.4% since 3.4% since yearend 1995.

The fall of our penitentiary system, as in many other countries, is founded basically in a growing cost of imprisonment and the lack of investments in this sector by the public administration, resulting in overcrowded prisons.

As a result, numerous problems have developed such as: poor hygiene, poor diet, lack of beds, poor medical service, elevated drug consumption, corruption, sexual abuse, and lack of adequate places for visits, including intimate visits. The combination of all such factors generates an environment that leads to violence and the absence of reintegration perspectives. This is a result of the non existence of a concerned political force for this sector, which still uses outdated management methods.

AIDS has been spread among the prisoners as an epidemic. An approximated 10% to 20% of the prisoners may be infected with the virus. The number is so high that the government avoid acknowledgement in order to prevent the provocation of rebellions.

Therefore, all necessary ingredients are present to transform overcrowded prisons into ticking time bombs, ready to explode so that the prisoners may call attention to their cause.

The riots are, according to Professor Luis Flávio Borges D'Urso “real reinvidications, sometimes with violence.” The prison system, being a social-control institution, suffers due to the lack resources from the public administration.

Prisons have never been a priority of the federal and state governments, for the simple fact that they do not “make up votes”, because up confinements the prisoner loses his right to vote, since his political rights are suspended (Art. 15, inc. III, Federal Constitution of Brazil).

The construction and reformation of prison buildings are government projects that gain little support among voters. Imagine if a politician had to choose between building a public hospital or a new prison with a greater capacity which would give more comfort to the prisoners during their sentences. Without doubt, the public opinion will lean strongly towards the hospital, or road, or a new police station.

Following public opinion, the prisoner should suffer. He is confined because he is a criminal, not deserving anything better. However, this sentiment which must be respected due to the violence wave results in a vicious circle. The imprisonment often has the effect of “improving” the criminal abilities of the prisoner instead of rehabilitating him.

Nonetheless, the legislature pushes to make penalties more severe for some felony crimes, torture, drug trafficking, criminal organization, etc. The judiciary branch has, in general, lenient positions, always interpreting the law on the lighter side.

Although institutes of penal transition and suit suspensions, created by law 9199/95, have drastically reduced the workload of the judiciary branch were still unable to be emptied prisons, because the criminals who committed petty offenses or some misdemeanors were rarely sent to jail. Instead, they were most likely fined, placed on probation or given community service to complete.

Still, the Federal Government, with the intention of emptying the prisons, gives many pardons and sentence commutations to offenders.

Instead of building more facilities the Brazilian Government is usually more lenient releasing offenders before the completion of sentence. In sum, unaware to society, everything is done for the prisoner to be released as soon as possible. It is the solution that the State created to solve the problem of overcrowded inmates population.

Over the last few years, there has been a sensible improvement in the Police, Judiciary and Public Ministry¹ which has resulted in a greater efficiency against the combat of crime, although there is still much to be done. From this, evidently, more arrests taken place. Inmates population naturally has also increased. However, the penitentiary system still lacks the creation of spaces in line with the current demand.

4. PRISONERS RIGHTS

The prisoners' rights, elevated to the rate of Constitutional dogma (article 5, Incise XLIX of the Federal Constitution) are usually disrespected by the Brazilian State. There is no true means of attending them in an overcrowded environment, where the penitentiary system is out of control.

The Law of Penal Execution (7210/84), in its article 41, assures the following rights to the prisoners:

Art. 41: Constitutes prisoners rights:

I – sufficient food and clothing;

II – work facilities and earnings;

III – social providence;

IV – savings constitution;

V – proportion of the share of time to work, to rest, and to recreation.

VI – exercise of the Professional, intellectual and sport activities, compatible with the sentence.

¹ “Ministério Público” (article 127 of Federal Constitution) - institution responsible for the processing of criminal offenders, similar to the Department of Justice in the United States.

- VII – Material, health, legal, educational, social and religious assistance;
- VIII – protection against any kind of sensationalism;
- IX – personal and reserved interview with the lawyer;
- X – spouse, partner, relatives and friend visit on determined days;
- XI – name reference;
- XII – treatment equality, except for requirements of the penalty individualization;
- XIII – special hearing with the director of the facility;
- XIV – representation and requirement to any authority in the defense of rights;
- XV – contact with the outer world through written mail, reading and other means of information that will not compromise the morale and good customs.

On the report elaborated by the Human Rights Watch named “Behind bars in Brazil”¹, despite its several critics as for the chaotic situation of the Brazilian Penal system, there are eulogies, to the Penal Execution Law, classified as modern and in accordance with parameters heralded by the United Nations and entities protecting human rights. Such law would not have its main focus on punishment, but the re-socialization of the condemned people would give special emphasis to the individualization of the sentence.

Conditions in many prisons are, in short, so deficient as to constitute cruel, inhuman, or degrading treatment, violating article 7 of the International Covenant on Civil and Political Rights. Their specific failings could also be enumerated under the more detailed provisions of the U.N. Standard Minimum Rules for the Treatment of Prisoners.

A widely known set of prison standards, the Standard Minimum Rules, describe "the minimum conditions which are accepted as suitable by the United Nations." Although

¹ Available on www.amaerj.org.br/artigos/art01 or www.org/reports98/brazil/Brazil-06.htm

the Standard Minimum Rules were formally integrated into the prison laws and regulations of many countries, few if any prison systems observe all of their prescriptions in practice¹

After this, it is concluded that the State, aside from not paying a good security politics, does not even come close to offering basic rights to the prison population, staying far away from the prisoners re-socialization and for his time, creating real schools of crime and rebellion factories, as well as stimulating a premature release of the condemned.

5. PUBLIC-PRIVATE PARTERSHIP AND PRISON - ORIGIN

Augusto Thompson², cited by Eduardo Araújo Neto, supports that the first idea concerning the participation of private companies in prison management, especially in industrial prisons, began in England in 1934. The creator intended then, with the purpose of accomplishing his own interests, to achieve the concession of the prison administration. In that time, the administration did not accept his idea. With the reappearance of liberal ideas during the Reagan and Thatcher age the idea reemerged in the United States, which had been through similar problems that faced by Brazil today as prisons become overcrowded and custody costs rise.

In 1983, in the American city of Nashville, Tennessee, the Company Corrections Corporations in America (CCA) was founded which today has over 15 thousand employees and own approximately 50% of the private prison market. It is the sixth biggest penitentiary system in the United States, only after federal prison certain state

¹ Information from <http://hrw.org/prisons/abuses.html>

²Privatização Prisional., informational from www.amaerj.org.br/artigos/art01

facilities. It manages about 67,000 beds in 63 establishments, 38 of which are owned by the CCA. It also has a contract for prisoner transportation.

CCA promises its ability to reduce the cost of state confinement by up to 20%. According to his director, Thomas Beasley, cited by Laurindo Minhoto ¹, " solving the penitentiary problem means, in general terms, to offer to the states alternative manners of financing the construction of new facilities, to adopt techniques of management period on the administration of prisons, and above all, to face the question of super population costs, attempting to generate conditions of rehabilitation."

It had been claimed that it was time to remove from the Government their exclusivity of prison administration, without violating their rule, power, evaluation and control over penitentiary services. If the government were to become inefficient, then the private initiative should be called on to help. They affirmed their positive experience in large institution administrations such as hospitals, schools, colleges, companies as well hostelling and personal training programs.

Also borne in the United States², in 1984, was the Wachknhut Corporation Correction (WCC) ³, which has operated within the New York stock market since 1996 and has under their administration approximately 43,000 beds in prison facilities. In 2001, it had signed about 50 contracts throughout the world, occupying

¹ MINHOTO, Laurindo Dias, Privatização de Presídios e Criminalidade, pág. 64

² On December 31, 2003, State prisons the USA were estimated to be at capacity to 16% above capacity; Federal prisons were operating at 39% above capacity. Information from Bureau of Justice Statistics, Bulletin November 2004.

³ Nowadays WCC belongs to The GEO GROUP, inc. – www.thegeogroupinc.com.

22% of the American private prison market. The WCC also has a differentiated prisoner' transportation program.¹

Following the American² initiative with the above companies, the idea spread throughout England, France, Canada, Germany, Australia, South Africa and more recently, Brazil, where the program is in initial stages, despite the lack of space to which the State is unable to respond.

According to the affirmation of Paulo Roberto Nascimento³, these two companies dominate the majority of the prison market and together earn profits of nearly almost \$ 900 million per year.

Despite the adoption by other countries, such as those previously cited, of a real partnership with the private initiative, it constitute a minority they in the face of the state prison system. Each country adopts a separate privatization modality, with a greater lesser participation of the private entrepreneur, accordance with the convenience and particularities of each prison.

6. THE BRAZILIAN EXPERIENCE

Brazil, following a worldwide trend to reduce the size of the State, also began to adopt privatization politics.

1 Prisoner Escorting & Court Services - PPS currently operates prisoner transportation and court custody contracts across the United Kingdom, moving more than 250,000 prisoners annually.

2 At yearend 2003 in the USA privately operated facilities housed 95,522 inmates (5.7 % of State and 12.6% of Federal inmates); local jails housed 73,343 State and Federal Inmates (5.0% of all prisoners). Information from Bureau of Justice Statistics, bulletin, November 2004.

³ Privatização dos Presídios: aspectos gerais, Paulo R. Nascimento, information from www.mj.gov.br/depen

Representative Aldo Demarchi¹ of the state of São Paulo, analyzed project 1443/93, which created the Paulista company of partnerships. Demarchi explains that in the early eighties, when the State lacked sufficient resources to promote investments forced to reorganize itself, the non state process, which generated the privatizations and sales of companies, began.

The second step involved the sale of public service concessions such as electricity and communication, to the private sector. The Public-Private Partnership (PPP) for itself represents a third stage, as the private initiative invests in the construction of works in the public interest, sharing both risks and results.

As opposed to privatization, in which the State role is limited to the regularization and supervision of activities developed by the private sector, programs such as PPP involve State leadership and a search for alliances with the private sector, to participate in one or more steps of an investment process. If the privatization is the transfer of state propriety, a PPP project is more similar to fusion, where both sides share risks and benefits.

The discussion about the cooperation between the public and private sectors came to an end in the legislative field with the promulgation by President Lula of law 11079 on September 30th 2004, which provides for the constructions of buildings and the payment of public services. In it, the public-private partnership (PPP) is accepted as an accord established between the public administration and private entities, which establishes judicial bond between them, aimed at the implantation of all, or in part, of services, and activities of the public interest.

¹ Information from www.aldodemarchi.com.br/news/view, accessed on 12/12/2004

As cited in a outline of authority of the Adjunct Bureau of Security of the state of Rio Grande State ¹, in relation the administration of Justice Prosecutor Fabio medina Osorio, we must herald the projects of law that talk about the PPP, in Brasilia, such as Bill number 714/1999, which alters the writings of the articles 91 and 93 of the LEP, and arranges privatization of agricultural colonies, industries and minimum security prisons; bill proposition 2003/1999 ², which arranges the payment of penitentiary service by juridical people of private law; and bill proposition 2146/199 which authorizes the State Executive Branch to promote the privatization of the penitentiary.

Although there now exists Federal Law 11079/04 outlining the rules of the topic, there was no previos necessity for the forging of partnership by the State. There had already been sufficient legislation allowing for the creation of such contracts, and it was already possible to carry them out by means of a more modern and update interpretation of Federal Laws 8666/93 (dealing with elicitations and public contractions),and 9074/95 (a relative law which allows for the concessions and permissions of public services).

Still, we see that all such state projects, were already being created in such a way as to avoid violation of the limits set up by novel law 11079/04, which specifically tackles this issue, principally the deadline of contract duration.³

6.1 MODALITIES OF PRIVATE PRISONS

¹ Version of 8.20.2004. It establishes rules for the concession of the preceded execution or not of public piece and/or service in prison facilities by juridical people from private law or company consorts and other providences.

² Both law projects (numbers 714 and 2003), go along, for more information, go to http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=15765

³ In the project of the State of Rio Grande do Sul the deadline is 30 years while the federal law says the deadline is 35 years..

Nowadays, according to Paulo Roberto Nascimento¹ Brazil has two types of private prisons: outsourcing modalities of prisons and industrial prison, adopted in the states of Paraná, Amazonas, Bahia, Ceará, Rio de Janeiro, São Paulo and with projects of total privatization in Goiânia and São Paulo.

6.1.1 PRISON OUTSOURCING

In the types of prison outsiders, certain services are contracted with private companies². Prosecutor Rita Andréa Rehem Almeida Tourinho, citing author Wilson Alves Polônio³, claims outsourcing to be "the process of business management consist in its transfer to others (physical or juridical persons) of services that would originally be carried out within their own company". The State, to gain agility and efficiency, and to avoid an increase in its body of employees, began adopting this company technique in many public service sectors.

The selection of companies is made through public concurrence, and rights and obligations of the parties are regulated by an administrative contract. The private sector started to provide some penitentiary services such as food, health, work and education for the inmates. The State is provided with only "host" service by the private entity, itself maintaining only administrative functions and the control of company services. In some units, security is also a responsibility of the private company, leaving a minimal number of public servers in charge of discipline.

¹ Paulo Roberto Nascimento, A privatização dos Presídios: Aspectos Gerais, information from website of DEPEN

² Di Pietro, Maria Sylvia Zanella. *Parcerias na Administração Pública*. São Paulo: Atlas, 2002, p. 174 cited by Rita Andréa Rehem Almeida Tourinho, information from <http://www1.jus.com.br/doutrina/texto.asp?id=5055>, accessed on: 09/15/04

³ TOURINHO, R. A. R. Almeida, in artigo "A terceirização do sistema carcerário no Brasil", information from <http://www1.jus.com.br/doutrina/texto.asp?id=5055>, accessed on 10/20/03

The federal government, according to Clayton Alfredo Nunesen, Director of the Nacional Penitentiary Dept (DEPEN) in a meeting with Counsel of Defense of Rights of the Human Person (CDDPH) said Government wanted to adopt in all the country a model of co-partnership. Such initiatives have undeniably contributed to the quick promulgation of the law 11079/04, which arranges contracts of public-private partnerships.

In Brazil, this kind of double responsibility, or co-partnership, operates in the state of Paraná. Here, there are four facilities which their outsouce service: the Curitiba Custody House, Londrina Custody House, State Prison of Piraquara and the State Prison of Foz do Iguaçu.

Paraná is among the states with the highest percentage of inmates taking part in some professional activity. Research shows that out of 5,319 inmates in the penitentiary system, 72% of them work. This is due to the fact that, for every three working days, one day is reduced from the inmate's prison sentence and earnings may reach 75% of a minimum wage, of approximately R\$ 200.

Among outsourcing prisons is the Curitiba Custody House (CCC), opened in August 2002, with a total area of 21,375 m², 4,760m² of constructed area, 108 cells for 432 inmates, and an average occupation of four inmates per cell, serving as a penal facility of maximum security destined to provisory male inmates.

Partning of North American prisons, the usage of pre-molded materials and concrete blocks innibits the construction of tunnels, making escapes difficult.

As for security, the external part of prison is maintained by an outsourcing company, and internal security enforced by disciplinary agents of the afered-mentioned utilizing such resources and equipments as: automated gates, suspense quadrants, video camera

monitoring, alarm and sound systems (electronic sirens), metal detectors (mobile and fixed) , and walk-talk radios.

Another privately-run penitentiary is the Penitentiary of Londrina, opened on January 25th, 1994. It serves as penal facility of maximum security, intended for male inmates.

Of all inmates in the Penitentiary of Londrina, 564 perform some type of labor. The prison establishment has three work places, one of them at Bordignon and Tessaro, where thirteen inmates are responsible for the production of 412 soccer-balls a month. The earnings of an inmate vary from R\$ 42 to R\$ 135 depending on the occupation. Some inmates share responsibilities for the maintenance, cleaning and other jobs on the unit such as library , barber and kitchen services¹

Now the State Penitentiary of Piraquara (PEP) is the largest penal unit ever built by the state government of Paraná, in partnership with the Ministry of Justice, and opened on April 16th 2002 as a penitentiary of maximum security, with a capacity of 543 inmates.

With 169 cells, PEP has 12,800m² of constructed area and a 7,500m² space for plantation. The investment value reached R\$ 8.5 million, with 80% originating from the Ministry of Justice and 20% from the State of Paraná. The administration carried out Montesinos, a security company from the state of Santa Catarina.. The prison employs 310 individuals divided into the following occupations: disciplinary agents, security agents (warden staff), doctors, dentists, psychologists, psychiatrics, occupation therapists, social assistants, counselors and pharmacist and nurse

¹ Justice Ministry, information from <www.mj.gov.br/Depen/inst_estados_pr.htm>, accessed on 12/15/04. U\$\$ 1 is about R\$ 2,80

practioners, who receive training from the Penitentiary school (ESPEN). Upon entry into the unit, every inmate receives a kit containing a uniform, hygiene supplies, sneakers, and sandals¹.

Yet another outsourcing penitentiary is the Penitentiary of Foz do Iguaçu (PEF), also patterning the American model, with in an area of 33,840m², which 5,800m² of the constructed area is reserved for male inmates with prison sentences. With a capacity of 496 inmates, distributed between 124 cells of 7.41m² each, costs totaled R\$ 11,400,000 funds which came out of the State treasury. External security is made the responsibility of Military Police, while internal security is enforced by penitentiary agents.².

The State of Goiás also signaled intention to adopt a co-partnership system, through the law project 1721/96, passed by Representative Sandro Mabel, following orientation developed by the Pontific Catholic University.

Greater São Paulo does not have a specific law for the privatization of prison, but according to representatives of the state government law 7.835/92, which deals with the concession of public works and services, authorizes such privatization.³

Despite the promulgation of the new law 11.079/04, which foresees the private-public partnerships, outsourcing model will still be used in a large scale in those cases in which investments do not surpass R\$20 million, or where the outsourcing of only services is more convenient to the state, mainly in smaller prisons.

¹ Justice Ministry, information from: <http://www.mj.gov.br/Depen/inst_estados_pr.htm>, visited on 09/25/04

² Justice Ministry, available at: http://www.mj.gov.br/Depen/inst_estados_pr.htm, visited on 09/25/04

³ ARAÚJO JUNIOR, João Marcello de (Org.). Privatização das prisões. São Paulo: Revista dos Tribunais, 1995

6.1.2 PRISON INDUSTRY GOAL

The Industrial facilities are built with Federal and State money, in partnership with the private initiative for the construction, through bidding and after a contract celebrated between this and the State, so that the prisoner can develop industrial jobs supplied by that.

Its mission is to employ and provide job skills training to the greatest practicable number of inmates by keeping them constructively occupied; produce market-priced quality goods and services for sale; and operate in a self-sustaining manner.

The first and foremost is a correctional program. The whole impetus behind the Prison Industries is not about business, but instead, about inmate release preparation, helping offenders acquire the skills necessary to successfully make that transition from prison to law-abiding, contributing members of society. The production of items and provision of services are merely by-products of those efforts.

6.1.2.1 THE STATE OF PARANÁ

In the State of Paraná, there are currently two facilities taking part in this type of outsourcing: Guarapuava Industrial penitentiary and Cascavel Industrial Penitentiary.

The first Industrial Penitentiary located in Guarapuava (PIG) , which is designated for male inmates was opened on November 12th, 1999 with a maximum capacity of 240 inmates. It is area totaled of 35,000m², also including conjugal visit rooms, a doctor's

office, a dentist office, three classrooms, six rooms for technical attendance, a laundry, a library, a kitchen and five work fields ¹

PIG was built with resources of state and federal government. With a total cost of R\$ 5,323,360 which included the project building, construction and television circuit, 80% of funds came from a partnership with the Ministry of Justice, and 20% from state of Paraná. The architectonic project covers an industrial area of over 1,800m², on which work field for sofas manufacturing is located.

On the factory, 75% of the unit inmates work 6 hours per day, earning 75% of a minimum wage² the remaining 25% of which is passed to the Paraná penitentiary Fund, as an administration tax, reverting these costs to better inmate living conditions . Production totals approximately 700 sofas per month. ³

The company supplies all personnel infra-structure (administrative and security), working material and supplies for cleaning, feeding, medicine, uniforms, personal hygiene material, bed ware, etc.

Prisoners who do not work in the sofa industry take part in activities in other areas such as cleaning, cooking, laundering , and the preparation of sofas for shipping. All prisoners receive the benefit of sentence term reduction (one day out of 3 working days).

¹ Justice Ministry, information from : <http://www.mj.gov.br/Depen/inst_estados_pr.htm>, accessed on 11/25/04

² Brazilian minimum wage is about U\$ 90,00, paid monthly.

³ Justice Ministry, information from : <http://www.mj.gov.br/Depen/inst_estados_pr.htm>, visited on 09/25/04

All of the job have 2 shifts of 6 hours, facilitating the execution of all penal treatment (legal, psychological, medical, social service, dental and education activity) at a time during while the prisoner is not working.

The state is in charge of the director, vice-director, control office of the security unit, who orient accompany and control the company work.

The contract signed the state and the Humanitas Prison Administration S/C, Ltd. delegates the management of the Guarapuava Industrial penitentiary to the latter party for 24 months, allowing the prorogation and with a monthly cost of R\$ 297,800.¹

In February 2002, the first Industrial penitentiary of Cascavel (PIC) was opened, intended for male inmates and with capacity for 240 inmates, in an area of 120,999,65 m² and building area of 7,177m². Following the pattern of PIG, the private company supplies all infrastructure of the personnel (security, technician, administrative and general services), working material, uniforms, bed ware and cleaning, feeding, medical, personal hygienic supplies.²

The Industrial penitentiary of Cascavel cost R\$ 5,118,990 to build, with 80% of funds originating from a partnership with the Justice Ministry (Federal Government), and 20% from the state.

The internal security is maintained by disciplinary agents (such as wardens), and outside security is enforced by military police ³

¹ Public concurrence number 01/2000-SEJU, with no more bibliographical data.. The value is equivalent U\$ 100.000, to the exchange of 02.28..05

² Justice Ministry, information from: <http://www.mj.gov.br/Depen/inst_estados_pr.htm>, visited on 09/25/04

³ Justice Ministry, information from: <http://www.mj.gov.br/Depen/inst_estados_pr.htm>, visited on 09/25/04

6.1.2.2. THE STATE OF CEARÁ

After the opening of the Guarapuava penitentiary in Paraná, the pioneer of the industrial field, the state of Ceará now has three private penitentiaries in the cities of Fortaleza, Juazeiro do Norte, and Sobral.

Opened in January 2001, the Regional and Industrial Penitentiary of Cariri (PIRC) is located in the Cariri region of the city of Juazeiro do Norte, 560 km from Fortaleza. PIRC is managed by the company Humanitas Private Prison Administration, based in São Paulo, which is also responsible for the penitentiary in Guarapuava (PR). The internal services of PIRC are carried out by the private initiative, and only the administration is in the hands of the government.

Built for a total of 550 inmates, PIRC contains 54 cells, each of which can hold five inmates, and where the same food served to both inmates and employees of the penitentiary. At PIRC, the inmates work in an industrial kitchen, at the bakery, in the harvest and in jewelry production, as well as cleaning the building. The jewelry is produced at a factory operated by Criativa Joias, a company that has been located in Juazeiro do Norte for over ten years, where the inmates make jewelry like rings, earrings, necklaces and badges.¹

7. OBSTACLES TO PARTERSHIPS

¹ Presídio só para comportados, information from: <http://www2.correioweb.com.br/cw/2001-05-13/mat_38056.htm> visited on: 09/18/04

A book¹ by João Marcello de Araújo Jr. supports the existence of ethical, juridical and political obstacles against the privatization of prison facilities. However, such obstacles may be easily overcome through the migration away from the ideological field to that of administration efficiency, in search of positive results, and without denying consideration to constitutional laws.

7.1 ETHICAL OBSTACLES

As for the ethical obstacles, Araújo argues that the Brazilian Constitution has adopted the principles of personal theories, warranting the assurance for the rights to life, to liberty, to equality, to security, and to propriety.

In concordance with the ethical principle of individual liberty, there exists an ethical command that prohibits any individual from exercising power over another; this power lies solely in the State. The only morally valid coercion is the one exercised by the State through the imposition and execution of penalties and other kind of punishment.

Thus, such arguments can not be accepted. The State fails constantly in its attempt to establish control over citizens who commit crimes. The existence of private police men, body guards and insurance companies has been assimilated into our society as something normal. When a crime takes place, these individuals are incontestably legitimated to act in order to avoid his consummation.

Of the same value as the liberty principle, it is the principle of security which validates the State's use of the private sector. Ethics lies, therefore, in conceding security to the population and even to the prisoners, who request better conditions under which to serve their terms. This can only be accomplished through the creation of more bed

¹ Privatização das Prisões, Ed. Revista dos Tribunais, page. 12

spaces, and by avoiding the mixture of first-time offenders with professional or dangerous criminals.

There also exists significant support for the argument that it would not be ethical for another business to profit from the suffering and misery of the prisoner paying his penalty, or from the work completed by the inmates who generally earn less than a minimum wage. These businesses profit – and it is for this very reason that they exist and serve the general population – from the misfortunes of others: private hospitals, asylums, funerary, rehabilitation centers, etc.

What would be said, for example, of professionals from the juridical area such as lawyers, judges, and prosecutors who have their jobs warranted thanks to the existence of crimes? Are they not worth earnings? Are they “profiting” from the existence of the crime, from the existence of errors in society and prisons that provide them with raw material for the development of their occupations? Would they not be simply fulfilling the duties of their profession?

The sustenance of such arguments against business profits from these crimes seems difficult, where the offending acts themselves were committed in search of personal profit, and without consideration to ethics. This does not imply an intention to degenerate the inmate population; it simply indicates the need for a balance of values.

Profiting in an elicited way is a healthy and ethical component of the economy. However, a break away from ideological debate is necessary in order to fully migrate to the practical field.

James D. Gwartney, Richard L. Stroup, two world-renowned¹ economists, teach us that the income is simply the compensation received in exchange for productive service paid to others. High earnings are achieved through an individual's performance of a service or obtainment of a good which benefits others. If the opposite were to exist, the consumer would not pay for such goods and services. In this, there lies a moral: if you intend to earn a lot of money, you must think of how to satisfy the needs of others. The opposite is also true: an individual's inability to help others will result in a low income.

Some people have the tendency to think that those who profit from an activity are exploiting others. This point of view is proven inappropriate. This person or business has achieved such income through the production of a good or service that helps other people. Today's well-off individuals and businesses are in essence "chosen by the people", by their own society which chooses the consumption of the goods and services that they themselves made.

7.2 JURIDICAL OBSTACLES

The arguments in favor of the existence of juridical obstacles also lack substance. No one intends, in any hypothesis, to privatize the law services or give up on *jus puniendi*, the State's right to punish. Certain rights will continue to be offered exclusively by the State – the consideration of parole, the right to visit family, the right to attend academic courses, and all other acts in the juridical decisive area. Such doubt was entirely overcome by the recent promulgation of the law 11079/04, that in Article 4, Amendment II, which formally prohibits any contract of public-private partnership aiming to delegate the functions of regulation and jurisdiction.

¹ ECONOMIA E PROSPERIDADE, O que Todos deveriam saber sobre, 2. ed. , IL pg. 30

The National Penitentiary Department (DEPEN) would also have the right to supervise and periodically check the private prison facilities, agreeing or not with the service paid by the particular (art. 72, amend. II from LEP) and highlighting irregularities. It would share such responsibility with the Public Ministry as well as the Regulation of Delegated Public Services. Still, society as a whole - inmates, public defenders, and the general public - could draw attention to failures which would then be corrected. ¹

The responsibility of the private investor lies solely in the housing of the inmates determined by the Execution Judgment. According to the 4th article of the Penal Execution Law, the State could seek cooperation of the community in activities of penalty execution.

Julio Fabrini Mirabete addresses this topic in his article, "Privatizations of penal establishments towards the Penal Execution Law." In this citation, Mirabete opinionates favorably to a total privatization of prison houses; however, he eliminates the necessity of a state complementary rule for penal establishments to be "made and operated by a private company", heralding juridical and juridical-administrative activities. Indeed, stretch the participation of private entities and other administrative activities, from merely nature material, which today are in charge of official organs that many times are not carried out for material order or human order. Nothing avoids that the federal or the state law, for a skilled instrument (delegation, concession, permission or privatization), charges a juridical person from his private law to be exercised to promote the material execution of the penalties.

But in a general character, by force of a state complementary rule, nothing impedes the direction and operation of penal establishments by private businesses, except for

¹ Eduardo Araújo Neto, Aspectos sobre a privatização dos presídios no Brasil, information from <<http://www.pgj.ce.gov.br/artigos/artigo76.htm>>, accessed on 09/26/04

juridical and juridical-administrative activities. There is no law that bans the possibility of management and material operation of penal facilities to be exercised by a private entity. In any moment, the federal law disposes that the director and his servers should be public ones. Although it is referred to administrative personnel, we must understand that these functions may be exercised by private entities when dealing with activities of penalty execution (vigilance, technical instruction, job, assistance, etc.).

From this, and to erase any doubt about legality, one must recognize the fact that in Brazil, there already exists the Regional Industrial Penitentiary of Cariri (Ceará), Valença (Bahia) and Guarapuara (Paraná), which is fully functional, with regular laws, and has not been declared unconstitutional. The recent law 11,079/05 eliminated any doubt which remained.

7.3 POLITICAL OBSTACLES

In reference to political obstacles, the main factor would be the operational cost of such prisons. It is right, as far as can be seen, at least upon first glance; the cost of maintaining an inmate in a private prison would be higher than in a public facility. However, we have to consider that the rehabilitation rate and comfort in such prisons is much superior to the ones existent in crowded state prisons. As well, it must be recognized that the construction of private penitentiaries would not require the State to spend funds that might be used for other investments instead.

In a report published by Zero Hora newspaper¹, it is verified that the recidivism rate at Guarapuava penitentiary is only 6%, while in others managed by the State, this number reaches up to 70%.

If we consider the side effects of recidivism in the economy, it is easy to verify the value of funds spent on an inmate in search of his rehabilitation, avoiding additional future expenses spent on further judicial processes, sentencing, the necessary number of police to guarantee the prisoner's security, damages caused by the crime, etc. These are all costs that are undoubtedly reflected in the public income, in values superior to expenses with the rehabilitation of the inmates. Of course, not all inmates are likely to be resocialized, but for those who do have the ability to adopt a crime-free lifestyle, such rehabilitation is worth the investment and is beneficial for the population with whom he will live.

8. ADVANTAGES OF THE PUBLIC-PRIVATE PARTNERSHIPS AND ITS APPLICABILITY FOR THE PENITENTIARIES

With the contracts of public-private partnership, the Government could use the efficiency and agility of enterprise environment to work towards the attainment of goals. Those targets, if not reached, could interfere with the tariff rates paid by the State that should have the right to reduction.

The contracts could contain a clause concerning the recidivism of inmates. The tariffs could be increased if some levels of rehabilitation were reached. This serves as a good means of stimulating services in order to transform inmates into law-abiding-citizens.

¹ Jornal Zero Hora, Porto Alegre, Edition of 02.03.02, reportage of Carlos Corrêa

In Brazil, a good example of outstanding facilities is the private prison of Guarapuava, where the index level of recidivism reaches only 6%. In Maringá, a public prison in the same state, the index level reaches 30%. Elsewhere, the national average is amazingly 70%.

The creation of jobs for inmates must also be stimulated through incentives fixed in a partnership contract. The workmanship of the inmates might be used to manufacture goods that may be sold to the State, as the American enterprise, UNICOR¹, does in the United States. It is a good opportunity to help offenders acquire the skills necessary to successfully make that transition from prison inmate to a law-abiding, contributing member of society, avoiding idleness and reducing their confinement term, where, according to Brazilian law, every three days of labor results in the reduction of one day of penalty.

Stipulations about the fine for escaped convicts must be fixed in the contracts. The private partner must pay a fine for each fugitive from the facilities that it manages, to be discounted in the occasion of the payment of the tariffs²

The private manager is better able to manage his staff than a civil servant. Private workers are obedient to a major, enforcing disciplinary power. Severe mistakes, lapses or insufficient capability are solved with the termination of employment without

¹ Federal Prison Industries (commonly referred to as FPI or by its trade name UNICOR) is a wholly-owned, Government corporation established by Congress on June 23, 1934. Its mission is to employ and provide job skills training to the greatest practicable number of inmates confined within the Federal Bureau of Prisons. By statute, FPI is restricted to selling its products to the Federal Government. Its principal customer is the Department of Defense, from which FPI derives approximately 60 percent of its sales. Other key customers include the General Services Administration, Federal Bureau of Prisons, Social Security Administration, Department of Justice, United States Postal Service, Department of Transportation, Department of the Treasury, Department of Agriculture, and the Department of Veterans Affairs. Information from <http://www.bop.gov/news/unicor/index.jsp>

² Performance-driven, CCA's strong security record is 0.43 escapes per 10,000 inmates - a rate more than ten times lower than state prisons' average.

bureaucracy; contrastingly, the punishment of public service workers is significantly less severe, where all kinds of discipline correction must await a fastidious administrative process whose final decision, in most cases, never exceeds a slight admonishment. In this case, the State must support this unproductive civil servant up through retirement.

Levels of production of public officers are difficult to measure and are always contested. In the private sector, however, the employee who is not producing adequately is readily dismissed. Those producing adequately will be kept by the private partner that has interest in his services.

The question of penitentiary security guards – whether they should derive from the private or public sector - must be debated, taking into consideration mainly the particularities of the managed prison under partnership. In any matter, there is no impediment in mixing public and private employees. The civil servants could be responsible for the discipline of noncompliant prisoners, for the removal of certain privileges if necessary, for the supervision of private prison employees, and for the guarantee of the fulfillment of prisoner rights. The Government, through its agents, has the right to follow the execution of the contract.

Still, through the use of resources from the private sector for the accomplishment of determined public services, new work positions would be created for the public sector. Fiscal resources would therefore be available for investments in other areas. In Brazil, there is a lack of approximately 150,000 beds in the penitentiary system. About 150 facilities of 1000 beds each would be necessary, not including the nearly 250,000 warrants¹ of arrest currently in circulation.

¹ This number is a estimative of censo penitenciário de 1995. information from Artigo de Roberto Carvalho Pedrosa - www1.jus.com.br/doutrina/texto.asp?id=4088

On the other hand, the partnership contract is balanced, since it focuses on the question of the distribution of risks between the parties, searching to place them in the hands of the party that experiences the lowest cost of maintenance. There are excellent lessons to be learned with the experiences of privatization and concession, specifically concerning the difficulties related to the evaluation of risk and the determination of a price satisfactory to both the private and public sectors.

9. CONCLUSION

The law that facilitates the improvement and elaboration of the public-private partnership contract has arrived at a perfect time. Such contracts have already been created, but indirectly so, through various other related laws.

However, a specific law guarantees a higher level of security for the investors. These investors will be more trustful of investments in the vast prison markets that exist in Brazil. The Government has a path to follow as well, within the limits established by the new law.

It is an agile and dynamic tool which makes possible several means of ensuring minimum conditions of healthfulness within the prison environment, chiefly solving the problem of overcrowded population of inmates.

This is not a magical solution for all problems. We can not ignore the fact that prison environments propitiate a wide variety of disturbances and problems that will always exist on some higher or minor level. The inmates are in jail against their desire,

constraining to live with other people not chosen by themselves, and confined to a physically limited space. They have an obligation to obey certain rules that did not apply to them when they were free. All of these factors contribute to a tense environment that must be managed and controlled.

Additionally, Brazilian private facilities mentioned had several problems also found in public prisons, such as staff strike and rebellion; however, these problems were found to exist on a much lower level in the private facilities.

Many of the problems currently affecting newer private prisons in Brazil have already been experienced by older prisons – within Brazil, as well as elsewhere in the world. The reduction, and often, resolution, of such problems in the older prisons may serve as examples of successful action to be taken by the newer facilities.

Therefore, the calculation, evaluation, and projection of the benefits and risks of such contracts must be completed in order to enable a realization of good contracts in just fares. The Government must determine until what tariff value it will be advantageous to pay for one additional bed space in a penitentiary system managed by the private sector. It is very important to evaluate the outsourcing cost-benefit.

This decision will always be the choice, and not an obligation, of the public manager to make use of the private-public partnership, whenever he recognizes its advantage to an existing prison, or to build a new prison, always pursuing an efficient administration.

In some services in small prisons, the Government could use common outsourcing as well, where cost does not reach the minimum value for public-private partnership contracts in administration concession.

Therefore, only through tough investments by the private sector will the penitentiary services become able to offer better quality in the short run. The creation of new bed spaces in the penitentiary system may diminish the risk of rebellions as well as recidivism rates, beyond the propitiation of better conditions or the completion of the prison sentence, and giving greater value to human rights.

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