



The applicability of CNJ recommendation 62/2020 in the criminal investigation in light of preventive detention:

The applicability of recommendation 62/2020 of the CNJ in the criminal investigation in the face of pre-trial detention^{two}

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SUMMARY

This present article is about the applicability of CNJ recommendation 62/2020 in the criminal investigation in the face of preventive detention, in the context of the Covid-19 pandemic, which resulted in several deaths and a great lack of support in terms of health for the population. Faced with the calamity, the National Council of Justice found itself with the duty to bring suggestions to magistrates working in the criminal sphere, regarding the Covid-19 contingency criteria in prison establishments, instructing them to adopt preventive measures against the spread of the infection. through socio-educational actions. Also considering the existence of the risk group. What needs greater attention, it is worth highlighting the prisoners, who live in clusters due to the physical structure and the number of preventive prisons in Brazilian prisons.

Key words: Recommendation 62/2020. Pandemic. Prison Establishment.

ABSTRACT

This article on the application of the pandemic treatment of 62/20 health problems 62/20 of the CNJ in the criminal investigation in the face of preventive detention, in the context of the pandemic in several issues and a great lack of support for the present population. The Council of Justice, the National Council of Justice saw itself with the duty to promote action in the criminal sphere, on the criteria of continuity in prison establishments. through socio-educational actions. Also considering the existence of the risk group. Which needs greater attention, which should be highlighted the prisoners, who live together due to a physical structure and the number of preventive arrests in Brazilian prisons

Keywords: Recommendation 62/2020 CNJ. Pandemic. Prison Establishment.

1. INTRODUCTION

This article aims to present preventive detention in the context of the pandemic and the suggestions of the National Council of Justice through Recommendation 62/2020. With the declaration of the new coronavirus pandemic, a disease called Covid-19 by the World Health Organization, Brazil, like other countries, saw the great need to adapt and try to update itself to save lives and maintain fundamental rights, in this way, the work of the Executive, Legislative and Judiciary powers was of utmost importance, which sought to obtain faster justice in order to promote the real effectiveness of the rights set out in the Constitution of the Federative Republic of Brazil of 1988.

The National Council of Justice, with Recommendation 62/2020, brought suggestions to magistrates working in the criminal sphere regarding the Covid-19 contingency criteria in prison establishments, instructing them to adopt preventive measures against the spread of infection through socio-educational actions.

The recommendation was made with the intention of there being a need to establish rules in order to prevent infection and the spread of the virus in confinement spaces, in order to reduce the risks of transmission of the virus and preserve the health of public agents, private individuals of freedom and visitors, guaranteeing the You have the right to guarantee collective health.

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However, the Brazilian prison system has aspects of precariousness and, according to the law, national advantage of penitentiary information (infopen) in general data, in 2019 in the period from July to December, the total number of prisons in Brazil were 748,009 (seven hundred and forty-eight thousand, and nine) people deprived of their freedom, therefore, we can see the fragility of the prison system in ensuring the protection of fundamental rights inherent to human beings in the country.

It turns out that the Brazilian prison system does not guarantee a minimum of dignity for prison inmates, as the sentence should not be seen as a form of punishment but rather of restoration, prison inmates must complete their sentence with dignity and leave to be able to re-establish themselves in the market. and in the social life he led, but this is not what happens, Brazilian prisons do not respect the Penal Code, the Criminal Execution Law or the fundamental rights expressed in the Constitution of the Republic of 1988, as they should be aimed at the social reintegration of the prisoner, the prevention of new crimes and the preparation of the arrested person to return to social life.

The Penal Code itself provides that:

Art. 38, the prisoner retains all rights not affected by the loss of freedom, requiring all authorities to respect his physical and moral integrity.

But the reality is different, the cells are unhealthy, there is a proliferation of infectious diseases, a lack of drinking water, hygiene products, a lack of access to legal assistance, education, health, work and others, highlighting precarious conditions of human existence. .

And despite the recommendation and other measures to prevent the spread of the virus, there were still large numbers of people infected by the coronavirus, the last data released by the CNJ was from March 2022, which states that 75,337 (seventy-five thousand and three hundred and thirty-seven) imprisoned people have been infected and a total of 320 (three hundred and twenty) deaths since the beginning of the pandemic.

Furthermore, there was a decision by the STF in ADPF 347 that declared the state of affairs unconstitutional for the Brazilian prison system and determined in the pandemic that:

The)to judges and courts, who provide, in cases of determination or maintenance of provisional arrest, the express reason why they do not apply alternative precautionary measures to deprivation of liberty, established in article 319 of the Code of Criminal Procedure; b) judges and courts, which, in compliance with articles 9.3 of the Covenant on Civil and Political Rights and 7.5 of the Inter-American Convention on Human Rights, carry out, within ninety days, custody hearings, enabling the appearance of the prisoner before the judicial authority in the maximum period of 24 hours, counting from the moment of arrest; c) to judges and courts, who consider, with reason, the dramatic situation of the Brazilian penitentiary system when granting criminal precautions, when applying the sentence and during the criminal execution process; d) judges, who establish, when possible, alternative sentences to prison, given the circumstance that imprisonment is systematically served under more severe conditions than those permitted by the regulatory framework; e) the Union, to release the accumulated balance of the National Penitentiary Fund, to be used according to the purpose for which it was created, refraining from making new contingencies.

With this, the National Council of Justice recommended that magistrates with competence for the criminal knowledge phase reevaluate provisional arrests and indicated the exceptionality of new preventive detention orders.

Considering that the country's Judiciary uses preventive detention as an exceptional measure to guarantee public and economic order and ensure the application of criminal law, with the coronavirus it has become even more necessary.

Preventive detention is the deprivation of freedom of an individual, occurring during the course of criminal prosecution, being an incarceration tool during the police investigation and in the procedural phase, used when evidentiary support and indication of the infraction are present.

As provided for in article 312 of the Code of Criminal Procedure, preventive detention may be ordered when there is proof of the existence of the crime and sufficient evidence of authorship and danger generated by the state of liberty of the accused.

It was when recommendation No. 62 of 03/17/2020, brought that:

Art. 1 Recommend to the Courts and magistrates the adoption of preventive measures against the spread of infection by the new coronavirus – Covid-19 within the prison system and socio-educational system establishments. Single paragraph. The recommendations have the following specific purposes: I – the protection of the life and health of people deprived of liberty, magistrates, and all public servants and agents who are part of the criminal, prison and socio-educational justice system, especially





those who are part of the risk group, such as the elderly, pregnant women and people with chronic, immunosuppressive, respiratory diseases and other pre-existing comorbidities that could lead to a worsening of the general health status due to contagion, with special attention to diabetes, tuberculosis, kidney diseases, HIV and co-infections; II – reduction of virus propagation factors, through the adoption of sanitary measures, reduction of crowds in judicial, prison and socio-educational units, and restriction of physical interactions when carrying out procedural acts; and III – guarantee of continuity of judicial provision, observing individual rights and guarantees and due legal process. (RECOMMENDATION 62/2020).

Given the recommendation, there were some changes in decisions by the Superior Court of Justice, as preventive detention needed to be seen as a second option, preferring precautionary measures before decreeing it, as follows:

Summary and excerpts of the decision: Drug trafficking (41 g of marijuana). Revocation of preventive detention. "It is necessary to immediately comply with the recommendation of the National Council of Justice, as a measure to contain the global pandemic caused by the coronavirus (Covid-19), and custody must be replaced by precautionary detention under home conditions." Injunction granted. (STJ; Habeas Corpus nº 567.006-SP; rel. Sebastião Reis Júnior; Monocratic Decision; j. 03/19/2020).

Summary and excerpts of the decision: Drug trafficking and association with trafficking. Request to replace preventive custody with house arrest. Patient who is the mother of 2 (two) minors, one aged 5 (five) years and the other aged 01 (one) year and 09 (nine) months. "Humanitarian reasons therefore prevail. Therefore, it is necessary to authorize the replacement of the patient's imprisonment with house arrest (...) without prejudice to the establishment of alternative precautionary measures by the magistrate, and the arrest may be re-ordered in the event of non-compliance with said measure or the emergence of new facts." It also emphasizes that "CNJ Recommendation No. 62, of March 17, 2020, establishes preventive measures against the spread of infection by the new coronavirus – Covid-19 within the scope of criminal justice systems". The ex officio order was granted to guarantee the patient the right to house arrest. (STJ; Habeas Corpus nº 558.308- PR; rel. Reynaldo Soares da Fonseca; Monocratic Decision; j. 03/25/2020).

It is noted that many of the jurisdictional bodies failed to comply with the recommendations of the National Council of Justice and for this reason the Socialism and Freedom Party, the Brazilian Institute of Criminal Sciences, among other bodies that value public health within the prison system, presented an Action of non-compliance with fundamental precept no. 347 9 (ADPF) with the aim of preventing the damage to fundamental precepts caused by the judiciary from continuing to be in force.

2. MATERIALS AND METHODS

The methodology used to carry out the research was the inductive and bibliographic method consisting of an analysis of judicial precedents, CNJ Recommendation, constitutional norms and books, an overview of the problem can be provided with the support of the Constitution of the Republic of Brazil of the year of 1988, to bring the fundamental rights and guarantees inherent to human beings in Brazil, the Code of Criminal Procedure to present on preventive detention, the judgments brought by the Court of Justice of São Paulo and Recommendation 62/2020 published by the National Council of Justice at the beginning of the pandemic guiding magistrates to inhibit the spread of the corona virus in the country.

3. RESULTS AND DISCUSSIONS

3 Recommendation 62/2020 aimed to certify the maintenance of the health of people who were in prison, and guide the Judiciary to adhere to the guarantee of collective health due to the proportion of cases of elimination and dissemination of the virus within the prison system, thus producing significant impacts inside and outside the prison. The aim is to reduce the epidemiological risks of virus transmission in the establishment, which is already unhealthy and presents difficulties in guaranteeing protective and hygiene equipment for those who are there. To this end, judges were recommended to apply measures, preferably socio-educational and in an open environment, in addition to reviewing decisions on preventive detention.





CONCLUSIONS

This article presented the need to make preventive detention exceptional and prioritize various prison measures, because of the public calamity created by the pandemic caused by the corona virus. It is well known that the contamination spread and killed thousands of people in Brazil and other countries. For this reason, the CNJ had support from the United Nations and the Inter-American Commission on Human Rights, to prevent further chaos within the country's prison system, which desperately needs structural reforms. And in this sense, we are talking here, above all, about an important dialogue and even harmony between the decisions handed down in the lower instances and the Courts.

In this context, it highlighted preventive detention that has the objective of maintaining public, economic and financial order in the country, in addition to being decreed in an exceptional manner when the criminal investigation is at imminent risk of being compromised by the person being investigated, however, during the course of a criminal investigation, the detention decreed is the preventive one that is initially carried out in the country's prison system.

It is concluded that given the state of calamity that the country has experienced due to the coronavirus pandemic, it is clear that fundamental rights and guarantees, especially those listed in the caput of article 5 of the Constitution of the Federative Republic of Brazil of the year 1988, are in a situation of collision with the Brazilian prison system, the availability of life is evident.

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