

## MULTI-LEVEL PROTECTION OF FUNDAMENTAL RIGHTS AND INCARCERATION

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### Summary

This study aims to analyze the impacts of incarceration on fundamental rights, considering the context of multi-level protection. Through bibliographical research, works by various authors were reviewed that address the themes of the prison system, human rights and multilevel protection. The analysis revealed that overincarceration not only violates the individual rights of inmates, but also compromises the effectiveness of rehabilitation and resocialization policies. From understanding the interactions between the national prison system and international human rights protection bodies, it was possible to conclude that multidimensional approaches are necessary to face the complex challenges associated with mass incarceration. Coordinated action between the different levels of human rights protection is essential to guarantee respect for the rights of people deprived of their liberty and to promote reforms in the prison system, aiming to build a fairer, more humane and effective criminal justice system. **Key words:** Extrication. Fundamental rights. Multilevel Protection.

### Abstract

This study aims to analyze the impacts of incarceration on fundamental rights, considering the context of multi-level protection. Through a bibliographic research methodology, works by various authors addressing the themes of the prison system, human rights, and multi-level protection were reviewed. The analysis revealed that mass incarceration not only violates the individual rights of detainees but also compromises the effectiveness of rehabilitation and reintegration policies. Understanding the interactions between the national prison system and international human rights protection organizations led to the conclusion that multidimensional approaches are necessary to address the complex challenges associated with mass incarceration. Coordinated action between different levels of human rights protection is crucial to ensure respect for the rights of persons deprived of their liberty and to promote reforms in the prison system, aiming to build a more just, humane, and effective criminal justice system.

**Keywords:** Decarceration. Fundamental Rights. Multi-Level Protection.

### Introduction

Incarceration is a complex reality that affects not only individual freedom, but also the fundamental rights of individuals involved in this process. In this context, multi-level protection emerges as a crucial approach to understanding and addressing the challenges faced by those in state custody.

Brazil faces a serious problem of overincarceration, characterized by a high rate of imprisonment in relation to the capacity of prison units. This phenomenon is the result of several interconnected factors, such as public security policies focused on punishment, lack of investment in preventive social policies, deficiencies in the judicial system and precarious conditions inside prisons.

Statistics reveal the magnitude of this problem. The country has one of the largest prison populations in the world, with an imprisonment rate that has increased significantly in recent decades. Overcrowding in prisons is a daily reality, leading to a lack of basic hygiene, health and safety conditions for inmates.

1 Prison overcrowding contributes to human rights violations, such as the lack of adequate access to legal assistance, education and work within prisons. Overincarceration also has disproportionate impacts on certain social groups, such as young people, black people and the poor, who are more often targets of public security policies and have less access to adequate legal resources to guarantee their rights.

This situation poses significant challenges for the Brazilian prison system, requiring urgent measures to reduce mass incarceration, promote alternatives to prison for non-violent crimes and improve detention conditions to ensure respect for inmates' human rights. Addressing the problem of overincarceration requires a multidimensional approach that addresses not only the issues



public security issues, but also the structural causes that fuel this cycle of mass imprisonment.

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This study aims to analyze the impacts of incarceration on fundamental rights, considering the context of multi-level protection.

### Multi-Level Protection of Fundamental Rights

Human rights are essential mechanisms to limit exploitation and guarantee decent living conditions for all. According to Carbonari,<sup>two</sup> These rights are continually affirmed through the fight against domination, exploitation and any form of aggression against human dignity, representing an incessant search for better human relations.

Herkenhoff<sup>3</sup> highlights that these rights are intrinsic to human nature and do not result from political concessions. Instead, it is the duty of political society to recognize and guarantee these rights, which are fundamental due to the inherent dignity of each human being. Thus, human rights are seen as an essential basis for justice and dignity, requiring protection and consecration by political and social institutions.

Roland et al.<sup>4</sup> (2018, p. 396) argue that the practice of human rights is essential for democracy and government policies. Without basic rights, individuals cannot be held responsible for their social conduct. Human rights are valid in domestic legislation, international treaties and ethical reflection. They are inherent to everyone, regardless of color, race, social class or gender, and must be protected by the State and society. Currently, every human being is recognized as a subject of rights, but can either suffer or commit violations of these rights.

Andrade<sup>5</sup> distinguishes Human Rights and Fundamental Rights and explains that modern constitutionalism seeks new conceptions of “State, sovereignty and governability” through a multilevel model of protection of these rights. This system had its first expression in Europe with the European Union, breaking the notion of “untouchable and nationalized” sovereignty.

Silva and Silva<sup>6</sup> explain that political-legal changes in the 20th century created international organizations and the multilevel protection of rights. This system regulates matters at subnational, national and supranational levels, facilitating dialogue between domestic Fundamental Rights and supranational Human Rights. Galindo, Urueña and Pérez<sup>7</sup> highlights that multilevel policy allows subnational entities to dialogue directly with supranational institutions, establishing a new community legal order with supremacy in national legal systems. This results in more complete protection of rights.

The protection of fundamental rights is no longer limited to nation-states, but is also the responsibility of other institutions, due to the possibility of the State itself infringing these rights.<sup>8</sup> This system requires coordination between States and various institutions to better protect human dignity, especially after the Second World War.

1 JAPIASSÚ, Carlos Eduardo Adriano; FERREIRA, Ana Lúcia Tavares. Prison overcrowding and international human rights systems. **Brazilian journal of criminal sciences**, n. 164, 2020, p. 169. two

CARBONARI, Paulo César. Human rights in Brazil: the insistence on violation. **Le Monde Diplomatique Brasil**, São Paulo, year 3, n. 31, Feb. 2010, p. 12. 3

HERKENHOFF, João Baptista. **Human rights course: genesis of human rights**. Rio de Janeiro: Acadêmica, 2018, p. 30.

4 ROLAND, Manoela Carneiro et al. Challenges and perspectives for the construction of a binding legal instrument on human rights and companies. **GV Law Magazine**, v. 14, 2018, p. 396.

5 ANDRADE, Régis Willyan da Silva. The dialogue between Fundamental Rights and Human Rights to create a Multilevel Legal System. **Journal of Constitutional Studies, Hermeneutics and Legal Theory (RECHTD)**. v. 9, no. I, p. 75-89, January-April 2017, p. 76.

6 SILVA, Alice Rocha and SILVA, Matheus Passos. The Ineffectiveness of the Multilevel Protection of Social Rights in the European Union. *R. Opinion. Jur.*, Fortaleza, year 14, n. 18, p. 44-73, Jan./Jun. 2016, p. 44. 7

GALINDO, George Rodrigo B., URUEÑA, René and PÉREZ, Aida Torres. **Multilevel Protection of Human Rights**. Manual. 2014, p. 17. 8

SILVA, Alice Rocha and SILVA, Matheus Passos. The Ineffectiveness of the Multilevel Protection of Social Rights in the European Union. *R. Opinion. Jur.*, Fortaleza, year 14, n. 18, p. 44-73, Jan./Jun. 2016, p. 47.



Padilla<sup>9</sup> states that multilevel protection precedes multilevel constitutionalism, being a “common complex structure of rights protection mechanisms” between national, international and supranational bodies, originated with the creation of the UN. In Europe, the European Union has a catalog of rights with the legal value of constitutive treaties and a supranational jurisdictional body for judicial cooperation.

### International Agreements and Treaties related to human rights ratified by Brazil

Human rights are universal and indivisible, with no hierarchy between economic, social, civil, political or cultural rights. Globalization accentuates the contradiction between freedom and social rights, as human rights do not keep up with the global economy, which aims for profit, resulting in a setback in the defense of these rights without state intervention. Piovesan<sup>10</sup> states that global and regional systems for the protection of human rights are complementary and are based on the principles of the Universal Declaration. The individual can choose the most favorable international mechanism for the protection of their rights, as identical rights can be protected by several global or regional instruments.

International organizations have created accountability mechanisms for when the State fails to implement fundamental rights, allowing international control and oversight. This international action, although supplementary, offers an additional guarantee of protection. Defenses are necessary to guarantee rights such as food, health, housing and education, and it is crucial to extend the benefits of human rights to everyone, without exception.<sup>11</sup>

The evolution of human rights continues to be a crucial trajectory for the advancement of society, highlighting the fundamental importance of ensuring respect for these rights, considering that they are innate to human beings from birth. The 1988 Federal Constitution establishes a constitutional hierarchy for the rights enshrined in international treaties, giving them immediate applicability in accordance with the provisions of article 5, paragraphs 1 and 2.

According to Piovesan,<sup>12</sup> while other international treaties have infra-constitutional force, human rights treaties have constitutional status, as stipulated by article 102, III, “b” of the CF. This differentiation is justified by the nature of the objectives of the treaties, with human rights aimed at protecting the fundamental rights of human beings, while common treaties seek to balance relations between States.

The various human rights protection systems interact for the benefit of protected individuals, allowing the choice of the most effective protection apparatus to preserve human dignity in specific cases. The criterion of the primacy of the most favorable norm, present in many human rights treaties, reduces potential normative conflicts, promotes greater coordination between vertical and horizontal legal instruments and reinforces the protection of rights. In short, in situations of conflict between International Human Rights Law and domestic law, the rule most favorable to the victim prevails. International human rights treaties complement and strengthen the protection of constitutional rights, never limiting or weakening that protection.<sup>13</sup>

The 1988 Federal Constitution expressly recognizes the rights arising from international treaties and conventions to which Brazil is a signatory. Constitutional Amendment No. 45, of 2004, added paragraph 3 to article 5, establishing that international treaties and conventions on human rights approved by the National Congress with three-fifths of the votes in two rounds will be equivalent to constitutional amendments. The catalog of fundamental rights in Brazil is vast, covering rights expressed in the Constitution, in international documents incorporated into Brazilian legislation and arising from the principles adopted by the Constitution.

However, the current challenge lies in the enforcement of these rights. Furthermore, Brazil is subject to the jurisdiction of the Court Inter-American Human Rights Committee (IACHR), established by Decree No. 4,463 of November 8

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<sup>9</sup> PADILLA, Carmen Montesinos. Multilevel protection of rights: Procedural obstacles. Public Law Department of the State. Gatafe, enero, 2015, p. 16.

<sup>10</sup> PIOVESAN, Flavia. **Human rights issues**. 9. ed. São Paulo: Saraiva, 2016, p. 101. SCHWENCK,

<sup>11</sup> Terezinha. **Environmental Human Rights**. Available at: <<http://www.fadipa.br/pdf/schwenck.pdf>>. Accessed in: Jun. 2024. <sup>12</sup>

<sup>13</sup> PIOVESAN, Flávia. **Human Rights and International Constitutional Law**. 14 ed. São Paulo: Saraiva, 2013, p. 40.

<sup>13</sup> PIOVESAN, Flávia. **Human Rights and International Constitutional Law**. 14 ed. São Paulo: Saraiva, 2013, p. 41.



November 2002, responsible for judging cases of human rights violations committed by member states of the Organization of American States (OAS) that have ratified the American Convention. The IACHR is a supranational court.<sup>14</sup>

The Inter-American Court of Human Rights was established in 1978 by the American Convention, having the authority to hold States responsible for violations of civil and political rights. In individual cases, the IACHR and the Court determine the State's responsibility for specific human rights violations, evaluating its actions, omissions, policies and standards of conduct.

In contentious cases, the State is represented by senior officials, while victims are represented by human rights organizations or specialized lawyers. The decisions resulting from these processes are binding. Regulated by articles 33b and 52 to 73 of the American Convention, as well as by its statute, the Court is composed of seven judges chosen from among the member states, with a mandate of six years, and may be re-elected only once. Its competence can be advisory or contentious, and decisions require a minimum quorum of five judges.<sup>15</sup>

There is no joinder in the Inter-American Court, because if several State parties have an interest in the case, they will be considered as a single party. Submitting a case to the court is the exclusive responsibility of the States Parties and the Commission. However, contrary to domestic law, the right to petition the Inter-American Court of Human Rights allows the plaintiff seeking reparation not necessarily to be the direct victim of the harmful event, an extended interpretation of procedural capacity, according to Proner,<sup>16</sup> following the Trindade line. Furthermore, unlike the domestic procedural system, the applicant has direct access to the Inter-American Court, subject to admissibility by the court's judges.

It is worth noting that only the States Parties and the Commission have the right to submit a case for decision by the Court, requiring the Commission's intermediary to carry out admissibility examinations and seek peaceful solutions to disputes (Article 48 - 1, ACHR). Trinity<sup>17</sup> explains that international human rights courts do not replace domestic courts or act as appeals bodies for the decisions of these courts. However, international oversight bodies can examine the domestic acts of States to verify their compliance with international human rights obligations.

According to Proner,<sup>18</sup> This approach aims to respect the sovereignty of States, prioritizing the resolution of illicit issues through internal judicial means. However, as mentioned previously, this rule is not absolute and is applied more flexibly in relations between States, aiming to preserve diplomacy between them. In the case of internal complaints by individuals against their own States, there is additional flexibility in the application of this principle.

Exhaustion of domestic remedies is one of the requirements for the admissibility of petitions before the Inter-American Court, in accordance with article 37, III of the Commission. This requirement must be proven by both the complainant and the government being complained about. This process reflects an evolutionary interpretation, which considers social dynamics and human rights conventions. Furthermore, the Court uses restrictive interpretation to interpret complaints in a more strictly normative way. A third interpretative form, teleological interpretation, emphasizes the objective and purpose of the Convention, resulting in the pro-victim principle, which favors the protection of victims' rights. Regarding the effectiveness of the Court's sentences, they are definitive and not subject to review or appeal. Other mechanisms guarantee compliance with decisions, while respect for the Court's decisions is essential to maintain good relations between States.<sup>19</sup>

The sentences of the Inter-American Court against Brazil are immediately effective and must be complied with promptly, as stipulated by articles 68, §1 and 65 of the American Convention. The main challenge no greeting The meaning of these sentences lies not in the compensation part, but in the punishment of those responsible for the

14 MAZZUOLI, Valerio de Oliveira. **Public international law course**. 7. ed. They are. Paulo: RT, 2013, p. 49.

15 WAR, Sydney. **The inter-American system for the protection of human rights and the control of conventionality**. São Paulo: Editora Atlas, 2013, p. 37.

16 PRONER, Carol. **Human rights and their paradoxes**. Analysis of the American protection system. Porto Alegre: Editora Sergio Fabris, 2009, p. 28.

17 TRINDADE, Antônio Augusto Cançado. **Treaty on international human rights law**. Porto Alegre: Sergio Antônio Fabris, 2013, p. 48.

18 PRONER, Carol. **Human rights and their paradoxes**. Analysis of the American protection system. Porto Alegre: Editora Sergio Fabris, 2009, p. 28.

19 PRONER, Carol. **Human rights and their paradoxes**. Analysis of the American protection system. Porto Alegre: Editora Sergio Fabris, 2009, p. 29.



human rights violations. Brazilian jurisprudence adopts a unique approach to international law, combining monist and dualist elements.

In practical terms, ordinary laws equate internal and external provisions, while complementary laws and constitutional norms follow a dualistic approach, with the National Congress not having a differentiated procedure for approving international treaties and the Federal Supreme Court not recognizing the capacity of treaties international organizations to revoke or create constitutional or complementary norms.

In cases where a new law conflicts with an international treaty, the expression of the State's will to depart from the application of the treaty occurs only within the scope of domestic law, without extinguishing the international norm. Therefore, despite the sovereignty of the State, international treaties ratified by the country must prevail over the provisions of the Federal Constitution, following the criterion of the norm most favorable to the victim.

### Impact of overincarceration on Fundamental Rights: action of multilevel protection

Baratta's perspective<sup>20</sup> about prison as a space that goes beyond mere institutional violence is fundamental to understanding the complexity of the prison environment. In fact, violence within prisons is not only limited to relationships between inmates and prison officers, but also encompasses interactions between incarcerated individuals themselves, as well as forms of group violence.

Firstly, the dynamics of life inside prisons often lead to conflicts between inmates themselves. Prison overcrowding and precarious living conditions inside cells create an environment conducive to tensions and confrontations between prisoners. Disputes over limited resources, such as space, food and access to basic services, can easily escalate into situations of physical or psychological violence among incarcerated individuals.<sup>21</sup>

Furthermore, prisons often function as spaces where groups or factions form, each with their own interests and internal hierarchies. These groups may engage in criminal activities within the prison, such as extortion, drug trafficking and even murder, as a way of imposing their authority over other inmates or competing for control of certain areas or resources within the prison.<sup>22</sup>

Thus, prison becomes a microcosm of society, where various forms of violence and conflict are reproduced and exacerbated. Violence between individuals and group violence within prisons are interconnected phenomena that reflect not only the lack of adequate incarceration conditions, but also broader structural problems, such as the absence of effective resocialization policies and overcrowding in the prison system.

Japiassu and Ferreira<sup>23</sup> highlight the seriousness of the problem of overincarceration in Brazil and its consequences for fundamental rights and security in the prison environment. By highlighting the high occupancy rates and the precariousness of detention conditions, the authors argue that the State fails to guarantee a safe environment in prisons, which results in a series of rights violations and the frustration of the purposes of the sentence. They point out that the lack of security in prisons has led to recurring episodes of violence, including notorious cases such as the one that occurred at the Urso Branco prison, in Rondônia, and at the Anísio Jobim Penitentiary Complex, in Amazonas. These incidents highlight the urgency of addressing the problem of overincarceration and its ramifications.

The study by Japiassu and Ferreira<sup>24</sup> offers a comprehensive analysis of the implications of the problem of prison overcrowding on the European and inter-American human rights systems. The active role of international organizations stands out in an attempt to control the growth of the prison population, influencing ciating factors internal to the penal systems of member countries.

20 BARATTA, Alessandro. **Critical Criminology and Criticism of Criminal Law**. 3rd edition. Rio de Janeiro: Editora Revan, 2002.

21 BARATTA, Alessandro. **Critical Criminology and Criticism of Criminal Law**. 3rd edition. Rio de Janeiro: Editora Revan, 2002.

22 BARATTA, Alessandro. **Critical Criminology and Criticism of Criminal Law**. 3rd edition. Rio de Janeiro: Editora Revan, 2002.

23 JAPIASSÚ, Carlos Eduardo Adriano; FERREIRA, Ana Lúcia Tavares. Prison overcrowding and international human rights systems. **Brazilian journal of criminal sciences**, n. 164, 2020, p. 178. 24

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In the European context, the European Court of Human Rights (EC Court) has examined a wide range of demands related to detention conditions, especially due to the persistence of the problem in countries such as Russia and Italy. Initially, the Court's jurisprudence was limited to procedural issues, but evolved to recognize poor living conditions as violations of the right to personal integrity. The creation of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) contributed to the adoption of more assertive measures, with the Court recognizing overcrowding as a form of degrading treatment.<sup>25</sup>

In the inter-American human rights system, the issue of prison overcrowding has been addressed by the Inter-American Commission on Human Rights (IACHR), with the establishment of the Rapporteurship on the Rights of Prisoners. The IACHR recognizes overcrowding as a factor that can constitute cruel, inhuman or degrading treatment and has recommended the adoption of policies and strategies to reduce the excessive use of pre-trial detention and promote alternatives to detention.<sup>26</sup>

The jurisprudence of the Inter-American Court has also evolved, recognizing overcrowding as a violation of personal integrity and determining measures to reduce the occupancy rate of penitentiary establishments.<sup>27</sup> These decisions reflect a growing commitment to ensuring respect for the rights of people deprived of their liberty and to facing the challenges arising from prison overcrowding.

Given the above, the Law and Order Movement, despite being attractive in its rhetoric, is not effective in the face of the challenges of crime, as highlighted by Lyra.<sup>28</sup> Instead, it becomes imperative to adopt more comprehensive and evidence-based approaches to combating crime, considering not only punishments but also the underlying roots and preventative measures. The prison, as highlighted by Lyra,<sup>29</sup> not only fails to resolve criminal problems, but also perpetuates an inhumane logic that animalizes individuals, fueling a cycle of recidivism and dehumanization.

In contrast to the Law and Order paradigm, a new alternative criminal policy movement emerges, based on the new criminology, which defends the abolition of the custodial sentence and promotes alternative measures to prison, as discussed by Araújo Junior.<sup>30</sup> This movement, as explained by Araújo Junior, is directed towards the principles of equality and fraternity, challenging the predominant punitive vision. However, it is regrettable that we currently find ourselves in a government context deeply committed to the extremism of the Law and Order movement, as noted by Lyra and Araújo Junior, which confronts us with challenging times.

Given this scenario, it is crucial to rethink the criminal system and prioritize education and prevention strategies to truly combat crime and promote a fairer and more inclusive society, as highlighted by Lyra<sup>31</sup> and Araújo Junior.<sup>32</sup> Investing in education is recognized as a more effective alternative to prison, as the latter not only fails to rehabilitate individuals, but also dehumanizes them and perpetuates a cycle of crime. In short, the search for solutions that balance punishment with social reintegration is a primary challenge to building a more humane and effective penal system.

## Conclusion

Given the analysis of the impact of over-incarceration on fundamental rights, the urgent need for action at different levels to face the challenges arising from this fe-

25 JAPIASSÚ, Carlos Eduardo Adriano; FERREIRA, Ana Lúcia Tavares. Prison overcrowding and international human rights systems. **Brazilian journal of criminal sciences**, n. 164, 2020, p. 188. 26

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28 LYRA. Roberto. **Penance of a Penitentiary**. Belo Horizonte-MG: Ed. Lider, 2013. LYRA. Roberto.29 **Penance of a Penitentiary**. Belo Horizonte-MG: Ed. Lider, 2013. ARAÚJO JUNIOR, João30 Marcello de Araújo. **Penal System for the third Millennium**. 2.Ed. River of

January: Revan, 1991.

31 LYRA. Roberto. **Penance of a Penitentiary**. Belo Horizonte-MG: Ed. Lider, 2013. ARAÚJO JUNIOR,32 João Marcello de Araújo. **Penal System for the third Millennium**. 2.Ed. River of

January: Revan, 1991.



nomen. Baratta's (1993) perspective on prison as a space that goes beyond mere institutional violence highlights the complexity of this environment, where not only violence between inmates and prison officers is present, but violent interactions also occur between incarcerated individuals themselves and forms of group violence.

It is crucial to recognize that prison overcrowding not only violates the fundamental rights of inmates, but also compromises the effectiveness of rehabilitation and resocialization policies. The lack of adequate incarceration conditions, combined with the absence of effective social reintegration programs, contributes to the perpetuation of the cycle of violence and criminal recidivism. In this sense, it is necessary to adopt multidimensional approaches that address not only public security issues, but also the structural causes that fuel overincarceration.

Multilevel protection is essential to face this complex challenge. Global and regional systems for the protection of human rights provide accountability mechanisms for States that violate the rights of detainees, ensuring international oversight and complementary to national actions. Furthermore, the interaction between different international organizations, such as the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, demonstrates a growing commitment to guaranteeing respect for the rights of people deprived of their liberty and to facing the challenges arising from prison overcrowding.

However, it is essential that these measures are accompanied by coordinated efforts at the national level to reform the prison system, promote alternatives to prison for non-violent crimes and improve detention conditions. This requires a political and social commitment to overcome the structural barriers that perpetuate over-incarceration and ensure that all people deprived of their liberty are treated with dignity and respect for their fundamental rights. Only in this way will it be possible to build a fairer, more humane and effective criminal justice system.

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