Symbolic jurisprudence: the unconstitutional state of affairs in relation to the Brazilian penitentiary system

Jurisprudência simbólica: o estado de coisas inconstitucional em relação ao sistema penitenciário brasileiro

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Abstract: The declaration of the unconstitutional state of affairs (ECI) in relation to the Brazilian penitentiary system in ADPF 347 is a legal, political and social event that did not reveal the practical scope intended by the STF decision. Instead of having the catalytic role of a structural change that would allow the restoration of a situation of protection of fundamental rights, the ECI is a procedure whose strategy is to exclude the incarcerated population. To describe this strategy, this article uses the genealogical method specific to Foucault's theory of power. In order to illustrate how the ECI reveals more continuity in the treatment of the issue by the judiciary than jurisprudential inflection, ADPF 347 will be placed among other decisions taken by the STF in what was identified as its "penitentiary system agenda". From this jurisprudential framework, we can demonstrate how the ECI generates new power relations within what Foucault calls governmentality. Foucault's reflections indicate that, although unintentionally, the ECI maintains the framework of forces responsible for the constitution's lack of normativity. By employing Neves' theory of symbolic constitution, the article describes the ECI as symbolic jurisprudence that interprets the constitution in a restrictive and exclusionary way. Besides this negative consequence, employing both Neves' and Foucault's theories, as a part of its a positive effect, the ECI reveals the excluded situation of prisoners, as well as the possible resistance to the subjectivication mechanism resulting from governmentality.

Keywords: Governmentality. Foucault. Judicial Power.. Human Rights. Resistance.

Resumo: A declaração do estado de coisas inconstitucional (ECI) em relação ao sistema penitenciário brasileiro na ADPF 347 é um evento jurídico, político e social que não revelou

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o alcance prático pretendido pela decisão do STF. Em vez de ter o papel catalisador de uma mudança estrutural que permitisse restaurar uma situação de proteção a direitos fundamentais, o ECI é um procedimento que tem por estratégia a exclusão da população encarcerada. Para descrever essa estratégia, esse artigo se utiliza do método genealógico próprio da teoria do poder de Foucault. Com o intuito de ilustrar como o ECI revela mais continuidade de tratamento do tema pelo poder judiciário do que inflexão jurisprudencial, a ADPF 347 será situada entre outras decisões tomadas pelo STF no que foi apontado como sua "agenda do sistema penitenciário". A partir dessa moldura jurisprudencial, podemos demonstrar como o ECI é gerador de novas relações de poder dentro do que Foucault chama de governamentalidade. As reflexões de Foucault indicam que, ainda que de forma não intencional, o ECI mantém o quadro de forças responsável pela falta de normatividade da constituição. Usando também a teoria de Neves sobre constituição simbólica, o artigo descreve o ECI como jurisprudência simbólica que interpreta a constituição de forma restritiva e excludente. Ao mesmo tempo, de forma positiva, e integrando o referencial foucaultiano ao de Neves é possível vislumbrar como o ECI revela a situação dos presos e as possíveis resistências ao mecanismo de subjetivação resultante da governamentalidade.

Palavras-chave: Governamentalidade. Foucault. Poder Judiciário. Constituição. Direitos Humanos. Resistência.

Introduction

> But in order for some part of them to reach us, a beam of light had to illuminate them, for a moment at least. A light coming from elsewhere. What snatched them from the darkness (...) was the encounter with power; without that collision, it's very unlikely that any word would be there to recall their fleeting trajectory.[3]

In 2015 the Supreme Court of Brazil (Supremo Tribunal Federal, STF) declared in a precautionary manner that the prison system of the country is in an 'unconstitutional state of affairs' (Estado de Coisas Inconstitucionais, ECI). Five years after this decision, in May 2022, the trial on the merits regarding the Allegation of Violation of a Fundamental Precept number 347 (Arguição de Descumprimento de Preceito Fundamental, ADPF) began with a virtual session. Socialism and Freedom Party (Partido Socialismo e Liberdade, PSOL), author of this action, signed the petition that highlights that despite a wide range of laws and legal instruments that were made available to public managers, the

3 FOUCAULT, Lives of infamous men, (2001), p. 161.

situation of repeated violation of the fundamental rights of prisoners persists in the country. The party asked the STF to recognize this situation and intervene promptly and correspondingly. The fact that there is a vast amount of legislation on the subject does not generate much controversy and it was not denied by any party. What is debatable is whether there was a sufficient omission that would justify the ECI. Most certainly, major decisions concerning prison management were not taken in a political vacuum.

By introducing the ECI as an exceptional legal measure, the Supreme Court intervened in the situation of human rights protection of the imprisoned population that was consensually called a state of exception, as pointed out in the discussions that led to the precautionary measure. In this article we will analyze this event as a practice when the law was employed by the STF to create a paradoxical and undemocratic situation: the protection of human rights based on exceptional measures and, thus, outside of Brazil's Constitution of 1988 (the Constitution). Thus, the gap between the symbolic and practical capacity of the Constitution to keep itself as the highest legal protector of human rights was made wider and more apparent by the stance of the STF. In this sense, Brazilian jurisprudence contributed to the regime of exclusion of one part of the population that employs a state of exception rhetoric to justify the implementation of procedural rationality instead of constitutional protection mechanisms for the inclusion of the same part of its population, a process that is grasped in the ECI. By doing so, it left us with the decisions that allow the jurisprudence of the STF to maintain this exclusion/inclusion regime because they are part of a framework of symbolic constitutionalization. In other words, seen as a means of implementing a symbolic constitutional text, they are not endowed with legal-political normative efficacy.

This article takes critical aim toward existing legal and political analyses of the role and activity of the Supreme Court and its involvement in the ongoing prison crisis. We believe that in the case of the Brazilian prison system and respective juridical activity related to it, there is an important analytical problem where the 'mechanisms of power' were not explored in a sufficient interdisciplinary manner as regimes of power in governance and practice, but rather are based on legal or political sparse inquiries. Intending to provide input to this critique, we employ Foucault's theory of power as a theoretical addendum for a legal critical approach regarding juridical practice related to prison management. Two main justifications for employing Foucault's theory in this work can be summed up as follows: we see genealogy as the most suitable methodology for our investigation as it can grasp the necessary levels of the complex relations between political, juridical and social spheres and

explore them in the given historical moment and within concrete legal and political repercussions. Even though Foucault develops his method using the European history of power and sovereign state, his understanding of governmentality, subject and power regimes within, are possible to observe within the peripheral context as well. In our understanding, ECI and other actions of the Brazilian judiciary regarding the 'unconstitutional state of affairs' are a product of a legally sophisticated management of the prison system that corresponds to Foucault's understanding of governmentality. Even so, there is no room in this work to develop in-depth these two claims but rather to adapt them to the general methodology of the analyses.

The first part of the analysis of the Brazilian judiciary activity employs process-tracing as its method, which is closely related to the idea of genealogy. We begin with the dogmatic contextualization of ADPF 347 among the precedents established after the implementation of the general repercussion system, which, even though it leans on more recent case law, serves to demonstrate that the situation of prisoners is not new or unfamiliar to the Brazilian judiciary, but has formed a part of the complex, yet, evident process of political and legal normalization of exclusion of the imprisoned population. In this part, based on the text analyses of the relevant summary judgments, we gather precedents of general repercussions related to the penitentiary system to uncover the discussions related to the topics that were addressed in the precautionary judgment in ADPF 347. Likewise, it becomes more apparent that what provoked the declaration of the ECI was not an exceptional event, but a long-lasting situation, which has generated various forms of intervention by the judiciary over time. This means that the ECI is not just a caesura, but a part of an established historical framework of exclusion and disrespect of human rights in the prison system.

Since ECI is a procedure in which no rule is declared constitutional or unconstitutional, its position and relation to the legal system is marked by the abandonment as a strategic part of the legal form that we observe through the theory of power, to reveal its particular and peripheral code, following the path that surpasses sovereignty and more classical discussions about division of powers within critical legal theory. Therefore, in the second part of this work, we tend to demonstrate that the ECI is an important legal event to understand Brazilian constitutionalism and for our theoretical analyses, we observe it as a creator of new power relations within what Foucault calls governmentality. By employing the ECI, the Constitutional Court placed itself outside of established regimes of rationality and exclusion of imprisoned people, which was not an act of using sovereign power, but another

sophisticated strategy of modern governance where techniques of power are used to produce social truth. We analyze law as a practice of government aimed at directing human conduct, finding differences and particularities in the modes of its operationality whose analysis depends on the political structures of power relations in different periods. In the same manner, we observe STF - not according to its institutional nature or properties, but through its practices over time that are marked with the logic of governmentality that does not search only to impose law on men, but to dispose of things: “that is, of employing tactics rather than laws, and even of using laws themselves as tactics — to arrange things in such a way that, through a certain number of means, such-and-such ends may be achieved”[4].

For Foucault, power is not limited by law or state institutions - it is dispersed throughout society, forming different connections that can often seem accidental or particular. More importantly, subjects in power relations are not products of a hegemonic power, but they also constitute several counter-hegemonic discourses that are part of the particular discourse, which in our case is politico-legal and peripheral. From this it follows that “power does have a definite opposite: other forms of power”[5], which Foucault calls resistances and which we call “power potentiality”. One of the main consequences of this potentiality is to limit techniques and other strategies typical for governmentality by revealing their intertwinement and relevance for truth production which in our case is grounded, but not defined, in constitutional symbolism.

Our last argument is that by employing ECI for governing the prison system, STF framed its activity inside of what we call symbolic jurisprudence and that only by defining a new conceptual ground can we understand the potentiality of this form of symbolic power and its rationality. The ECI, as an intentional tactic, revealed this rationality as highly symbolic because it produces an effect contrary to that which is manifestly sought. This argumentation we build on the grounds of Marcelo Neves’ theory of symbolic constitutionalization. Just as the validity of a constitutional norm that prescribes human rights is paradoxically revealed in its violation, as Neves points out, in our understanding symbolic jurisprudence can also demonstrate a form of counter-power, as according to Heller[6], revealing the true power of the figure of prisoner. In the last part of this article, we will explore

4 FOUCAULT, 2000a, p. 211.

5 HELLER, 1996, P. 99.

6 HELLER, 1996.

the formation of the symbolic jurisprudence, which involves the exercise of power, and explore its ambivalence.

The precedents of the general repercussion and ADPF 347

Certain precedents that came into force after the introduction of the general repercussion system (Constitutional Amendment (EC) nº 45/2004), can help us to form a small overview that demonstrates a rising pattern of STF interventions in penitentiary matters. EC nº 45/2004 introduced a filter for processing extraordinary resources (REs) by the Constitutional Court, which becomes a requirement to demonstrate general repercussion, bringing the effects of the concrete constitutionality control closer to the abstract, and constituting a kind of *tertium genus* of the constitutional control.[7] Considering that it is in the abstract control of constitutionality that one can observe the greatest impact of decisions by the judiciary on political issues, the system of general repercussion, bringing the two forms of control closer together, amplifies the very political role of the Constitutional Court.

After the introduction of this procedural technique into the Brazilian legal system, the STF intervened directly in the prison system on at least four occasions. In August 2015 it recognized the possibility for the judiciary to demand from the national state and the states to realize necessary works in the prison establishments. At the beginning of the following year, STF held, establishing a thesis, that the public administration is responsible for a detainee's death within a prison, even in a case of omission, and is responsible for providing adequate compensation to the detainee's family (RE 841.526/RS -RG, Theme 592). In another appeal, RE 580.252/MS-RG (Theme 365), which was brought in front of the Constitutional Court in 2008, a rule was settled in the sense that the State is obliged to reimburse all damages, including moral, demonstrably caused to detainees as a

7 In Brazil, the constitutionality control system enshrined in the 1988 Constitution mixes diffuse control, originally adopted by the 1891 Constitution, and concentrated control through direct action of unconstitutionality by action (art. 102, item I, item "a"), by omission (art. 102, § 2) and by the declaratory action of constitutionality (art. 102, item I, item "a"). All of these actions are regulated by Federal Law No. 9.868/99 and through the allegation of non-compliance with a fundamental precept that is regulated by Law No. 9,882/99. The extraordinary appeal is one of the forms of diffuse control of constitutionality, but as a result of the adoption of the general repercussion system, both the Civil Procedure Code of 1973 and the current one, of 2015, started to establish several procedural mechanisms that bind the organs of the judiciary to the decisions rendered through this system, and the access to the Brazilian Constitutional Court becomes, at least in theory, more difficult. And as of a practical consequence, public administration also ends up following this new orientation.

result of the lack or insufficiency of the legal conditions of incarceration. Finally, in RE 641.320/RS-RG (Theme 423), judged in May 2016, the Constitutional Court granted identical requests to those that had been provisionally denied in ADPF 347 less than a year earlier, establishing a long rule that outlined a reference for the magistrates to observe the prison situation at the time of sentencing, in an attempt to dissuade them from the preferential application of the custodial sentence.

All these appeals were brought before the Constitutional Court prior to the consideration of the injunction in ADPF 347[8] whose judgement was concluded in September 2015, the same year when it was presented by the Socialism and Liberty Party (PSOL). Even taking into consideration the scope of the decisions that could be handed down with general repercussions (which binds all bodies of the judiciary and are effective against all), the STF admitted the merit analysis of the ADPF (that can also be seen as an instrument that integrates diffuse and concentrated constitutionality control[9]), before ruling in extraordinary resources allocated to this system. In addition, it is also considered pertinent to declare the ECI, a new juridical technique, imported from the Colombian constitutional court, to deal with what was identified as structural litigation (Report of the Judgement, p. 10). The plaintiff's immediate jurisprudential reference was the recorded decision of the case file of case T-153, which is part of a broader picture of increasing intervention by the Colombian constitutional court in its respective prison system[10].

The rapporteur of ADPF 347, Justice Marco Aurélio, acknowledged that necessary ECI requirements were present: massive violation of the fundamental rights of one group - the imprisoned population; actions and omissions that evidenced the inertia and incapacity of several agents of the federative entities (Union, States, Municipalities and Federal District) and the need to overcome them also by a plurality of actors. He also understood the framework of structural failure as the result of "systemic responsibility" of the public power, which in return is attributed to the lack of communication between the executive and legislative powers because the unconstitutional inertia and violation of fundamental precepts would not only result from the absence of laws but also from the lack

8 In addition to RE 580.252/MS-RG, RE 592.581/RS-RG and RE 641.320 were also filed to the Constitutional Court in 2008, and RE 592.581/RS-RG and RE 641.320/RS-RG in 2011, and RE 841.526/RS-RG in 2014.

9 In this sense, interpreting Law No. 9,882/99, which regulates the allegation of non-compliance with a fundamental precept, the STF ruled in ADPF 127.

10 HIGUERA and GOMES, 2019.

of adoption of administrative and budgetary measures. Moreover, he did not evade from blaming the judiciary, pointing out that 41% of the prison contingent was formed by prisoners in provisional custody who, at the end of the respective processes, were mostly acquitted or sentenced to alternative sentences, which reflects the reproduction of the culture of incarceration by judicial decisions. The STF, according to the Rapporteur, would be the only actor capable of "taking the other Powers out of inertia, catalyzing debates and new public policies, coordinating actions and monitoring the results"[11].

If the precedents of the general repercussion did not reach the levels of more chronic behaviour, the ECI could have been seen as the paroxysm of the prison situation in Brazil, to which the Constitutional Court responded by appealing to other two powers of the State that are responsible for the political decision-making process. In an attempt to exclude itself from the responsibility for the ECI, the position of STF revealed one paradox regarding the exceptional nature of ECI. As an instrument that should be used in extremely serious situations, ECI represents an interventionist tool, which was highlighted by Justice Gilmar Mendes. He defended that the ADPF, understood as a multifunctional action, by encompassing the cases that could very well give rise to an intervention could be understood as the evolution of the constitutional jurisprudence, and moreover, become an instrument of constitutionality control (included in the Constitution) to restore institutional normality in the situations of severe disturbance of the constitutional order[12]. The recognition of the ECI, in turn, also requires an exceptional situation - "an analog figure, but of the opposite meaning [de signo opuesto] of the classic exceptional figure of modern constitutionalism"[13], which would allow the exercise of a wider range of powers by the judiciary during a limited period. In other words, even in the face of the chronic violation of the prisoners' human rights, the situation was described as exceptional.

11 BRASIL. Supremo Tribunal Federal. Aguição de Descumprimento de Preceito Fundamental nº 347, Medida Cautelar. Report of the Judgement, 2015, p. 09-13.

12 Justice Gilmar Mendes defended the suitability of the ADPF as a possible evolution of judicial review, which could replace the representation of interventionist unconstitutionality, maintained in art. 34, item VII and art. 36, item. III, of the Constitution and heading towards obsolescence. At this point, it can be observed that Brazil adopts the federative form of the state and the intervention of the federal level in the subnational level (in the states and municipalities) is an exceptional possibility. Hence, despite topologically being distant from other forms of exception - the state of defence and state of siege, in the Constitution federal intervention also aims to restore or guarantee constitutional normality as a form of exceptionality.

13 GARAVITO, 2010, p. 439.

Despite its exceptional nature, the ECI should be also understood as a technique of jurisdiction deferred in time, which by expanding the participation of the judiciary in the cycle of public policies regarding the prison system would overcome the lack of fundamental rights institutionalization as provided in the Constitution, and guarantee the greater control over public policies effectiveness. But the requests accepted by the Constitutional Court resulted in being limited to determining the custody hearings by criminal judges, a requirement that is already part of the American Convention on Human Rights (Pact of San Jose, Costa Rica), which Brazil signed in 1992, and in which the reduction of the National Penitentiary Fund (FUNPEN) was avoided. Thus far, requests to draw concrete action plans to improve the implementation of public policies coming from both national and subnational levels have not been examined by the STF, which as a precautionary measure and ex officio has limited itself to ordering to the branch offices to forward information on their respective prison situations.

Furthermore, despite the urgent nature of the situation, the Rapporteur's vote, which was supported by the plenary, ended up invoking the need to implement institutional dialogues, which seems to be an unexpected deference by the Constitutional Court to the other powers at a time of necessary damage containment measures. Institutional dialogues, in theory, would allow the refinement of the theory of separation of powers to adapt to the complexities of current democracies to rule out the possibility that the last word within the control of constitutionality would always be given by the judiciary, preserving the principle of the supremacy of the Constitution[14]. But given the situation of a total calamity of the penitentiary system, the judiciary's decision to stop using coercion (eventually resorting to law enforcement techniques) and to impose, at least in an emergency way, obligations and limits to actions that violate fundamental rights by the states' agents, can be seen as at least unexpected, and to certain degree unreasonable.

Governmentality and law

Foucault's genealogy of power shows us how the relation between law and the State surges in the history of the state as the main indicator for the transformation. However, to overcome sovereignty, it is necessary to deconstruct and decompose its relationship to

14 CLEVE, 2015.

the law. In the 17th century in the development of “the administrative apparatus of the territorial monarchies”[15] and in the increased interest in what can be named a “knowledge of the State”, or what Foucault calls “the science of the State”, which at that time was basically summarised in different statistics or techniques that states could use to govern in their territory, begins the recovering of the “art of government”. For the philosopher this essentially meant “a renewed version of the theory of sovereignty”[16] that found a new base within the theories of contract and government, rising from statism and distancing its bases from the law: “With government, it is a question not of imposing law on men but of disposing of things: that is, of employing tactics rather than laws, and even of using laws themselves as tactics”[17]. Amidst a further increase in the size of the population in the 18th century, the art of government became a political science, transforming sovereignty and power into new and more innovative techniques and strategies of power that Foucault will analyze under the term “governmentality”. However, power relations remained confined to sovereignty and discipline, and it is possible to portray them only by placing them in a triangle whose vertices are sovereignty, discipline and governance, which is most apparent in the theory of crime. Thus, no historical or juridical moment transformed sovereignty into discipline or discipline into an impersonal form of control, which makes their analyses even more complex and interdisciplinary.

“To cut off the king’s head” for Foucault means detaching the problem of sovereignty from political philosophy. Instead of focusing its investigation on critique and reflections about sovereignty, political philosophy should focus on the relation between truth and power, more specifically, on the deconstruction of regimes of truth to understand how power manifests itself. These regimes are marked by political, economic, intellectual and ideological production of truth, a process that is marked by power relations. In the same way, power for Foucault cannot be identified with the state sovereignty, the form of law, or the overall unity of domination[18]. Power is always a relational concept that does not spring from defined places that we could call sources of power. Because it can result from and derive from any relation, power forms dense networks, a dense tissue that crosses and

15 FOUCAULT, 2000a, p. 212.

16 Foucault, 2000a, p. 214.

17 Foucault, 2000a, p. 211.

18 FOUCAULT, 1978, p. 92.

wedges what we call reality. It is a diffuse, always and already movable web of strategically and rationally based relations between bodies that enable social subjects to react to the action of another subject and that create change. Finally, "power relations change (…) as a result of the intentional exercise of power by specific and historically situated individuals and groups"[19].

When it comes to detaching sovereignty from the law, Foucault's philosophy offers us with critical and research methodology, raising important historical and logical arguments, but its focus is not, at any point, in describing or finding something as the 'nature' of law. His method focuses on understanding the relevant changes in the relation between law and modern forms of power (discipline and government) to reveal the changing character of law and the lack of philosophy of difference in the Anglo-American and Roman legal tradition, as well as the shortcomings in the understanding of the power of the liberal position on law[20]. That is why we should avoid falling into a trap of equalising the juridical power with the legal power in Foucault's philosophy, keeping in mind that with the former we will fail in grasping the whole reality of power relations, and that law is not always juridical nor that the juridical power always manifests itself as legal[21].

The need for this distinction we can also found in our empirical example. In their verdict, the STF justices symbolically placed the responsibility for the state of complete legal exclusion of the imprisoned population into politics, taking it away from the Brazilian judiciary. A supposed need for intervention of law into what is traditionally presented as a field of politics, De Giorgi and Vasconcelos see as a product of an "institutional frustration, an impotence to act concerning what has been qualified as a state of affairs"[22]. The relation between law and sovereignty, in this case, is grasped in a specific political and historical frame where different power agents were engaged differently, following their rationality and using the law as a set of rules according to its particular interests. That is why, in addition to asserting its right to intervene, the STF symbolically reaffirmed its innocence in the decades-long illegality and inhumanity, carefully taking away the attention from the existing jurisprudence intervention into the matter, and placing it into structural problems, where it

19 HELLER, 1996, p. 83.

20 TADROS, 1998, p. 77.

21 Tadros (1998) tracks the problem of equalizing these two terms of power in the work "Foucault and the Law" by Hunt and Wickham where law becomes the same as a rule and sovereignty.

22 GIORGI and VASCONCELOS, 2018, p. 485.

can act as an observer and where the politics is in its very centre. Moreover, it failed to offer a plausible justification for the incorporation of the ECI into the Brazilian legal system, especially considering the ineffective measures adopted in the injunction. The most important issue, what is referred to as the "culture of mass incarceration"[23], has not been tackled.

Finally, moving towards governmentality, in our case it is possible to explore parts of the logic behind power regimes that produce systems of rationalization that are knowable and, therefore, governable. Here we use the word 'rationalization' having three points in mind: first, normalization of the exclusion of the imprisoned part of the population is just one activity inside of the process of rationalization, and it is defined at the very end of this process; second, via processes of rationalization prisons, become the goal for themselves, regardless of their actual effectiveness, and third, practices of exclusion and violence against the imprisoned population cannot exist and persist without the regime of rationality where the power is organized operatively, inspired by different calculations to achieve its goals. As a product of such rationalization, the ECI cannot externally relate to the processes of exclusion, since it is a product, a tool that provides for the new place of interaction between legal and political communication, framed by the margins that displace the State with its strict borders of power, building new forms of intervention that define "a shift from laws that apply to juridical subjects to security measures that intervene in a

23 According to the National Penitentiary Department (DEPEN), an agency of the Ministry of Justice and Public Security responsible for data collection regarding the prison system (Available at: https://www.gov.br/depen/pt-br/sisdepen), prisoners without conviction at the time of the ECI declaration amounted to more than 40% of the entire imprisoned population. Although this number has dropped since then, the improvement cannot be directly attributed to the decision in ADPF 347. One of the important variables that may have contributed to the reduction of provisional arrests, is the change in the STF's understanding of when the conviction in ADCs 43, 44 and 54 is considered definitive. Another variable is the release of funds from FUNPEN, which led to the release of funds to the states that were used for the creation of new prisons with increased capacity, as shown by data from the Penitentiary Department (DEPEN), an agency linked to the Ministry of Justice and Public Security (for an interesting analysis of this data see Carmona (2019), p. 97 et seq., available at: https://repositorio.uniceub.br/jspui/bitstream/prefix/14488/1/61400613.pdf). Hence, although the decision in ADPF 347 caused a release of funds from FUNPEN without commitment, which with time decreased (see Rocha (2019), p. 61 et seq.), the reduction in the number of pre-trial detainees in the years that followed the precautionary decision in ADPF 347 did not necessarily result from the implementation of custody hearings or a change in the posture of magistrates to apply alternative sentences, but from the increased prison system capacity. According to the last survey carried out by DEPEN in 2021, there are 670,714 prisoners in Brazil from which, 196,830 (29.35%) are provisional prisoners (see https://dados.mj.gov.br/dataset/infopen-levantamento-nacional-de-informacoes-penitenciarias). According to the World Prison Brief (WPF) website, an online database linked to the Institute for Crime & Justice Policy Research at Birbeck, University of London, Brazil continues to hold the third largest population of prisoners in the world (https://www.prisonstudies.org/highest-to-lowest/prison-population-total/trackback?field_region_taxonomy_tid=All Last accessed September 1, 2022).

milieu"[24]. The ECI emerges as one of the techniques of a power regime, and in its declaration, we can observe parts of the discourse that are used to justify principles and reasons found in its rationalization processes that are possible to observe on the global scale, in both central and peripheral social systems[25].

Resistance and power

For Foucault, one of the important wheels of power that emerged in the 18th century was penal institutions. To understand what the penal system really is, we need to put prison as an institution, as a social phenomenon, at the centre of our investigation. More broadly, Foucalt will also question what is a crime, not to understand certain derived juridical rationality but to interrogate law itself, to investigate what is law. His approach demonstrates that to think about existing social systems or phenomena, we first need to find its border, and limit points, which he calls "borderline experiences" that put into question what is normally and ordinarily considered acceptable. Madness and crime are one of those points and both are related to the "experience of death", to the "absolute point of death", and more importantly, how certain systems relate to those points.

The above-mentioned, the "culture of mass imprisonment" in Brazil owes its name to a very high number of people who spend months, even years, in overcrowded facilities without even being charged, completely blurring the little of what is left of the original idea of the penitentiary as a rehabilitation system. To understand better the way power produces this situation, we need to examine the relation of the subject and power. According to Foucault, in governmentality power is not an objectifying, but subjectifying force (Foucault, 1982). In other words, power does not aim to destroy the subject, but to change it, or rather, to constitute it according to its specific goals and standards, and what is more importantly, to include the subject itself in this process, making the subject active in his governing process. Furthermore, states "as a modern matrix of individualization" in governmentality is

24 MCLOUGHLIN, 2014, p. 689.

25 "Related to governmentality, law provides 'techniques of power' because its structures of meaning and practices of discourse grant the capacity to objectify and thus 'govern' the substance of what we believe to be 'just' conduct on a global scale." See Rajkovic, N., (2010), 'Global law' and governmentality: Reconceptualizing the 'rule of law' as rule 'through' law for a good analysis of the symbolic and productive capacity of global law and its relation to the concept of 'rule of law'.

transformed into a new form of pastoral power in which the active subject is affirmed in the form of its submission[26].

Finding places, ruptures, outside of the systems of control and discipline, to question and define them, revealed to Foucault that there is no Power with a capital "p". Power is everywhere “but that does not mean that power is equally distributed – it just means that absolute power (economic, political, cultural, etc.) is a structural and practical impossibility”[27]. This statement does not imply that power is not reversible and that subjects are mere objects. On the contrary, what Foucault tries to tell us is that they do not derive from a hegemonic power, but through different counter-hegemonic discourses that are part of wider historical and particular discourses, and in our case, peripherals. Prisons that emerged as disciplinary institutions are witnesses to historical events that took place in very similar ways in both peripheral and central modernity. They are based on intentional institutional decisions, motivated by economic and controlling goals, but without providing any improvement, and instead of reforming itself, the prison system “served (...) as a mechanism of elimination”, rationalizing its existence “in terms of new ends” [28] that were created intentionally.

More broadly, this argument “allows us to analyze the crime control field as a field of power relations and subjectification and draws attention to the impact of new knowledge and technologies upon the power relations between governmental actors as well as between the rulers and the ruled”[29]. If we consider crime to be a social behaviour, rather than an individual act, the fight against crime in Brazil, marked by the use of different exceptional measures, becomes the main characteristic of its governmentality constituted by laws, institutional practices and forms of expertise that support different interest groups. This apparatus has evolved into a system that can be known and governed, transforming criminal justice into a system. Thus, “the interweaving of these different ways of 'governing crime' produces an intricate web of policies and practices that cannot be reduced to a single formula”[30]. The ECI enables and produces only a part of the capillarity of this system, of the

26 FOUCAULT, 1982, p. 783.

27 HELLER, 1996, p. 86.

28 FOUCAULT, 2000c, p. 386.

29 GARLAND, 1997, p. 188.

30 GARLAND, 1997, p. 188.

regime of power that governs the prison system, which is part of the broader scope of crime management in Brazil.

Although the mechanism of power cannot be controlled by individuals, “where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority about power”[31]. With the plurality of power networks, there is a plurality of particular resistances, because each of them needs to be understood as a specific case. They can only relate to the strategies of power, but since resistance can produce social change, it cannot be seen as anything other than power, or “counter-power” to use John Heller’s term, which we can also describe as a potentiality of new forms of power. Their “irregular mode” and “heterogeneous principles" through which they can create different “mobile and transitory points of resistance”[32], give them a specific type of potentiality to create a social action that can bring about certain social change. Finally, and most importantly, understood through the theory of power, resistance allows subjects to reveal, and therefore limit the regimes of power and the rationality of governmentality.

From the lower levels of particular resistances, which in the penitentiary system can be attributed to prisoners, civil society and academic groups, and other institutional reactions “the points, knots, or focuses of resistance are spread over time and space at varying densities, at times mobilizing groups or individuals in a definitive way, inflaming certain points of the body, certain moments in life, certain types of behaviour”[33]that always and everywhere have the potential to constrain and tame governmentality. Thus, “resistance is not, for Foucault, a metaphysical principle devoid of empirical utility”[34], but it is what keeps social mechanisms of power formation free, disabling absolute hegemonic power and enabling counter-hegemonic subject positions. In other words, resistance is a necessary condition in subject formation.

For Milović (2021), resistance as the most intimidating relationship between subject and power is linked to the right to the body, seen in a broader aspect as the opening towards the new subjectivity. He points out that following Nietzsche, Foucault observes the transition from submissive bodies to the submission of bodies. This argument is also related

31 FOUCAULT, 1978, p. 95.

32 FOUCAULT, 1978, p. 96.

33 FOUCAULT, 1978, p. 96.

34 HELLER, 1996, p. 102.

to Foucault's idea of self-care, which is always linked to the State and is a social question. At this point, all interrogations of the status of the individual can be understood as "struggles against the 'government of individualization'"[35]which, in turn, can be defined only as different types of resistances and denial of dominant power rationality, and the knowledge behind it. These struggles are also transversal, focused on the effects of power as such, and not on the concept or idea of power, and an immediate enemy, with no tendency to provide solutions for the future. But, in their immediacy and originality, they manage to limit the governmentality and form political subjects, as opposed to governed subjects.

Symbolic jurisprudence and resistance

Related to our analysis, the constant creation and framing of legal and political positions of the subjects of power within the prison system, that is perhaps best articulated in the ECI, reveals what we call symbolic jurisprudence. As explained above, there is an important paradox in Foucault's understanding of power as not subjective, but intentional force. Since it does not come from any sovereign, a "headquarters of power", a desubjectivisiation of power entails a possibility of unintentional consequences, even when the power is practised intentionally. In other words, "this local intentionality results in an aggregate set of *sui generis* power structures that are the unintentional effects of this individual action" (Haugaard, 2022, 345-346). Strategic usage of ECI by the Brazilian judiciary, as an institution, was intentionally searching to promote structural changes in the prison system. All procedural rules were met and STF acted in a counter-majoritarian way, but the ECI application did not result in a change in the field of forces that govern the prison system. By penetrating the logic of unintentional institutional effects, which are always followed by the form of "counter-power" or resistances, we can create a theoretical basis in which the ECI is not only recognized as an internal part of the regime of power but also as a tactic that reveals a symbolism deeply rooted in the functioning of the Brazilian judiciary. In fact, in the case of the management of the prison system, certain symbolism has become a central point of both political and legal discourses and practices.

The "symbolism" in legal studies is correlated to the legal effectiveness. For a law to be considered effective, it is necessary to take into account its social validity, which

35 FOUCAULT, 1982, p. 781.

is verified through the congruent generalization of normative expectations[36]. However, according to Neves, the lack of normative effectiveness and social force are not enough to qualify a legislation as symbolic. Legislation is considered symbolic when its indirect effects, which can generate confirmation of social values or function as an alibi, or even as a dilatory commitment, are more important than those manifested[37]. In the context of a constitution, this argument demonstrates that the validity of constitutional norms does not only result from constituent processes and constitutional reforms but also from the constitutional implementation that involves the text and constitutional reality in a reciprocal relationship. If this condition is not met, we can talk about symbolic constitutionalization[38]. Moreover, a negative definition of symbolic constitutionalization (as lack or absence), can be linked to a positive one (as excess) that becomes evident when constitutional activity and language play a political-ideological role insofar as the constitutional model would only be achievable under different social conditions[39]. In summary, these two aspects of symbolic constitutionalization, the positive and the negative, are related to the constitutional ineffectiveness, which may serve to certain political and social goals different from the ones that are officially proclaimed[40]. That is why symbolic constitutionalization is a broader phenomenon than symbolic legislation because it reaches a greater social, temporal and material scope[41].

Using this approach, we believe it is possible to define ECI as a part of the framework of symbolic constitutionalization, as one of the ways of implementing the constitutional text. According to Neves, constitutional norms also become effective through concrete decisions, which serve as a filter for divergent and contradictory expectations with the proposed constitutional text[42]. In this way, the ECI indicates that not only the constitutional text can be endowed with symbolic effectiveness in the sense adopted by Neves, but also the realization of certain laws through judicial decisions that make up the

36 NEVES, 2018, p. 52.

37 NEVES, 2018, p. 53-54.

38 NEVES, 2018, p. 83ff.

39 NEVES, 2018, p. 98.

40 KLINK, 2014.

41 NEVES, 2018, p. 99.

42 NEVES, 2018, p. 90.

jurisprudential framework. The term symbolic judicialization, coined by Walber Carneiro (2013), is used to insert the increasing judicial interventions in the field of public policies, which results from the understanding of jurisdiction as a method applied to the constitutional text, in a semantic perspective, disregarding the complex relationships established between the legal system and society. Nevertheless, the way the constitutional text was applied in the declaration of the ECI can be seen also as a strategy aimed at preserving the lack of normativity of the symbolic constitution.

Judicial interventions through a discourse of protection of human rights in what in principle is defined as an area of politics are also not exceptional. Brazilian Constitutional Court has been the subject of several analyses[43] that highlight its activity as proper to a political actor. Within the interventionist framework, the ECI can also reveal the mechanism described by De Giorgi as "legitimation of alterity by the systems"[44]. Human rights discourse might be applied as an interventionist juridical strategy that ultimately legitimizes the exclusion of those who have never been integrated into the system of human rights in the first place, whether legally or politically, of those who form the surplus of alterity. In general, when it comes to the effectiveness of many human rights, certain symbolism is almost inevitable. However, ECI illustrates a situation through political arguments, but using legal rationality, and distancing the juridical branch from the human rights project (including the constitutional project as well), but still offering to take over a main role in "fixing" the exceptional situation.

At this point, Foucault's argument can be placed in a dialogue with the system theory perspective adopted by Neves and Carneiro. The ECI is an example of how power is exercised in modern society. It is a mechanism that belongs to "a new form of pastoral power"[45], and as one of the justices indicated[46], the activity of STF also needs to be

43 See, for example, Maciel and Koerner (2022) "Meanings of the judicialization of politics: two analyses"; Matthew Taylor (2007) "The Judiciary and Public Policies in Brazil"; Diana Kapiszewski (2010) "How courts work: institutions, culture, and the Brazilian Supremo Tribunal"; Thammy Progrebinschi (2011) "Judicialization or Representation: Politics, Law and Democracy in Brazil"; Andrei Koerner (2013) "Judicial activism?: Constitutional and political jurisprudence in the post-88 STF"; Ribeiro and Argueles (2019) "Contexts of the judicialization of politics: new elements for a theoretical map".

44 DE GIORGI 2017, p. 247.

45 FOUCAULT, 1982, p. 783.

46 Justice Edson Fachin, when analyzing the injunction, postulated in his vote that with *fumus boni iuris* and *periculum in mora* that authorizes it, it would be up to the judiciary to play a role of a "symbolic, pedagogical character and recognition of the inadequate protection of fundamental rights" (Justice Edson Fachin Voting Report, p. 65).

understood through its symbolic and pedagogical role that it built regarding human rights. Faced with the violation of fundamental rights, the judiciary intervenes to restore its strength, establishing a relationship of power that is also one of “affection” and, therefore, of government. The exceptional situation in which the prisoners would find themselves, and which would justify the intervention of the judiciary, in the way described above, through the formation of jurisprudential precedents becomes a technique of governmentality that, in turn, has a symbolic function to reaffirm the exclusion of subjects who will remain in a situation of what Neves will call a “sub-integration”[47].

Conclusion

From a legal, sociological, moral, political or any other point of analysis, the situation of the imprisoned population in Brazil has become the obvious expression of political and legal irrationality that spills over the frames of any civilized society and reaches the point of banality. The banality moves from the level of justification and flawed definitions to the reconciliation in what can be called the “culture of mass incarceration”, which is disabling opportunities to discover its rationality and underlying power relations. The emperor is naked - the fact without the form, without the content. However, as Foucault points out, the fact that something is banal does not exclude it from reality. More importantly, to truly comprehend, and not just accept it, we need to emerge onto the path of examining and defining different banal facts, connecting them to specific problems of a given social reality. Likewise, taking into account a piece of the supposed rationality of the Brazilian prison system, the broader objective of this article was to offer an analytical approach to the connection between this banality and the ECI as its specific consequence.

In the complex problematic regarding the Brazilian prison system, the law is just one of the tactics whose role becomes more apparent when STF transferred the problem from law to politics, promoting a discourse of self-exemption from a conflict that is produced in the very operationality of law, in what De Giorgi and Vasconcelos call state of diffuse illegality[48]. The main question for this paper was to deconstruct this mode of legal functioning

47 NEVES, 2018, p. 184; In Neves' theory, the lack of functional differentiation in peripheral modernity generates the sub-integration of some and the over-integration of others in the various social subsystems. This situation results from a political practice and a social context that allow a restricted and exclusionary implementation of the Constitution.

48 DE GIORGI and DE PAIVA VASCONCELOS, 2018, p.490.

in the complex power regimes, and even more challenging, to understand the position of the subject placed in the centre of different power mechanisms, the figure of the prisoner.

The ECI does not oppose decisions from the political sphere and does not occupy their place. It rather mimics a form of rationality that organizes and arranges things. It is the visible part of a process that individualizes, but also institutionalizes how a collectivity should be treated (or conducted). The symbolic aspect of the ECI does not result from its ineffectiveness in changing the situation, but from the use of the law and the Constitution to productively govern the substance of what we believe to be "fair" conduct on a global scale. The exercise of power by the STF reflects the political needs in a given social context that were consciously recognized. But it also aims at and delimits the substance of what is believed to be the fundamental rights of prisoners: indemnities, reforms of existing facilities, financial resources, and building new prison facilities. The discussion about freedom, in turn, is reduced to an appeal to magistrates to avoid or reduce the use of such punishment that deprives the prisoners of what is legally defined as their fundamental rights.

Using the arguments from the above framed dogmatic analyses, we can conclude that on the one hand, the ECI allowed more than just annulling an unconstitutional law, approved by the majority in the legislative power, or overcoming an unconstitutional legislative omission and, in this way, also circumventing the minority representativeness deficit. On the other hand, it is not just a technique that allows the judiciary to overcome the lack of concrete institutionalisation of fundamental rights provided for in the Constitution, coordinating the formulation and implementation of public policies. More importantly, and as a form of subtle engineering, ECI reveals the ultimate path of truth production that Foucault understands not as "the production of true utterances but the establishment of domains in which the practice of true and false can be made at once ordered and pertinent"[49].

Mass incarceration is a by-product of this technology of government. It is the negative effect of symbolic jurisprudence, which is not intentional, but which is institutionally and socially regularised and produced by the non-subjective articulation of different individual and group tactics[50]. The positive symbolic force of the ECI jurisprudence is to bring to light the existence of prisoners as social subjects. Power relations are, in general, unknown, because they are widespread in the social fabric, but the strategic use of ECI

49 FOUCAULT, 2000b, p. 230.

50 HELLER, 1996, pp. 87-88.

gives visibility to some of these relations, most notably by revealing resistance as a product of constructed power relations. Prisoners resist power regimes and assert themselves as free subjects - a *sine qua non* condition for any power relationship - who have a capacity to limit governmentality - a reduced capacity, it is true, but that can work to relocate the condemned to a place other than one of omission and "sub-integration".

Only in this sense can we agree with De Giorgi and Vasconcelos for whom peripheries offer resistance to modernity[51], but without losing sight of the fact that resistance is not the result of a specific way of exercising power in the peripheries, but part of the counter-hegemonic discourses produced in power relations, as understood within Foucault's capillary and evolutionary theory of power that allows the return to the subject and power relations, and not to the power itself, thus contributing to describe part of a certain symbolism and its potentiality of power.

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51 DE GIORGI and DE PAIVA VASCONCELOS, 2018, p.499.

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