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# The selectivity of the Brazilian penal system[1]

*The selectivity of the Brazilian penal system[two]*

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**Summary**

The present work aims to analyze the problem of the structural selectivity of the Brazilian penal system, as an instrument of social control, since the principle of equality does not seem to be applied, going against the official discourse that tends to present Criminal Law with an isonomic feature, punishing equally all those who violate incriminating precepts to become selective, repressive, stigmatizing and with strong hygienist traits for a certain social layer. This article seeks to unravel this selectivity in its*modus operandi*, when trying to understand the selective functioning of the modern Brazilian penal system, highlighting the points in which the state repressive system, analyzing current examples of the differentiation of State action in the lower social classes to the detriment of the higher ones and when functioning in this way, shows- inefficient from several points of view.

**Key words**: Penal system, selectivity, justice

**Abstract**

The present work aims to analyze the problem of the structural selectivity of the Brazilian penal system, as an instrument of social control, since the principle of isonomy does not seem to be applied, going against the official discourse that tends to present Criminal Law with an isonomic feature, equally punishing all those who violate incriminating precepts to become selective, repressive, stigmatizing and with strong hygienist traits for a certain social layer. This article seeks to unravel this selectivity in its modus operandi, by trying to understand the selective functioning of the modern Brazilian penal system, highlighting the points in which the repressive state system, analyzing current examples of the differentiation of State action in the lower social classes to the detriment of the higher levels and, when functioning in this way, it proves to be inefficient in several points of view.

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## 1. Introduction

According to the Brazilian constitution of 1988, in the caput of its article 5, equal treatment before the law guarantees any citizen the right to life and freedom. In other words, every human being is equal before the law, regardless of their sex, social class or ethnicity. The Penal system is what ensures compliance with this maxim to the individual, whose objective is to admonish the offender in an indiscriminate manner.

This is not, however, what happens in the Brazilian judicial reality. Just a brief analysis of how this system works and we can see a lot of disputes about these issues, once we realize how the system does not seem to act indiscriminately when capturing those who commit some type of crime. In practice, what seems to happen is a differentiation of the state when treating in a more or less



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strict the individual who committed a crime, differentiating him by his location - and obviously his class - as well as the assessment of his phenotype so that he then has a tendency to commit crimes. (Oliveira, 2020) The debate on the issue of selectivity in the actions of the Brazilian penal system; of its failure to truly apply the law of equality referred to in the constitution and how this selectivity interferes in several other problematic points of a society is sought through this article by analyzing articles by scholars in the area seeking to understand, regarding punitive logic, this selectivity evidenced in this system.

## two. Penal System

The state has the status of peacemaker of society and, therefore, only it has the right to use violence supported by the use of coercive action in order to guarantee the well-being and coexistence of all, which then depends on a " group of institutions that, according to relevant legal rules, are responsible for carrying out criminal law, which we call the criminal system". (NILO BATISTA 1990).

For Zaffaroni (2007, p. 65-66):

> We call institutionalized punitive social control 'penal system', which in practice ranges from the moment a suspected crime is detected or supposed to be detected until a sentence is imposed and executed, presupposing a normative activity that creates the law that institutionalizes the procedure, the actions of employees and defines the cases and conditions for this action. This is the general idea of the "penal system" in a limited sense, encompassing the activity of the legislature, the public, the police, judges and officials, and criminal enforcement.

What are called "criminally reprehensible conduct" seem to permeate human beings, responding in this way with acts of violence, small or large, even though these are not approved by society and make their coexistence difficult. Laws and conduct were then created as necessary for society to practice good coexistence.

Culpability is understood as "a judgment of disapproval of a certain person for the practice of a certain conduct" (CAPEZ, 2003, p. 530) and in this sense, culpability lies in the act itself and not in the subject; the act should be blamed, not the person. The state then – should – blame the act without looking at who committed it, that is: judging the action committed and not the person who committed it. However, this seems to be far from the Brazilian criminal reality.

## 3.Selectivity of the Penal System

The Penal system works differently, as stated by Nilo Batista (2007, p.25) and is divided into three segments: Police, Judicial and Executive. And the institutions linked to these processes that work primarily with the police, as they are responsible for investigating crimes; the prosecutor who represents public justice, together with the judge who represents law enforcement and, finally, the penitentiary institution. Not necessarily following a chronological order, as they are independent of each other and are part of the system, as explained by Zaffaroni and Pierangeli when stating that "the judiciary can control the execution, the executive is in charge of custody of the prisoner during the process , the police officer takes care of the transfers of condemned prisoners (...)" (2011, p. 70-71).

Understanding the process, it is important to emphasize here that the Brazilian constitution understands that the Democratic Rule of Law encompasses the dignity of the human person as a crucial foundation for the entire legal system applied. It is up to the constitution, within the criminal sphere, to guarantee this legitimized right, supporting and – limiting – the power of the State by exercising the function of controlling and socially useful coexistence (ANDRADE, 1997).

However, in Brazil, in fact, what is perceived is the great inconnection between the criminal policy constituted in its practice, and the constitutional guidelines that understand the penal code, thus making it possible to debate the selectivity of the Brazilian penal system.

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"Everyone is equal before the law, without distinction of any kind [...]". Only this information contained in art. 5th of the Federal Constitution can be a trigger for the debate and analysis of the principle of equality within criminal law.

It is necessary to explain here how selective the penal system is. Even though it is based on a fair and equitable guideline, just look at the places where most arrests and police operations are carried out; the fatal victims and where the stray bullets are destined. (Oliveira, 2020) The difference in judicial treatment is clear

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and here we point out cases like Rafael Braga[5]illustrating that it happens every day that there is no equal treatment required by law and how there is unequal oppression of one social class over another. It is not difficult to see the ruling class and its purchasing power controlling this system defending its own interests. Understanding then that the privilege of the speed of the criminal system, as well as the dignified treatment provided for by law, is held and exclusive to this social class, making it non-partial, non-exempt and much less intended for everyone. (BARATTA*apud*ANDRADE, 1997, p. 282)

What seems to exist at the time of criminalization is a pre-judgment based on what the person is and not what they did. In other words, the system realizes that if he is poor, if he is black, if he has the archetype of criminal - widely spread and naturalized in society as the black man - they help it to judge him in advance and therefore the principle of So repeated isonomy is not applied (Zaffaroni, 2007) Crime is in the social status to which the citizen is seen and the criminal system has a clear preference between one and the other. Even those who commit crimes - as or more heinous - than those from a lower social class, are not judged or condemned by the system as those from a lower class are (Andrade,1997)

When greater "tolerance" is found on the part of the State for some crimes in relation to some people, this perception is clear. Theft seems to be fervently condemned if identified with crime in the low-income classes of society, but it does not seem to happen when there is "white-collar crime" (DIAS; ANDRADE, 1984, p. 47). This expression was coined to refer to crimes committed by people of high social class. This benevolence is even seen in the disclosure of the fact when the crime is committed by people from the dominant classes.

In this way, we can say that the level of penalty applied falls on people of low social class and this phenomenon we call*labeling approach*or labeling theory.

### 3.1 Labeling Approach

O*labeling approach*for Hassemer (2005), it means a focus on social labeling, and its central thesis is the idea of*"criminality is a label*, which is applied by the police, the public prosecutor's office and the criminal court, by formal instances of social control" (HASSEMER, 2005, p. 101-102, emphasis added). In this sense, the theory explains the fact that some individuals are classified as criminals - primarily those from a lower social class - they are "labeled" as criminals simply because they fit this pattern, automatically implying the ability to act illicitly and this attribution depends a judge's interpretation. Hassemer (2005).

Examples such as facial recognition through photos when it is done by simply presenting, to the victim or witness, images of the suspect previously selected from police albums or social networks – a common practice in police stations indicated by article 226 of the CPP[6], which determines that the suspect – whenever possible – be placed next to other people with some similarity, so that the victim or witness can point him out. It was understood, in the Superior Court of Justice and other courts, that the legal provision brought recommendations for the authorities, and not an indispensable rule, thus becoming extremely problematic, as assessed by Minister Schietti (2022) in the STJ's special news edition.

The Jornal Nacional report from May 2022 highlights three men who were victims of confusion when they were arrested by facial recognition, when they were named as suspects of crimes committed by other people, and the only evidence presented by the Civil Police against them was a Photograph. Paulo Renato Soares' report highlights the fact that "they managed to prove their innocence and leave prison, but they are far from feeling free"

The social label is then placed on these subjects and they are seen as criminals and are held responsible as criminals. It doesn't just mean that poor people and black people are criminals, but because they have labeled it that way and creating a social stigmatization that seems to control the entire system. Andrade (1997, p. 205). It is believed that the poor are marginal and this is internalized in society as common sense, the concentration then of policing in the outskirts is greater and clearly the treatment and conduct is differentiated, as if it were practically impossible for there to be criminalization of the upper classes.

Statistically, 95% of the prison population is poor. However, 5% of "slum dwellers" in São Paulo, according to research by Pimentel (1983), are actually offenders. In this sense, he states that "(...) Poverty is not a cause of crime, because, if it were, all poor people would commit crimes, which, fortunately, is not the case.

5 Brazilian recyclable collector recognized as the only person convicted in circumstances related to protests in Brazil sil in 2013. Arrested in police raids without witnesses, with a cleaning product and on suspicion of forged arrests, according to the young man's defense.

6 Criminal Procedure Code.



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it happens. But, certainly, poverty is a fact of crime(...)" (Pimentel, 1983 p. 17) proving a point that has been talked about for a long time in this work: the theory of equality cannot be applied since it exists, in practices labeling behavior.

Even with examples and examples of the social condition being a victim of racism and prejudice, being seen and pointed out every day, the Penal system seems to have the right destiny when it comes to blaming crimes. A social preference that makes the system prefer to put up with one sector and ignore others, thus making the law flawed since it seems that only one group is the preferential victim of the actions of a system.

**4.The Qualitative and Quantitative power of the Penal System**

The impossibility of predicting a real estimate of the degree of criminalization, since the concept seems to be manipulated by the Penal system itself, causes an entire society to think of the configuration as being real that crime is found in the lowest layer of society and increases considerably the judgment and punitive actions in the vulnerable sectors of this same society. (ZAFFARONI, 199)

This demand ends up demanding selectivity from the system – theoretically neutral –. It is preferable, for possible measures to be taken, for crimes committed by certain people to the detriment of others, obviously cutting across social class. The very choice of which case is on the agenda appears to be selective to comply with a system prior to the Penalty system itself, but it is known that choosing the cases to be investigated and judged violates the basic principle suggested by the penal system: the equality so demanded.

The justification given by the State is the large number of processes in progress and the lack of human resources to deal with cases quickly. Notoriously, the number of crimes included in the criminal code are thousands and many are lost within the system itself since the Brazilian population seems to fall into several daily infractions that go unnoticed by the system simply because the offenders are not charged. (PIMENTEL, 1983)

If all crimes committed – robberies, adulteries, fraud, bribes, falsehoods, rapes, abortions, injuries, threats, assaults, etc. - were, in fact, criminalized, "there would be practically no individual in our society who was not, on several occasions, criminalized" (ZAFFARONI, 1991, p. 26). The percentage of infractions investigated and punished are on a scale of less than 10% and in itself is selective as it is chosen – probably based on the scale already presented – which infraction is administered and which is not. (BARATTA apud ANDRADE, 1997)

This quantitative value still respects a qualitative order of racial and social character: The number of poor and black criminals is much greater than that of white and rich people. A survey carried out by the Brazilian Public Security Forum, through the 14th Brazilian Public Security Yearbook published in 2020 with data from 2019, showed that in 15 years, the proportion of black people in the prison system grew by 14%, while that of white people decreased 19%. out of every three prisoners, two are black. Of the 657.8 thousand prisoners for whom color/race information is available, 438.7 thousand are black (66.7%).

This citizen offender fits the profile that is easy to capture and refer to criminal proceedings, it becomes easier to capture it, forward it and speed up the criminal process. Sanitization is clearly perceived when the system speeds up the process of "black criminals" to the detriment of large corporate criminals who do not correspond to the stereotype of criminals in our society. (ANDRADE, 1997).

**Final considerations**

It is clear then how the selectivity of the Brazilian penal system ends up intensifying the inequality that exists in society. It intensifies, corroborates and propagates inequality in Brazil. The legitimacy of the principle of Equality, in view of situations in which the labeling theory is applied, it appears to be a fallacy repeated by a dominant social class that needs to remain in power.

The State, together with the Penal System, should guarantee democracy and citizen rights and not manipulate these, violating principles that the State insists on asserting that exists: equality. The propagation of the existence of a concept that is clearly not explained ends up greatly disrupting the system itself.

Effective action for real conclusive changes within the Penal system needs to be passed through the sieve of a new system that avoids the marginalization of poor and black people. Points common and sensitive to the whole of society, such as education, employment, health and safety, must be starting points for



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the reduction in crime as well as a social change in the stereotype of crime that falls on Afro-descendant, poor and peripheral people. In addition to criminalizing poverty, it infringes on the human rights of the socially vulnerable and keeps the socially dominant unpunished. The system cannot, however it appears to be discriminatory and used to corroborate the wrong image that individuals from the low-income class are criminals.

Not just demand more from society, from governments and enforce the will of knowledgeable citizens. A radical change in society is necessary from the point where it is necessary to build this society in an active and not passive way; The state is democratic by law and must act as such. It is then necessary to act, in society, to minimize the prejudice that has been embedded in it that marginalized citizens have a false stereotype and should not influence the State's decisions.

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