TRANSFER OF SENTENCED PEOPLE (TSP) AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS: AN ANALYSIS OF THE PRISON OF FOREIGNERS IN AMAZONAS IN THE LIGHT OF TRANSNATIONAL LAW

A TRANSFERÊNCIA DE PESSOAS CONDENADAS (TPC) COMO INSTRUMENTO DE PROTEÇÃO DE DIREITOS HUMANOS: UMA ANÁLISE DA PRISÃO DE ESTRANGEIROS NO AMAZONAS À LUZ DO DIREITO TRANSNACIONAL

Wilken Almeida Robert[1]
Daniel Britto Freire Araújo[2]
Mônica Nazaré Picanço Dias[3]

ABSTRACT

The procedure for the transfer of sentenced persons is a legal mechanism provided for by the Migration Law on a humanitarian basis and its objective is to allow persons who have been definitively sentenced in another State to serve their sentence in the country of their nationality or residence. The question to be answered by this research is: how can this institute contribute to the protection of foreign prisoners? Thus, the objective of this article is to investigate this instrument of international cooperation, verifying its potentialities in the light of Transnational Law. The aim is to assess the possibility of using it to protect the human rights of foreign-

1 Master's student in Constitutionalism and Rights in the Amazon at the Federal University of Amazonas (UFAM). Specialist in Public Law from the Federal University of Amazonas (2018). Specialist in Criminal Sciences at Estácio de Sá University in partnership with the Renato Saraiva Education Center (CERS) (2017). Graduated in Law from the Federal University of Amazonas (2015). Currently holds the position of Chief of Staff of a Judge at the Court of Justice of Amazonas. ORCID iD: https://orcid.org/0000-0003-3651-759X.

2 Master's student in Constitutionalism and Rights in the Amazon at the Federal University of Amazonas (UFAM). Specialist in Civil Procedural Law from the University of Southern of Santa Catarina (UNISUL) (2008). Currently holds the position of a Public Defender for the State of Amazonas. ORCID iD: https://orcid.org/0000-0002-9819-6915.

3 PhD in Legal Science UNIVALI/SC (2013). Master in Environmental Law from the Amazonas State University (2008). Specialist in Criminal Law and Criminal Procedural Law (2001) and Bachelor of Laws from the Federal University of Amazonas (1997). Currently works as an attorney, Adjunct Professor C, I at the Federal University of Amazonas in Criminal Law and Criminal Procedural Law; Professor of Criminal Law and Criminal Procedural Law at Santa Teresa College; Professor of Criminal Law at CIESA /AM; Professor of the Postgraduate Program (Master in Constitutionalism and Rights in the Amazon) at UFAM. ORCID iD: https://orcid.org/0000-0003-0901-6896.

How to quote this article:/*Como citar esse artigo:*
ROBERT, Wilken Almeida; ARAÚJO, Daniel Freire; DIAS, Mônica Nazaré Picanço. The transfer of sentenced persons as an instrument of human rights protection: an analysis of the imprisonment of foreigners in amazonas in the light of transnational law. **Revista Meritum**, Belo Horizonte, vol. 16, n. 1, p. 347, 2021. DOI: https://doi.org/ 10.46560/meritum.v16i1.8284.

ers imprisoned in Brazil, more specifically, in the state of Amazonas. To do so, the deductive method will be used, starting with a bibliographical review of general themes such as Transnational Law, protection of human rights and the very concept of the "Transfer of Convicted Persons" institute, in view of the problem formulated. As a source of quantitative observation, statistical data, collected by the National Penitentiary Department within the state of Amazonas in the period between July and December 2019 (last census conducted), and the provenance of foreigners arrested in the specified geographic area will also be used, given its location in a border region. All this to verify the feasibility of adopting the measure of Transfer of Convicted Persons as an aggregator mechanism for both regional prison public policies and in the aspect of protecting the human rights of foreign prisoners.

Keywords: Transnational Law; Penitentiary System; Foreigners; Transfer of Convicted Persons.

RESUMO

O procedimento de Transferência de Pessoas Condenadas (TPC) é mecanismo legal previsto na Lei de Migração, com base humanitária, e que visa permitir que pessoas condenadas definitivamente em Estado diverso possam cumprir pena no país de sua nacionalidade ou residência. A questão a ser respondida, todavia, é: como tal instituto pode contribuir para a tutela de indivíduos estrangeiros presos? O objetivo do presente artigo, assim, é investigar o referido instrumento de cooperação internacional, verificando suas potencialidades à luz do Direito Transnacional, para aferir a possibilidade de sua utilização como proteção de direitos humanos dos estrangeiros presos no Brasil e, mais especificamente, no Estado do Amazonas. Para tanto, far-se-á uso do método dedutivo, partindo-se da revisão bibliográfica de temas gerais como o Direito Transnacional, proteção de direitos humanos e do próprio conceito do instituto "Transferência de Pessoas Condenadas", para alcançar as repostas para o problema formulado. Utilizar-se-á também dados estatísticos coletados pelo Departamento Penitenciário Nacional no âmbito do estado do Amazonas, no período compreendido entre julho a dezembro de 2019 (último censo realizado), como forma de observação quantitativa e da proveniência de estrangeiros presos no recorte geográfico especificado, dada a sua localização em região de fronteira. Tudo isso para, ao fim, se alcançar como resultado a viabilidade da adoção da medida de Transferência de Pessoas Condenadas como mecanismo agregador tanto para as políticas públicas penitenciárias regionais, mas, principalmente, no aspecto de proteção aos direitos humanos dos presos estrangeiros.

Palavras-chave: *Direito Transnacional; Sistema Penitenciário; Estrangeiros; Transferência de Pessoas Condenadas.*

1. INTRODUÇÃO

When a person is sentenced to imprisonment by the State in its judicial capacity it emerges a State obligation to provide the minimum elements for the maintenance of basic needs such as food, lodging, health, education, professional training, religiosity and any others that do not conflict with the nature of the sentence's execution and that allow social reintegration at the end of the term of the sentence.

However, in States like Brazil, where the most basic social rights have always been denied to large portions of the population, "prison has been consolidated as a form of punishment par excellence without ever fully providing for the most basic needs of the population it incarcerates" (GODOI, 2015, p. 135).

Nevertheless, it is necessary to keep in mind that the prisoner does not lose the quality of human being, who is subject of rights and, more than ever, needs the State protection and provision to subsist.

Considering the precarious conditions under which sentenced Brazilians are imprisoned[4], the situation of foreign citizens imprisoned is even worse.

Factors such as language, culture, lack of a fixed residence, lack of training for the development of labor activities after serving the sentence, distance from family members, are just some of the problems that make the re-socialization process of this person even more difficult.

In this scenario, a mechanism for international cooperation in criminal matters has arisen and seeks precisely to give greater humanity to the sentences served by foreigners. It is the Transfer of Sentenced Persons.

This is the main purpose of this article, which aims to analyze the applicability of the institute, verifying its potentialities in the light of Transnational Law, to assess the possibility of its use to protect the human rights of imprisoned foreigners.

In this way, it will be possible to verify how the humanitarian procedure for the transfer of sentenced persons can contribute to the guarantee of human rights for foreigners imprisoned in Brazil and to the improvement of prison management in the state of Amazonas and may represent a tool for reducing prison overpopulation.

This is done from the perspective of Transnational Law because, as it will be shown, international cooperation on human rights, especially in the case of prisoners, requires an analysis beyond domestic law and international law.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

2. UNDERSTANDING TRANSNATIONAL LAW

The approach to Transnational Law requires a brief review of the concepts of globalization and transnationality. This is necessary because, although they have different definitions, they are closely related and complement each other.

Once the relevant considerations on the concepts in question have been presented, some possible applications of Transnational Law will also be demonstrated, as an example, but which will allow us to understand, in extension and depth, how this branch of law can contribute to the protection of other rights, among which human rights are particularly relevant.

2.1 GLOBALIZATION, TRANSNATIONALITY AND TRANSNATIONAL LAW

Although it appeared in the 1980s (THERBORN, 2001), the expression globalization represents a much older phenomenon, dating back to the 15th and 16th centuries, when Europeans began the process of maritime colonial expansion. Thus, it is possible to realize that globalization is not a sudden and consolidated fact, but a gradual integration process that is constantly expanding (SILVA; LOPES JUNIOR, 2008).

4 Cezar Roberto Bitencourt (2004) has long been describing the crisis of prison sentencing, listing among other problems the following: prison overpopulation; lack of hygiene; poor working conditions; deficient medical and health care; malnutrition; high drug consumption; and sexual abuse.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

According to the lessons from the German sociologist Ulrich Beck (1999), the phenomenon of globalization unfolds from the dissemination of technological advances, especially after the second half of the twentieth century, spreading widely throughout the world after the end of the Cold War. Thus, the author explains that:

> Globalization means the everyday experience of borderless action in the dimensions of economy, information, ecology, technology, cross-cultural conflicts and civil society, (...) which transforms everyday life with undeniable violence and forces everyone to accommodate its presence and provide response (BECK, 1999, p. 47).

This increasingly intense and integrated global situation, however, is not compatible with principles and rules that are limited to dealing with conflict and dispute issues between the various States, typical of classical international legal relations. On the other hand there is an increasing demand for solidarity and cooperation relations, typical of transnationality.

In this regard, Ulrich Beck (1999) identifies the theme of social organization in the historical context of the late 1980s and early 1990s. He explains that society, increasingly connected and globalized by capitalist hegemony since 1989, lives in a new world, a kind of uninvestigated continent that opens up to a transnational no-man's land, that is, an intermediate space between the national and the local. Therefore, in this context, discussions about transnationality and Transnational Law begin.

Faced with the need for answers and elements of understanding that are compatible with current demands, the models based on national and international law that have existed up to now are no longer sufficient to regulate the complexity of existing and future social relations.

Explaining what the idea of transnationality would be, Gustavo Lins Ribeiro (1997) teaches that its fundamentals derive from the idea of globalization, but with emphasis on the relationship between territories and the different social, cultural and political arrangements that guide the way individuals represent belonging to social, cultural, political, and economic units.

Also, according to this author, discussing transnationality implies raising the possibility of changing conceptions about citizenship, aiming to create a clear sensibility and responsibility regarding the effects of political and economic actions in a globalized world (RIBEIRO, 1997).

As reported by Ojeda Avilés (2013), the outlines for the emergence of a new transnational order, and, therefore, of a Transnational Law, are thus being outlined: (i) the hidden conflict between the State and the Market, that is, between the public and the private (the horizontal power of large multinational companies has come to compete with the vertical power of governments and to take advantage of their international status to overcome both local governments and also workers' entities, in a phenomenon known as the privatization of international relations); (ii) the occurrence of disasters on a global scale, whose responsibility can be attributed to multinational companies (for example: Bhopal leak[5] ; Exxon Valdez ship[6]; among others); (iii) a wide variety of normative production by those involved in the transnational scenario, for

5 Leak in Bhopal (1984): A leak at a pesticide plant released more than 40 tons of toxic gases into the air in the city of Bhopal, India. After the accident, the company abandoned the site, and more than 2,000 people died from contact with the lethal substances, and others suffered burns to their eyes and lungs. (UNION CARBIDE CORPORATION, 2019).

6 Exxon Valdez ship (1989): the tanker collided with submerged rocks off the coast of Alaska and started an unprecedented spill (about 40 million liters of oil), contaminating more than two thousand kilometers of beaches and causing the death of one hundred thousand birds (GONÇALVES, 2017).

example private regulations, arbitration awards, collective agreements, etc., which dispute and many conflict with national legal norms and international treaties.

A pioneer in the matter, Phillip C. Jessup, through the work entitled Transnational Law (1965), in the context of the globalization and transnationality scenario, coined the term and gave the first outlines of what would be the Transnational Law.

According to the author, International Law no longer contained all the issues related to the problems of the world community, which is why the new relationships arising from globalization would be the content of Transnational Law. The concept of this new branch of law would encompass the set of rules regulating acts or facts that transcend national borders, and such situations may involve individuals, companies, States, organizations of States or any other groups (JESSUP, 1965).

In a further theoretical development, Detlev Vagts (1986) clarified that Transnational Law has three characterizing elements: 1) Subjects that transcend national borders; 2) Subjects that do not bear a clear distinction between public and private law; 3) Subjects that bear open and flexible sources, such as soft law[7].

Still about the definition, Harold Hongju Koh (2006), a follower of Vagts, teaches that Transnational Law is a hybrid between domestic and international law, of crucial importance in the life of contemporary societies. For the author, it is through Transnational Law that one can allow: the incorporation of rules of International Law into domestic law (as in the case of Human Rights); the inverse procedure, that is, the replication of a rule of domestic law of a given country in International Law (with the making of a trade regulation treaty, for example); the horizontal exchange of knowledge between States, copying successful experiences from one domestic system to another.

After these considerations, it is possible to synthesize what has been discussed through the concept of Antonio O. Avilés (2013) for Transnational Law adopted in this article: it is a set of rules that regulates the relations between subjects without empire and with transnational transcendence[8].

Therefore, the study of transnationality and Transnational Law are of great importance in the contemporary world, to the extent that legal science demands the realization of studies that contemplate the evolution of the globalized world society, in the face of changes brought about by the phenomenon of transnationalization and new situations previously neither experienced nor imagined (PIFFER; CRUZ, 2018).

7 Expression used in the scope of International Public Law that designates the international text, under various names, that are not legally binding on the signatories. They are, therefore, optional, unlike jus cogens, which are cogent norms. In turn, they are also known as *droit doux* (flexible law) or even soft norm. According to Valério de Oliveira Mazzuoli, "it can be said that in its modern sense, it comprises all rules whose normative value is less constraining than that of traditional legal norms, either because the instruments that house them do not hold the status of 'legal norm', or because their provisions, although included in the context of binding instruments, do not create positive law obligations for States, or only weakly constraining obligations. (MAZZUOLI, 2015, p. 184-185). Examples of normative acts that enshrine the soft law: arbitration awards, private regulations, collective agreements, uses and customs.

8 For Avilés (2013), this definition encompasses the following three elements: a) it refers to horizontal contents, including the private relations of public entities or the rights to provide benefits before such entities; b) regulated by normative sources of all kinds, not only public ones: laws, treaties, arbitration awards, collective agreements and contracts, uses and customs, and even business decisions and practices of a regulatory nature are part of this branch of Law; c) supranational transcendence in any of the elements is determinant, as otherwise it does not acquire the appropriate dimension.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

The conditions and novelties of the globalized world also reflect directly in the context of criminal prosecution and execution, and transnational law has mechanisms and instruments to add to international cooperation in favor of human rights, in general, and of prisoners.

First, however, it is worth briefly highlighting some other applications of Transnational Law.

2.2 APPLICATIONS OF TRANSNATIONAL LAW

Transnationality and Transnational Law manifest themselves in the daily lives of individuals, companies and States, as it has been demonstrated. The following objects will be taken as examples of its application: the European Union; Sports Law; environmental protection.

This is expected to open the horizon of application of transnational theories and to understand the scope of Transnational Law, so that it can then be used in the protection of human rights.

2.2.1 EUROPEAN UNION (EU)

The European Union is an arena of important transnational developments and arguably where transnational law has reached levels of development not yet seen in other parts of the world. It consists of an economic and political union of 27 independent member States situated in Europe. It was established in 1992 by the Maastricht Treaty and its legal nature is that of a *sui generis* international organization, an intergovernmental community that is similar to the organizational formulas of national States (PIFFER, 2014).

The States that comprise the European Union transfer portions of their sovereignty to the Organization to deal with issues that are considered common to all members, such as monetary policy, immigration policy, and the environment, in order to jointly achieve common objectives, namely: to ensure the free movement of people, goods, services, and capital between member countries.

The European Union, here understood as an intergovernmental community, has its own institutional apparatus, notably the European Commission, the Council of the European Union, the European Council, the Court of Justice of the European Union, and the European Central Bank. The European Parliament is elected every five years by the citizens of the European Union.

Finally, from a normative perspective, the European Union is constituted by its own autonomous legal system (constituted by several treaties) regarding to the national systems, but in close connection with them, since it is realized (made concrete), in part, through the national institutions, in a cooperative relationship.

Thus, the European Union integration process itself has characteristics of transnationality, being, in the view of Joana Stelzer (2011), a reference of an organization that goes beyond the territorial limits of the States, having a legal model that is not limited to borders.

2.2.2 SPORTS LAW

The Sports Law also attracts attention for its evident transnationality due to its notable public relevance. Although it had been treated as a secondary activity until the end of World War II, after this troubled period, it began to have public relevance, and even gradually provided for by the Constitutional Charter as an obligation of the State (MIRANDA, 2011).

According to Martinho Neves Miranda (2011), the various international competitions and the Olympic Games, along with globalization, have driven sports to figure in the world legal scene. However, it lacks a unified regulation with the adherence of the States to the guidelines established by the sports institutions, in a universal way.

Among the prominent institutions that belong to the complex institutional structure that involves the world sport, it is the International Olympic Committee (IOC), created on June 23, 1894, being considered the most important world sports association. Its autonomy is evidenced before the prohibition for any of its members, in accepting from the government, organizations or third parties, any kind of interference in the freedom of action and vote (PIFFER; CRUZ, 2018).

The International Federations of various sports, the National Olympic Committees, and the Arbitration and Sports Courts also belong to this huge and complex system in the sports world.

These organizations and their own regulations demand that the Sports Courts acts based on rules and regulations originated in the structures of world sports. This highlights the transnational character that goes beyond any rules of domestic law, creating a criterion of exclusion of the State judicial pathway regarding specific issues of competitions, provided, of course, that do not interferes in other branches of law.

2.2.3 ENVIRONMENT

Among so many other cases of Transnational Law applicability the environment is the third and last example selected before analyzing human rights.

The transnationality of environmental issues is demonstrated by the relationship of development between ecosystems and life all over the planet, making it manifestly impossible to implement an effective protection restricted to a certain country or a delimited territory based on an outdated modern concept of sovereignty.

This happens because injuries to the environment that affect the collectivity, cross borders, alter the climate balance, affect current and future generations and the entire community of life, go beyond the territorial limits of states (PIFFER; CRUZ, 2018).

The issue is so relevant that Arnaldo Miglino (2011) foresees the ecological problem as the one that will probably lead to the creation of a transnational power center, overcoming the ideology and legal structure of international relations. For the author, the need for transnational regulatory instruments is urgent to restore the ecological and climatic balance since all the law and international organizations are incapable of appropriately disciplining such problems.

The creation of institutional mechanisms to ensure the effective materialization of solidarity and cooperation is, as argued by the author, considered necessary. It is also mentioned

that this need is not only in the environmental field, but also in other diverse manifestations of transnationality, especially when human rights are involved, as it will be demonstrated below.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

3. INMATES' HUMAN RIGHTS

The expressions "human rights" and "fundamental rights" are used as synonyms by some authors, at least with regard to their material content. Despite the objective of the present research, it is relevant to mention the relationship between human rights and international law, since these are the legal arrangements that recognize the human being as an object, regardless of any link with the constitutional order of the States, being, therefore, valid supranationally. The Fundamental Rights, on the other hand, would be the rights of the human being recognized and positivized in the constitutional sphere of a State.

As discussed in the previous topic, this incorporation of domestic rights into the international sphere, and the opposite, is particular to Transnational Law, also encompassing Human Rights.

Therefore, the human rights will be analyzed from the perspective of transnationality, and then, the issue of those persons deprived of their freedom addressed.

3.1 THE TRANSNATIONALITY OF HUMAN RIGHTS

After the end of World War II and the discovery of the horrors perpetrated by Nazi fascism, notably the massacre of millions of human beings for reasons of eugenicist policy, such as the holocaust of the Jews in concentration camps, the international community realized the need to establish legal rules for the protection of human rights, so that such events would not be repeated. Thus, the branch of international human rights emerged with the establishment of several international treaties, as well as the institution of international courts for the prosecution and trial of those accused of violating these standards (PIFFER; CRUZ, 2018).

Among the numerous international treaties signed in the post-war period, the following deserve special mention: (i) Convention for the Prevention and Punishment of Genocide(1948); (ii) International Convention on the Elimination of All Forms of Racial Discrimination (1965); (iii) International Covenant on Civil and Political Rights (1966); (iv) International Covenant on Economic, Social and Cultural Rights (1966); (v) Convention on the Rights of the Child (1989); (vi) Comprehensive Nuclear-Test-Ban Treaty (1996); (vii) International Convention for the Suppression of the Financing of Terrorism (1999).

Among the competent courts for the enforcement of international rules, the International Court of Justice, the International Criminal Court, the Court of Justice of the European Union, and the Inter-American Court of Human Rights, besides others, are worthy of attention.

However, the great challenge faced in the enforcement of human rights in transnational terms is the consideration of the concept of sovereign states. However, the disregard of the transnational characteristic of the Human Rights theme restricts countless possibilities for the protection and recognition of these rights (PIFFER; CRUZ, 2018).

For Piffer and Cruz (2018), this is how Transnational Law can be seen as an important instrument for the protection of human rights, especially when issues such as non-discrimination, migrants, and other transnational social actors who need the protection and enforcement of their rights because they are human beings are at stake.

Protecting human rights, sometimes not even constitutionalized, demands a concomitantly positive (provision) and negative (defense) approach from States. The deficient performance of countries in the protection of such rights, whether by ignoring them or by not providing the existential minimum, generates damages that go beyond the territorial limits of a country.

When it comes to diffuse rights, the transnationality of the issue is even more latent, since it is not known exactly where their holders are located, what the conditions of aggression are or who should be protected (GARCIA, 2011). Thus, only through transnationality it is possible to guarantee some effectiveness to this class of rights.

Thus, once the pertinence of the analysis of human rights from a transnational perspective is demonstrated, the discussion about the guarantee of human rights for prisoners follows, given the vulnerability of this group, which can be even greater in the case of foreign prisoners.

3.2 RIGHTS OF INMATE

At this point of the discussion, we must address something obvious from a legal point of view but forgotten (or neglected) from a political-social point of view: the rights constitutionally guaranteed to any citizen, *uti cives*, in the words of Jason Albergaria (1987), also remain with the imprisoned, except those expressly or necessarily mitigated by law or sentence.

This is because a conviction does not remove from a prisoner his or her quality as a human being with legal rights and guarantees, except, of course, for those expressly lost or limited by the sentence (such as freedom of movement) as mentioned above.

The Federal Constitution reserves its fundamental rights to all, indistinctly, and not only to individuals at liberty.

In this regard the Criminal Enforcement Law states that all rights not affected by the sentence or the law shall be assured to the convicted and the inmate (article 3). Similarly, article 38 of the Penal Code establishes that the prisoner retains all rights not affected by the loss of freedom.

Thus, only the rights related to the free locomotion of the prisoner would be suspended during the completion of the sentence and only in the case of closed regime. Suppress from the prisoner other rights unrelated to the freedom of locomotion would be to apply an additional penalty not provided by law (MIRABETE, 2017).

For this reason Edmundo de Oliveira (1980) is emphatic when he states that the condition of the condemned man cannot be underestimated by prison life and the loss of some of his rights cannot mean a civil death.

Thus, it is evident that the list of rights provided by article 41 of the Criminal Enforcement Law is not exhaustive.

Still citing Albergaria (1987), it should be noted that the Statute of Criminal Enforcement, when listing these rights in its articles, is highlighting them, not excluding other rights guaranteed

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

in other legislation, especially the fundamental human rights constitutionally provided. This is what the author calls "prison rights", which correspond to the obligations of the Penitentiary Administration, provided in the form of assistance.

Therefore, the convicted person in prison and serving his sentence not only has duties but is also the subject of rights that will have to be recognized and supported by the State and the international, or even transnational, community.

Thus, the condition of citizen of the imprisoned person must be recognized, guaranteeing them all the fundamental rights, arising from human nature itself (as long as they are not limited by the sentence).

There is, however, a significant disparity between the legal treatment given to prisoners and the social-political reality in prisons.

This occurs, in particular, because the marginalization of the imprisoned person is increasing, keeping them away not only from the social life that is typical of deprivation of liberty, but also, many times, from their condition as citizens with rights and dignity.

Ana Gabriela Mendes Braga (2014, p. 73), indicates that "the absence of identification with the person imprisoned and of recognition of them as an equal, makes their suffering invisible in the eyes of society.

In the same vein, Garland:

> [...] the public does not listen to the anguish of prisoners and their families, because the discourse of the media and popular criminology shows criminals as 'different', and less than fully human [...] the conflict between civilized sensibilities and the often brutal routine of punishment is minimized and made more tolerable. Modern punishment is then institutionally ordered and represented by a discourse that denies the inherent violence of its practices" (Free translation). (GARLAND, 1990, p. 243)

Common sense considers incarceration as the solution to criminality. It is forgotten, however, that imprisonment, by itself, does not rehabilitate, and can contribute to the prisoner's return to society unproductive, idle, and marginalized, as an egress prone to criminal recidivism.

Based on this, Ana Gabriela Mendes Braga (2014) emphasizes the need for society's concern with the reinsertion of the prison system's egresses, insofar as the segregationism represented by the prison walls further distances the conditions for readaptation after life in prison.

This social reintegration presupposes, therefore, a sentence that, when served, respects the prisoner as a human being and that can help him, providing him with favorable conditions to return to harmonious social life, keeping them away from the practice of crime.

In this regard, Vitor Gonçalves Machado argues that resocialization:

> is aimed at the idea of humanization, consisting of a model where the prisoner is provided with the essential conditions and means for his effective reintegration into society, avoiding, at the same time, recidivism. The resocializing goal is to neutralize the harmful effects acquired especially during the execution of the prison sentence, so as not to stigmatize the prisoner. It suggests, therefore, a positive intervention in this in order to enable him to integrate and participate, with dignity and actively, in society, without trauma and limitations. (MACHADO, 2014, p. 1)

Social reintegration is, therefore,among many others, a right of imprisoned citizens who, as such, use work, study, or any other available programs to support their safe social return, characterized by respect for the human dignity of offenders and the active participation of the community in this process (FELBERG, 2015).

Furthermore, if the recognition of the rights of the prisoner is doubtful, as to the foreign convict serving time in Brazil, the issue is even more complicated.

Imprisonment in a place other than your country of birth or residence tends to represent an extra obstacle to one of the main functions of the penalty: effective resocialization.

This is mainly, in addition to difficulties such as language and culture, there are constitutionally provided rights that, although they constitute fundamental rights, do not reach foreigners, but only nationals.

For example, it is worth noting that some judges do not grant foreign prisoners the progression of the penalty to a more beneficial regime or conditional release, based on the risk of escape of these prisoners, because they have no home in the country. In this sense, the following judgment of the Court of Mato Grosso in the HC 14.214/2009:

> [...] The progression of regime is forbidden to foreigners in irregular situation, convicted of drug trafficking, if there is a process of deportation from the national territory in development and if he does not demonstrate to have a fixed residence in Brazil, thus avoiding the frustration of the penal execution [...]

Thus, it does not seem there are many practical guarantees as to the possibility of the foreign prisoners in Brazil receiving a sentence governed by the progressive system, focused on re-socialization and avoiding recidivism, especially since, away from their country and their family, the basic element that is social reintegration is missing.

The concern about the issue, it should be emphasized, needs to be greater than the internal legal order of a country, since it involves a matter as seen, of human rights.

Fortunately, in Brazil, there is a mechanism that can contribute a lot to tackle the problem, as it will be seen in the following item.

4. THE TRANSFER OF SENTENCED PERSONS AS AN INSTRUMENT OF HUMANITARIAN PROTECTION FOR FOREIGNERS IMPRISONED IN AMAZONAS

The instrument of international legal cooperation in criminal matters known as “Transfer of Sentenced Persons (TSP)” is a useful object for the analysis of the concepts studied in this research. It happens because the protection of the human dignity of the prisoner and the preservation of their fundamental rights are necessary.

This chapter aims to analyze the procedure of Transfer of Convicted Persons, after observing data from the prison system in the state of Amazonas regarding the number and origin of foreign prisoners, in order to identify the possibility of its use for the transnational protection of prisoners’ rights.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 347-364 • Jan. - Apr. 2021

It was decided to reduce the sample of foreign prisoners to the prison population in custody in the State of Amazonas: first, for a matter of regionalization of the discussion in the present article; second, due to the greater accuracy in the statistical data collected by the National Penitentiary Department in that geographic area, in the period from July to December 2019 (last census conducted); and third, due to the proximity of the State of Amazonas with the Brazilian territorial limits and, consequently, with border countries, being common the processing, conviction and incarceration of foreigners for crimes committed in the state.

Therefore, some numbers about the Amazon prison system started to be analyzed.

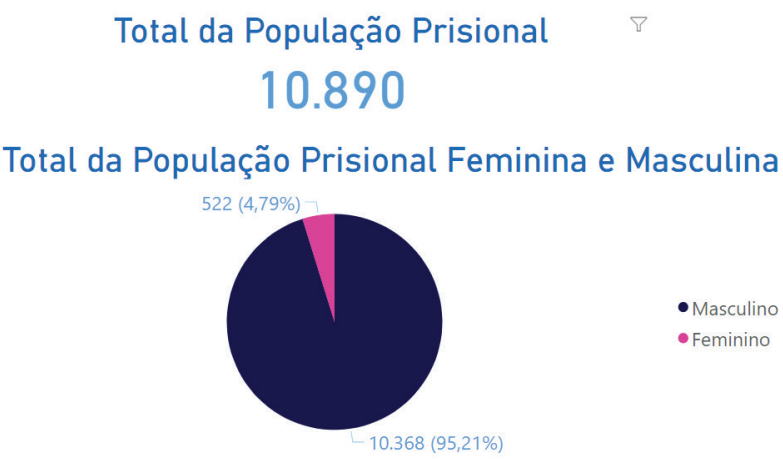
4.1 THE FOREIGN POPULATION IN THE AMAZONIAN PRISON SYSTEM IN NUMBERS

The prison population in Amazonas, according to the most recent Analytical Report of the Survey of Penitentiary Information (INFOPEN[9]) - which compiles data collected from July to December 2019 -, is 12,069 (twelve thousand and sixty-nine) prisoners, being 10,890 (ten thousand, eight hundred and ninety) in custody in the penitentiary system and another 1,179 (one thousand, one hundred and seventy-nine) deprived of freedom in other prisons linked to the Public Security agencies (Judicial Police Stations and Police Battalions and Military Firefighters).

For the purposes of this article, the custodial prison population analyzed will be, exclusively, that of the Amazon prison system, since this was the database used in the graphic analysis of the National Penitentiary Department itself, in the aforementioned time frame (July to December 2019) [10].

Thus, once the parameters and cuts of the collected data have been established, the analysis of these 10,890 (ten thousand, eight hundred and ninety) prisoners in the Amazon penitentiary system will be carried out, which, as to gender, can be represented in the following chart:

Graph 1 **– Prison population in Amazonas**



Source: Infopen/ Jul.-Dec.2019

9 Statistical information system of the Brazilian penitentiary system, under the responsibility of the National Penitentiary Department – an agency subordinated to the Ministry of Justice and Public Safety.

10 In Brazil, the number of prisoners according to the same analytical report is 755,274 (seven hundred and fifty-five thousand, two hundred and twenty-four).

Although the number of prisoners is significant, the situation is even more worrisome when the number of vacancies officially existing in the state is verified. It happens because, according to the survey of the analytical report of INFOPEN (2019), there are, in Amazonas, 3,511 (three thousand, five hundred and eleven) vacancies, which means an average of 1 vacancy for each 3.1 prisoners.

In other words, the prison system in the State of Amazonas is overcrowded, with a deficit of 7,379 (seven thousand, three hundred and seventy-nine) vacancies.

Due to the high rate of overcrowding, the number of foreign prisoners seems to be small, since, of the total number of prisoners, there are 127 (one hundred and twenty-seven) individuals from other countries, 103 (one hundred and three) men and 24 (twenty-four) women. Also, the majority among the foreigners arrested in the state of Amazonas are Colombians, Venezuelans, and Peruvians.

The data mentioned above should be considered.

The number of incarcerated foreigners in brazil is about 1% of the prison population in the country. However, these prisoners fulfill their sentences in a prison system in a chaotic state and whose sentences tend to be more sacrificial, as it will be seen below.

Furthermore, the positive impact that the transfer of more than a hundred prisoners can have on the administration of the Amazon prison system, which is constantly trying to reduce incarceration and restructure public prison policies, should not be minimized.

Thus, as it will be shown, the procedures of Transfer of Convicted Persons is not the solution to the problem of prison administration in the state of Amazonas. However, it can aggregate a lot to the regional public prison policies, but, mainly, in the aspect of protection to the human rights of the prisoners.

4.2 THE TRANSFER OF SENTENCED PERSONS PROCEDURE (TSP)

Extradition is the first institute to be considered when thinking about international legal cooperation in regard to prisoner migration.

This is an act of cooperation that consists in the surrender of a person, investigated, prosecuted or convicted of one or more crimes, to the country that requests it, and is not admitted for purely administrative, civil or tax cases. (DEL'OLMO; KÄMPF, 2011).

This institute aims to restrict freedom and enable the surrender of people who are outside the borders of a State that prosecutes or convicts them, based on the principle of universal justice. Nowadays, in Brazil, this institute is regulated by law number 13.445 of 2017 (establishing the Migration law).

Extradition has, therefore, a more repressive character, aiming precisely to prevent migratory initiatives from hindering the sovereign States' duty-power to punish (MUZZI, 2017).

The Transfer of Sentenced Persons (TSP), beside extradition, is an institution of international legal cooperation. However, it is little researched. The institute has an eminently humanitarian focus, insofar as it aims to bring the family and its social and cultural environment closer

together, which is an important psychological and emotional support that facilitates rehabilitation after the sentence has been served.

The instrument under review is a measure whose purpose is to allow persons definitively sentenced in another State to serve their sentence in the country of their nationality or with which they have personal ties or residence (MUZZI, 2017).

According to the Ministry of Justice and Public Security website (2020):

> the United Nations has insisted on the indispensability of such cooperation, directing efforts to spread the proposal of prisoner transfer as a modern method of re-education to strengthen the foundation of personal reconstruction of the prisoner facing the prospect of a future free life in society.

In Brazil, it is provided for in the Migration law between articles 103 and 105. The Department of Asset Recovery and International Legal Cooperation, as an agency of the Ministry of Justice and Public Safety (MJPS), is responsible for all administrative proceedings for transfer purposes of convicted persons, as well as for the analysis of the admissibility of the request.

The primary requirement for the investigation procedure to be initiated is voluntariness. It is necessary, therefore, for the prisoner (or their representative) to express their will to serve the sentence (or the rest of it) in their home State or State with which they have the aforementioned ties.

Under the given circumstances, the Migration law, in its article 104, institutes the following requirements to proceed with of the request: i) the prisoner's bond with the State to which the transfer is requested; ii) the final conviction; iii) the sentence to be served (or remaining to be served) is at least one year at the date of the request to the state of conviction; iv) double criminality; v) express consent of the prisoner to be transferred; and vi) the agreement of both States.

Furthermore, it is important to point out that the Transfer of Convicted Persons can be classified according to the position of the Brazilian State in the process in question being active or passive.

The modality of Active Transfer of sentenced persons will occur when a Brazilian prisoner in a foreign State requests or agrees to be transferred to Brazil in order to serve their sentence close to their family and/or social environment. Persons who, although not nationals, have personal ties or habitual residence in Brazil may also make such request (MUZZI, 2017).

On the other hand, the Passive Transfer of convicted persons occurs when the foreign individual convicted in Brazil requests or agrees to be transferred to a State of which they are a national or have a personal link or habitual residence (MUZZI, 2017).

The website of the Ministry of Justice and Public Safety (2020), explains the procedure that must be followed by the foreigner who wishes to be transferred to serve the remainder of their sentence in their country of origin. The formal request for transfer must be forwarded to the Ministry of Justice, which will contact the competent agencies to receive the rest of the documents under the respective treaty (bilateral or multilateral).

In the case of a Brazilian serving a sentence abroad, in addition to making the request to the country in which they are staying, it is also possible to forward the request to be transferred to the Brazilian Ministry of Justice and Public Safety, which will adopt the necessary measures

to inform the petitioner's wishes to the other State. As a rule, the transfer expenses are paid by the State that will receive the Brazilian citizen who has been sentenced abroad.

The transfer requests must be granted by the countries involved, under the terms of the Treaties signed between the signatory States and Brazil, and the refusal decision must be justified.

Finally, it is important to point out that Brazil currently has 17 bilateral Treaties for the Transfer of Sentenced Persons, and four multilateral ones[11].

4.3 TRANSFER OF SENTENCED PERSONS (TSP) AS A POSSIBLE TRANSNATIONAL SOLUTION TO A REGIONAL PROBLEM

The globalization and the increase in migratory flows and transnational criminality have led to an increase in the number of prisoners in countries other than their own, as it has been demonstrated in this research.

The State of Amazonas, due to its proximity to the Brazilian border with other South American countries, puts the region in a peculiar position for the practice of transnational crimes, among which drug trafficking is one of the most frequent one.

Drug trafficking, which could be the object of its own study focusing on transnationality and Transnational Law, is commonly practiced in border regions (merely geographic), as it is the case of the triple border formed by Colombia, Peru and Brazil.

Haesbaert and Gonçalves (2005) point out that in this international drug industry, operations occur on a global scale, but their profits depend on the geographical location of the places of production and consumption, the existence of national borders, and the legislation of each national State.

It can be seen that drug trafficking, considered a transnational crime, is endowed with negative implications for the politics and the economy of the countries that are part of its route, generating very significant losses, both political and economic, to the countries involved.

These negative implications are reflected even in the prison system. It is enough to obsesrve that, of the foreign prisoners in Amazonas, the number of those of Colombian and Peruvian nationality represent a significant percentage of the prison population[12].

Under the given circumstances, not only must the policies related to fighting transnational crimes be reviewed, but also a solution for the situation of these prisoners in national territory must be found, whether for humanitarian reasons or for reasons of prison administration.

11 According to the website of the Ministry of Justice and Public Safety (2020), Brazil has bilateral agreements with the following countries: Argentina; Belgium; Bolivia; Canada; Chile; Spain; India; Japan; Panama; Paraguay; Peru; Poland; the Netherlands; the United Kingdom of Great Britain and Northern Ireland; Suriname; Turkey; and Ukraine. Furthermore, there are four specific multilateral treaties on the subject: the Inter-American Convention on Serving Criminal Sentences Abroad (Decree Number 5919 of October 3, 2006); the Convention on the Transfer of Sentenced Persons between Member States of the Community of Portuguese-Speaking Countries – CPLP (Decree Number 8. 049, of July 11, 2013); Agreement on the Transfer of Sentenced Persons between Mercosul States Parties (Decree Number 8.315, of September 24, 2014); Agreement on the Transfer of Sentenced Persons from Mercosul States Parties and the Republic of Bolivia and the Republic of Chile (Decree Number 9.566, of November 16, 2018).

12 According to a report on the EMTEMPO portal, from November 04, 2018, 94 (ninety-four) of the 105 (one hundred and five) foreign prisoners in the Amazonian prison system were Colombians (55) and Peruvians (39). Available on https://d.emtempo.com.br/amazonas/126612/amazonas-possui-105-estrangeiros-presos.

It is imperative to remember that prison overpopulation is one of the factors that leads to a drastic reduction in the use of other activities that the penal center should provide to achieve the resocialization of each convict.

Furthermore, the linguistic and cultural factors can also be a hindering element in the search for social reintegration of foreign convicts in Brazil, who suffer an additional and more distressing punishment.

Likewise, it is more advantageous for the prisoners to serve their sentence in their country[13], not only for the offender, but also from the point of view of re-socializing public policies.

The previous subtopic showed that the Transfer of Convicted Persons instrument may be effective in reducing the problem raised, since, at the same time that it ensures the dignity of the human person, aiming at bringing the family and the sociocultural environment closer, in order to enable the effective resocialization of the prisoner, it also contributes to the reduction of the prison population in the region.

This measure avoids the negative discrimination that occurs inside penal establishments, as well as the unequal treatment regarding the concession of benefits, often denied to foreigners.

Thus, in addition to guaranteeing a dignified and fair enforcement of the sentence imposed, the instrument, at the same time, helps the prisoners' families, who suffer in a potential way the evils of conviction due to distance: difficulties in relationships, financial problems, social stigma.

5. CONCLUSION

In view of what has been presented, the present research, whether from a humanistic, administrative, or even economic point of view, allows to conclude that the procedure for the Transfer of Sentenced Persons is an important instrument for transnational cooperation that keeps the aims of the prison sentence imposed on foreign convicts in view, but at the same time allows them to serve their sentence with dignity in their country.

It was also verified that the perspective chosen to discuss the theme, that is, Transnational Law, proved to be adequate since Human Rights, themselves, have transnational aspects, and even more so when it comes to the human rights of foreign prisoners.

At the regional level, although it does not represent a final solution to the problem of prison administration in the state of Amazonas, there is no doubt that the procedures for the Transfer of Convicted Persons can add significantly to the local public prison policies in the aspect of protecting the human rights of prisoners.

It is important to remember that prison overpopulation is one of the factors that leads to a drastic reduction in the use of other activities that the penal center should provide to achieve the resocialization of each prisoner, and Amazonas, unfortunately, is an example of this.

13 The official website of the Ministry of Justice highlights a news item entitled "Transfer of foreign prisoners helps resocialization", which states that, statistically, CPS increases the possibility of recovery and resocialization after the sentence has ended. Available at: https://www.justica.gov.br/news/transferencia-de-presos-estrangeiros-auxilia-ressocializacao.

Therefore, proposals such as the present one only tend to contribute to the reduction of the problem, and the instrument of the Transfer of Convicted Persons shows itself capable of being one more positive measure in the search for a solution to the Brazilian prison problem.

Thus, it is hoped that this brief analysis will serve as motivation for the study and reflection on the matter, as well as that it will contribute to the beginning of a social and political restlessness with the purpose of reaching an effective and definitive solution in regard to the resocializing aspect of the deprivation of freedom, whose effectiveness in Brazil is limited.

REFERENCES

ALBERGARIA, Jason. **Comments on the law of Criminal Execution**. Rio de Janeiro: Aide, 1987.

AVILÉS, Antonio Ojeda. **Transnational labor law.** Valencia: Tirant Lo Blanch, 2013.

BECK, Ulrich. **What is Globalization? Equivocations of Globalism**: Response to Globalization. Translation by André Carone. São Paulo: Paz e Terra, 1999.

BITENCOURT, Cezar Roberto. **Collapse of the Prison Penalty**. 3. ed. São Paulo: Revista dos Tribunais, 2004.

BRAGA, Ana Gabriela Mendes. Between prison and the world: civil society's entry into prison and social reintegration. **Revista Espaço Acadêmico**, v. 13, n. 154, p. 71-81, Mar. 2014. Available on: https://ojs.uem.br/ojs/index.php/EspacoAcademico/article/download/21885/12538. Accessed on: 20 Mar. 2021.

BRAZIL. Ministry of Justice. **Analytical Report of the Survey of Penitentiary Information** (INFOPEN). 2019. Available on: http://antigo.depen.gov.br/DEPEN/depen/sisdepen/infopen. Accessed on: 28 Aug. 2020.

BRAZIL. Ministry of Health. **Transfer of Convicted Persons**. Available on: https://www.justica.gov.br/sua-protecao/cooperacao-internacional/transferencia-de-pessoas-condenadas. Accessed on: 22 Aug. 2020.

BRAZIL. Ministry of Health. **Transfer of foreign prisoners helps resocialization**. Available on: https://www.justica.gov.br/news/transferencia-de-presos-estrangeiros-auxilia-ressocializacao. Accessed on: 20 Mar. 2021.

DEL'OLMO, Florisbal de Souza, KÄMPF, Elisa Cerioli Del'Olmo. **Extradition in Brazilian Law**. Rio de Janeiro: GZ Ed., 2011.

FELBERG, Rodrigo.**The social reintegration of former citizens: a new dimension of applicability to affirmative actions**. São Paulo: Atlas, 2015.

GARCIA, Marcos Leite. Transnationality, "new" fundamental rights and UNASUL: new perspectives for the XXI century. In: **Âmbito Jurídico**. Vol XIV (94). Rio Grande, November 2011. Available on: http://www.ambito-juridico. com.br/site/index.php?n_link=revista_artigos_leitura&artigo_id=10619. Accessed on: 22 Aug. 2020.

GARLAND, David. **Punishment and Modern Society**: a study in social theory. Chicago: Oxford University Press, 1990.

GONÇALVES, Darly Prado. Major environmental disasters in Brazil and in the world. **Unicamp Newspaper**. Available on: https://www.unicamp.br/unicamp/index.php/ju/noticias/2017/12/01/principais-desastres-ambientais-no-brasil-e-no-mundo. Accessed on: 20 Aug. 2020.

HAESBAERT, Rogério; GONÇALVES, Carlos W. P. **A new world (dis)order**. São Paulo: UNESP, 2005

JESSUP, Philip C. **Transnational Law**. Translation by Carlos Ramires Pinheiro da Silva. São Paulo: Fundo de Cultura, 1965.

KOH, Harold H.. **Why Transnational Law Matters**. Faculty Scholarship Series. Paper 1793. Yale Law School Legal Scholarship Repository. HeinOnline – 24 Penn St. Int'l L. Rev. 752 2005-2006. Available on: http://digitalcommons.law.yale.edu/fss_papers/1793. Accessed on: 18 Aug. 2020.

LANDAZURI, Daniel. Amazonas has 105 foreigners in prison. In: **EMTEMPO**. 04 November 2018. Available on: https://d.emtempo.com.br/amazonas/126612/amazonas-possui-105-estrangeiros-presos. Accessed on: 25 Aug. 2020.

MACHADO, Vitor Gonçalves. **The social reintegration of the prisoner:** an analysis of the main discourses against and in favor of the socializing purpose of punishment. Instituo Brasileiro de Ciências Criminais. Apr. 2014. Available on: www.ibccrim.org.br/artigos/2010/04. Accessed on: 02 Mar. 2020.

MAZZUOLI, Valério de Oliveira. **Course on public international Law**. 9 ed. São Paulo: Revista dos Tribunais, 2015.

MIGLINO, Arnaldo. Uma comunidade mundial para a tutela do ambiente. In: CRUZ, Paulo Márcio (Org.). **From sovereignty to transnationality**: democracy, law and state in the 21st century. Itajaí: UNIVALI, 2011.

MIRABETE, Julio Fabbrini. **Criminal execution**. 13. ed. São Paulo: Atlas, 2017.

MIRANDA, Martinho Neves. **The Law in Sports**. 2 ed. Rio de Janeiro: Lumen Juris, 2011.

MUZZI, Tácio. The mechanisms of international legal cooperation in the new migration law: Extradition, transfer of enforcement of sentence (TEP) and transfer of sentenced persons (TPC). In: **Cooperação em pauta**. Edition number 30 August 2017. Available on: https://www.justica.gov.br/sua-protecao/lavagem-de-dinheiro/institucional-2/publicacoes/cooperacao-em-pauta/cooperacao-em-pauta-n30a. Accessed on: 24 Aug. 2020.

OLIVEIRA, Edmundo de. **Rights and Duties of the Condemned**. São Paulo: Saraiva, 1980.

PIFFER, Carla. **Transnationality and Immigration**: the possibility of enforcement of Transmigrants' Human Rights in the face of Return Decisions in Italy and the European Union. Thesis (Doctorate in Legal Science), Universidade do Vale do Itajaí - UNIVALI, Itajaí, 2014. Available on: http://siaibib01.univali.br/pdf/Carla%20Piffer.pdf. Accessed on: 20 Aug. 2020.

PIFFER, Carla; Cruz; Paulo Márcio. Manifestations of Transnational Law and Transnationality. In: PIFFER, Carla; BALDAN, Guilherme Ribeiro; CRUZ, Paulo Márcio (Orgs.). **Transnationality and Sustainability**: Difficulties and Possibilities in a Changing World. Porto Velho: Emeron, 2018.

RIBEIRO, Gustavo Lins. The Transnational Condition. **Série Antropologia**, Brasília, v. 223, p.1-34, 1997. Available on: https://repositorio.unb.br/bitstream/10482/17597/1/ARTIGO_CondicaoTransnacionalidade.pdf. Accessed on: 16 Aug. 2020.

SILVA, Lemuel Rodrigues da; LOPES JR, Orivaldo Pimentel. Globalization - from its mercantilist genesis to bourgeois neoliberalism. **Inter-Legere Electronic Magazine**. n. 03, Jul.-Dec. 2008. Available on: https://periodicos.ufrn.br/interlegere/article/download/4752/3955/. Accessed on: 10 Mar. 2021.

STELZER, Joana. The phenomenon of transnationalization of the legal dimension. In: CRUZ, Paulo Márcio; STELZER, Joana (Orgs.). **Law and transnationality**. Curitiba: Juruá, 2009.

THERBORN, Göran. Globalization and inequality: questions of conceptualization and clarification. **Sociologia**. Porto Alegre, n. 6, 2001. Available on: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1517-45222001000200007&ing=pt&nrm=iso. Accessed on: 10 Mar. 2021.

UNION CARBIDE CORPORATION. Bhopal Gas Tragedy Information. 2019. Available on: http://www.bhopal.com/. Accessed on: 20 Aug. 2020.

VAGTS, Detlev F. **Transnational business problems.** New York: The Fundation Press, 1986.

Recebido/*Received:* 22.10.2020.

Aprovado/*Approved:* 25.04.2021.