PREVENTIVE DETENTION AT THE JUDGES INITIATIVE BEFORE THE BRAZILIAN ACCUSATORY SYSTEM

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Abstract: The article aimed to discuss preventive detention in accordance with the Code of Criminal Procedure, within the characteristics of the police investigation and criminal proceedings, with possible changes introduced by Laws nº 12,403/2011 and 13,964/2019. The methodology used was the bibliographical research, through legislation, doctrines, and scientific articles that portrait the theme. The research indicated that the changes made to article 311 of the Code of Criminal Procedure were evidently positive, making the procedure more impartial concerning the position where the judge will only declare the preventive detention when provoked by the party, namely: the Public Prosecutor, complainant or assistant, and at the request of the police authority. However, it is noteworthy that, although divergences have been found within the Code of Criminal Procedure and in extravagant Laws, most Courts have adopted the position that the less the magistrate acts at his/her own initiative, the more impartial the criminal process will be.

Keywords: Preventive detention; Criminal prosecution; Anti-crime package.

1. Introduction

Preventive detention is a procedural instrument that can be used before the conviction of the defendant in criminal proceedings, being decreed by the judge after he/she is provoked by the legitimate parties. They often wonder what the term of this preventive detention would be. However, there is no certain and determined term in the law regarding this duration, having only rules that determine that the duration must follow the necessary time.

Preventive detention, as its name says, has the purpose of ensuring the proper course of criminal investigation, but it leaves a time lapse when it comes to the prolonged duration, which can be considered an embarrassment to the accused, becoming an act of illegality. Preventive detention requires the element that determined the guatantee of public order or economic order to be decreed, for the convenience of a criminal investigation or to ensure the application of the criminal law in cases where there is evidence of a crime or enough evidence of authorship. Law 13,964/ 2019 added that preventive detention can be decreed when there is danger generated by the state-of-freedom of the accused.

According to the Code of Criminal Procedure, the crimes that fall under preventive

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detention are the crimes of intent punishable by a maximum sentence of more than four years, repeat offender in crime of intent, and crimes that involve domestic and family violence against women, adolescents, children, the elderly, the sick, or a person with disabilities to ensure protective measures.

Furthermore, preventive detention may be decreed when the individual creates doubts about the civil identity or does not provide sufficient elements to clarify it. These assumptions are provided for in article 313 of the Code of Criminal Procedure. The decree of preventive detention may also occur in a manner other than that established in article 313, when another cumulative precautionary measure is not enough and the accused fails to comply with the collection, with reference to the grounds and assumption.

The topic under study aims to deepen the understanding of the characteristics and developments of preventive detention, especially from the changes influenced by Law 13,964 of 2019 - "Anti-Crime Package", more specifically the removal of the words "ex officio" from article 311 of the Code of Criminal Procedure and divergences identified in the code itself and in the extravagant Laws.

This article aimed to discuss preventive detention in the form of the Code of Criminal Procedure, presenting the possible changes introduced by Law 12,403/2011 and Law 13,964 of 2019.

The methodology used was bibliographic research. The study was outlined through two items and sub-items. First, a literature review on the characteristics of preventive detention, as well as its definition, is presented. Subsequently, a discussion on preventive detention is presented in the code of Criminal Procedure, identifying the legitimate parties to request and represent preventive detention. The second item addresses the differences between the provisions of the Code of Criminal Procedure and the decisions and differences in the higher Courts. It also presents the legislative differences. Finally, we present the final considerations of the study.

2. Preventive detention ex officio

The species of imprisonment in Brazil are provided for in the legal system in three types, namely non-criminal imprisonment, criminal imprisonment, and precautionary imprisonment. Non-criminal imprisonment is divided into civil commitment and military detention. Criminal imprisonment is that resulting from a conviction. According to the Supreme Court in ADC'S 43, 44, and 54, they are convictions res judicata (CUNHA, 2020).

In a brief introduction, precautionary imprisonment occurs when the accused, before is detained before the trial because his/her freedom offers risk at the end of the investigation. However, international legislation has sought to protect the fundamental rights of the citizen before this type of imprisonment. Jain (2020) explains that for a detention to be legal according

to Human Rights, it must be performed according to the procedures of the Rule of Law and without any kind of arbitrariness.

Recalling that international human rights activists recognize that arrest and failure to comply with a legal order of a Court, or th arrest to ensure compliance prescribed by law does not constitute a violation of fundamental rights. However, detention on mere suspicion is a violation of fundamental rights and, in general, the personal freedom of individuals. Detention is legal in case of prevention, that is, to prevent a person from fleeing after committing a crime, or when a person is diagnosed with mental illness, and one must prevent him/herfrom any harm.

The Human Rights Committee prohibits the detention of asylum seekers and for the purposes of extradition and deportation, even in case of illegal entry. What is perceived is that preventive detention is justified to maintain public order for reasons of Public Security, although it is difficult to determine what exactly fits the definition of public order. Therefore, preventive detention ordered in the name of public order must be controlled by law and in accordance with the procedure established by law and cannot be arbitrary (BRASIL, 2011).

Detainees have the right to be informed of the reasons for the arrest and detention, the basis of which they were arrested, and the charges made against this them. The detainee has the right to appear before the judicial magistrate within a reasonable time and the right to obtain a prosecutor or attorney of his/her choice. Finally, an independent body is necessary. One that is not under the control of the Executive and is known to give impartial judgments, being essential for compliance with the determinations of the fundamental rights of the citizen (BRASIL, 2013).

The precautionary imprisonment has stood out in the Brazilian criminal procedure. It consists of detention in flagrante delicto, preventive detention, and temporary detention. Preventive detention is decreed by the competent judicial authority, that is, who can decree it is the judge. However, this must be provoked by the police authority or request of the Prosecutor's Office, claimant or assistant, and can occur at any stage of the investigations or criminal proceedings (CUNHA, 2020).

Hoffmann (2008, p. 82) explains that:

> [...] precautionary measures may be adopted against the *status libertatis* of the person accused (embodied in various forms of procedural detentions) as in favor of the *status libertatis*, represented by measures such as the provisional release with or without bail and the *habeas corpus*, which may be aimed at facts related to the criminal act, whose provisions are made by the search and seizure, insurance measures (kidnapping, legal mortgage, and provisional attachment), provided for in articles 125, 134, and 136 of the Code of Criminal Procedure.

Therefore, pretrial detention focuses on maintaining the accused in custody to ensure his/her presence before the Court, prevent him/her from committing another criminal activity,

and/or prevent him/her from illegally interfering in the investigation of the case.

When it comes to preventive detention at the judge's initiative, it is important to understand what the expression *ex officio* means in forensic language. According to Silva (2005), the expression is used when an authority "executes oat its own initiative, without someone's request, only because it is under the obligation or legal duty to do so".

However, as Gomes teaches (2011), *ex officio* is directly related to the principle of inertia of jurisdiction, i.e., *ne procedat judex ex officio*, which means in the opinion of Tavares (2020, p. 2) "that it is not up to the judge to choose or 'pursue' the cases he/she intends to decide, judicial guardianship must be urged by someone else".

However, when the judge evaluates the 'flagrante delicto', he/she can "apply a precautionary measure (including converting the imprisonment into preventive detention) and does not necessarily need a request, representation, or even agreement of other authorities or parties for this". In this case, the judge did not take the initiative choosing the case of application and does not violate inertia, he/she is acting as established by article 5, items LXII, LXV, of the Federal Constitution of 1988, and article 306 of the CPP. According to Ribas (2020, p. 1), "the communication and referral of the case-file is formal and required by law, including submitted to distribution for the purpose of establishing competence" since it is an act with reason, value, and form.

Understanding the precepts of preventive detention and the definition of preventive at the judge's initiative, it is relevant to know the legitimate parties to request and represent preventive detention, a topic discussed in the next item.

2.1 Legitimate Parties to Request and Represent the Preventive Detention

According to the new text of article 311 of the Code of Criminal Procedure, the Prosecutor's Office, the claimant, or the assistant are entitled to request preventive detention. This preventive detention may also occur by the representation of the police authority, where the chief of police will indicate, even if succinctly, the reasons justifying the measure. The Public Prosecutor's Office has the status of private holder of the public criminal action, provided for in article 129, I, and may request preventive detention in the phase of investigations or posteriorly, during the course of the criminal action, when the complaint is already offered (BRASIL, 1941/2019).

The claimant has always been known in the legislation that changed the course of preventive detention. This consists of the legitimacy of the common and ancillary claimants. Therefore, the holder of the exclusively private criminal action and holder of the criminal action subsidiary of the public action, more rare since crimes of private criminal action have lighter sentences and, due to its lower seriousness, preventive detention is rare to see, as well as the action subsidiary of a public action is more difficult to occur.

The prosecution assistance is new, introduced by Law 12,403 of 2011 since the prosecution assistance was not provided for in the previous wording of this device. The request for a preventive detention from the prosecutor's assistant is legitimate when done personally or through a legal representative, in case of incompetency, according to article 268 of the Code of Criminal Procedure.

2.2 Preventive detention in the Code of Criminal Procedure

Preventive detention is a precautionary measure found in the Code of Criminal Procedure of 1942, the adoption of which was inspired by the Italian Code of Criminal Procedure of 1930. The Brazilian Code underwent significant changes in 1994, with the advent of Law 8,884 of November 11th, 1994, which provided for the prevention and repression of offenses against the economic order, inserting in article 311 of the Code another element of caution, enshrined in the guarantee of economic order.

Law 11,340 of August 7th, 2006, was enacted, authorizing the preventive detention, regardless of the case of crime sentenced with detention in cases involving domestic and family violence against women, in accordance with the law, especially to ensure the implementation of emergency protective measures added with item IV of article 312 of the Code of Criminal Procedure, repealed due to the modification of Law 13,964 of 2019.

The preventive detention of article 311 of the Code of Criminal Procedure is that decreed before the trial of the criminal conviction, unlike criminal imprisonment. For Cunha (2020, p. 253), "there are those who glimpse unconstitutionality in the device that authorizes the decree of preventive detention, for confronting article 5, LVII of the Charter, which violates the presumption of innocence". This position, although minority, was considered by the guarantor doctrine, with the Italian Luigi Ferrajoli (2002) as an expositor of the inadmissibility of detentions before the criminal conviction becomes res judicata, violating the principle of the presumption of innocence.

The decree of detention *ex officio*, in the original wording of article 311, allowed the judge to decree the preventive detention at his/her own initiative, at any stage, be it during investigations or during the criminal procedure. The possibility previous ti the enactment of Law 12,403 of 2011, was the object of criticism by the jurisprudence.

The decree of preventive detention *ex officio* during this phase of the investigation is prohibited by the accusatory system since the decree for preventive detention during the police investigation was removed from the legal system. It is worth noting that such understanding has changed with the evolution of laws, e.g., the possibility of preventive detention during the police investigation and criminal proceedings before Law n° 12,403 of 2011 (ALVES; JOSITA, 2020).

After the enactment of Law 12,403 of 2011, it became possible to decree the preventive

arrest in the police investigation only by provocation, still allowing the modality *ex officio* in the course of criminal proceedings. The enactment of the Anti-crime Package of Law 13,964 of 2019 banned the modalities of the decree at the judge's own initiative both during the investigation and in the course of criminal action (RIBAS, 2020).

The prior deficiency was the subject of an amendment to law 12,403 of 2011, limiting this power during the investigation phase and prohibiting the decree of preventive detention at the judge's initiative, leading the judge to wait for provocation from the Prosecutor's Office or Police Authority. However, in the course of the proceedings, the judge could also decree the preventive detention regardless of representation or request of the parties (LEONARDI, 2019).

In this sense, Cunha (2020, p. 259) cautions:

> Even with the change, an important part of the doctrine taught that the ideal would be to remove from the judge this power to act at his/her initiative, as a form of preservation of the accusatory system, which well defines the position of each in the criminal procedure. If the judge is given the power to judge and if, to this end, he/she must maintain a position of equidistance and impartiality, it would be more appropriate to leave to the parties the possibility of requesting preventive detention, thus avoiding any action by the judge him/herself.

In view of this theoretical thinking, it is observed that the new amendment to article 311 prohibits the judge from acting at his/her own initiative during any of the phases of criminal prosecution, making the decree of preventive detentions possible only through provocation.

The amendment regarding the maintenance of preventive detention was established in Law 13,964 of 2019, according to article 316, sole paragraph, which provides for the mandatory unoffiial revision of the decree of preventive detention every 90 days by the body issuing the decision (CORREA, 2020).

The change seeks to avoid the forgetfulness of defendants who end up serving their sentence before the sentencing itself, being forgotten in the Brazilian prison system. Therefore, preventive detention becomes illegal if there is inertia by the judiciary in question regarding the review in this period. Thus, the prisoner must be immediately released, having relaxed the preventive detention. It should be noted that the Brazilian judicial system is collapsing in many legal districts. However, this issue cannot burden the detained defendant.

3. Divergence between provisions of the Code of Criminal Procedure

Given the current Brazilian accusatory system, each procedural subject will have to perform a defined function within the procedure. It is up to one to accuse, as a rule, the Prosecutor's Office, and, another to defend, the attorney or public defender. In this situation, it is entirely necessary for a third party to judge, i.e., an impartial judge. These assumptions were expressed in Law 13,964 of 2019, article 3-A, which determined that “the criminal proceedings shall have an accusatory structure, being prohibited the initiative of the judge in the

investigation phase and the replacement of the evidentiary action of the prosecution".

The main features of this system was the separation of the bodies of the prosecution, defense, and judgement, having a procedure of parties. The defense needs freedom and equality of position, demanding the adversary proceeding, including the free presentation of evidence by the parties. The Federal Constitution of the Republic of 1988 adopts this system.

Although it is possible to state that the Brazilian procedural system is accusatory, it is common to find several inquisitive traces within the Code of Criminal Procedure. Many authors, especially those with a guarantor position, state that they should be banned or not accepted, articles such as 156 of the Code.

The judge in the case of article 156 acts at his/her initiative since the article allows this initiative even before the criminal proceedings determine the production of evidence in advance, if it is considered urgent and relevant, that is, without a request from the parties. The legal system has many situations that enshrine the inquisitorial position of the judge.

In this sense, Lima (2020, p. 105) cautions:

> From the moment the same person concentrates the functions of investigating and gathering the evidence, he/she will be committed *a priori* with the thesis of the guilt of the accused. Indeed, if the magistrate took the initiative to determine the performance of an investigative act, even before the beginning of the criminal proceedings, he/she indicates, by him/herself, that he/she is seeking confirmation for some hypothesis about the facts. In other words, the judge leaves the position of impartiality, arising from the position as a third party to a partial position, no longer alien to the interests of the prosecution or the defense.

These are just a few of the remnants present in the Code of Criminal Procedure, such as that which occurs in article 316, which establishes that, "The judge may, at his/her own initiative or on request of the parties, repeal the preventive detention if, in the course of the investigation or proceedings, he/she verifies the absence of a reason for its existence, and may decree it if there are reasons to justify it". Therefore, the inquisitory system is once again linked to the Code of Criminal Procedure, as the head provision and the final part of the article establish an action at the judge's initiative, where he/she can "re-decree" the preventive detention.

It has been sought to leave the judge increasingly free from decisions by initiative in administrative procedures, such as police investigation and administrative processes, seeking more impartiality in his/her acts and sentencing, leaving aside the practice initiative in the investigation phase and criminal prosecution. As an example, an attorney won´t obtain impartiality when requesting a *habeas corpus* for his/her client from the judge who decreed the preventive detention at his/her own initiative, since he/she will hardly release the accused (TALON, 2017).

The rite becomes more impartial if the judge decrees the detention after being provoked

and not having acted at his/her initiative, as provided for in Law 13,964 of 2019, unlike the acts that happened before its enactment.

Acting at the judge's own initiative still exists in the current Code of Criminal Procedure. A series of issues in the legal system concern the judge acting at his/her own initiative before criminal prosecution. The Anti-Crime Package presents the directive of the accusatory system, the exercise of *jus puniendi* by the State in which the parties produce evidence and the judge only judges based on such evidence brought to him/her, not concentrating the functions of investigation and judging, as it was with the inquisitory system, *in dubio pro reo,* if the evidence is not convincing regarding culpability, the defendant must be acquitted (LOPES JUNIOR, 2020).

The Anti-Crime Package, Law 13,964/2019, brought a trial of *Habeas Corpus* 188.888/MG, by the 2nd Class of the Supreme Court. "With Rapporteur Minister Celso de Mello, the trial unanimously accepted the illegality of the conversion of prison in flagrante delicto into preventive detention *ex officio"* (MARIANO JÚNIOR, 2020). In this sense, we present a few decisions of the Federal Supreme Court in the following item.

4. Decisions and Disagreements in the Higher Courts

Article 310, amended by Law 13,964/2019, added to the Code of Criminal Procedure the legal provision of prison in flagrante delicto, the prisoner is then subjected to a custody hearing, which must be carried out within 24 hours after the flagrant. The custody hearing is held in accordance with the American Convention on Human Rights. It consists of the presentation of the prisoner to a judge. Although it was added by Law 13,964/2019, this type of detention was already provided for in the Brazilian legal system, as can be observed in Resolution nº 213/2015 of the National Council of Justice. According to Cunha (2020, p. 238) "there are basically two purposes for this, namely: protection of the physical integrity of the prisoner and the finding, that is, examination according to the circumstances of the specific case, analyzing the need to maintain the detention of the accused".

In flagrante delicto detentions, the police authority curtails the freedom of the citizen only with the operator's hearing, witness. On several occasions, this operator/witness are the policemen of the garrison who made the arrest in flagrante delicto. Thus, no other acts of Investigation are conducted. In this sense, Minister Celso de Mello indicates that the magistrate cannot express this power of caution in a criminal procedure, and the police authority cannot restrict freedom as a precaution because it would be violating fundamental rights. As Lopes Júnior explains (2020, p. 3), "it is worth repeating that the criminal procedure limits the punitive power of the State, so that, to restrict the freedom of the citizen, it is essential that it fits the hypotheses contained in the Code of Criminal Procedure".

Also regarding the judge's iniciative, Law 13,964/2019 amended paragraphs 2 and 4 of

article 282 of the Code of Criminal Procedure, in the same junction of the aforementioned article 311, excluding the term “ex officio” in any case, prohibiting the magistrate to decree preventive detention without request of the member of the Public Prosecutor's Office, the assistant prosecutor, claimant, or representation of the police authority.

The articles alluded to above prohibit the possibility of decreeing the preventive detention at the judge's own initiative, leaving clear that a request is necessary to convert a flagrante delicto arrest into preventive detention, as established by article 310, item II, of the Code of Criminal Procedure. In this sense, the communication of the arrest warrant in flagrante delicto alone does not mean that the request was made, given that it is not presumed since it is a question of freedom of a person, requiring a concretely reasoned decision. The request for preventive detention must be expressed, unambiguous, and containing concrete evidence. It is in this sense that the decision of the *Habeas Corpus* 188,888/MG,

> [...] (re)affirms that the procedural system to be applied in the Code of Criminal Procedure is the accusatory for guaranteeing the adversary proceeding and the right to a fair hearing. Therefore, Law 13,964/2019 prohibited the possibility of the judge to decree preventive detention at his/her own initiative since, to remain impartial, the magistrate in the accusatory system must be mere spectator, observer, inert, and judge with what was produced by the parties, and not have a positive conduct. Therefore, a teleological, systematic interpretation demonstrates the impossibility of the judge to convert the arrest in flagrante delicto into a preventive detention, even with the lack of explicitness of article 310, II, of the CPP. After all, the CPP applies the accusatory system (MARIANO JÚNIOR, 2020, p. 3).

There is the possibility that the judge, without the request of the police authority or the Public Prosecutor's Office, can convert the arrest in flagrante delicto into preventive detention, causing divergence in the Superior Court of Justice. In this sense, the classes that Judge criminal matter have recently consolidated two distinct understandings on the matter. For the 2nd Class of the Federal Supreme Court, as cited above, it can only be converted to preventive detention at the request of the Prosecutor's Office or police authority.

The 5th Class of the Superior Court of Justice has adopted the understanding that the Law excluded the possibility of making a conversion at the judge's initiative since legislation has sought to extinguish such modality, a position that has recently spread with that of the 2nd Class of the Federal Court, even with single decisions of Ministers of the STF.

Despite having two classes already addressing in an almost consolidated form, the 6th Class of the Superior Court of Justice does not agree with such an understanding, maintaining the jurisprudence and not considering the changes of Law 13,964/2019. Minister Rogerio Schietti Cruz highlighted in his report of the decision of HC 597.536/GO that “there is no nullity in the conversion of prison in flagrante delicto into precautionary detention by the single Magistrate, given the urgency with which this hypothesis should be treated”, based on article

310, item II of the Code of Criminal Procedure. Therefore, it is important to clarify that there is no "decision at the judge's initiative if the Code of Criminal Procedure directs the magistrate to analyze the conversion of the detention during the custody hearing of the arrested in flagrante delicto" (BRASIL, 2020, p. 1), as can be seen in the decision of HC 597.536/GO, judged on October 27th, 2020, DJe on November 12th, 2020:

> HABEAS CORPUS. DRUG TRAFFICKING AND ASSOCIATION FOR TRAFFICKING. CONVERSION OF THE FLAGRANTE DELICTO INTO PREVENTIVE DETENTION NOT PRECEDED BY REPRESENTATION OF THE POLICE AUTHORITY OR THE PUBLIC PROSECUTOR'S OFFICE. NULLITY. NON CONFIGURATION. PERICULUM LIBERTATIS. ARTICLES 312 AND 315 OF THE CPP. REPUTABLE MOTIVATION. ORDER DENIED. 1. As for the alleged nullity resulting from the conversion of the flagrante delicto into preventive detention at the judge's initiative by the single Judgment, it is seen that the action of the Magistrate falls under the hypothesis of article 310, II, of the Code of Criminal Procedure. 2. The jurisprudence of this Superior Court is firm in pointing out that, despite the changes made by Law nº 13,964/2019, there is no nullity in the conversion of the arrest in flagrante delicto into precautionary detention at the judge's initiative, by the single Magistrate, given the urgency with which this hypothesis must be treated. Precedents. 3. Preventive detention is compatible with the presumption of the lack of guilty of the accused provided that it does not assume the nature of anticipation of the sentence and does not automatically arise from the abstract character of the crime or the procedural act practiced (article 313, paragraph 2, CPP). Additionally, the judicial decision must be based on concrete grounds concerning new or contemporary facts, from which one can extract the danger that the full freedom of the investigated or defendant represents for the means or purposes of the criminal procedure (articles 312 and 315 of the CPP). 4. The appropriate motivation was presented to justify the preventive detention – notably, the seizure of almost 1 kg of marijuana and the risk of criminal repetition, evidenced by the defendant's recidivism and the fact that he was serving time in the semi-open regime at the time of the illegal practice considered -, sufficient circumstances, according to the jurisprudence of this Superior Court, to withstand the imposition of extreme caution. 5. Order denied (BRASIL, 2020, p. 2).

Rapporteur Minister, Rogerio Schietti Cruz, states that the judge should, in the custody hearing, convert the arrest in flagrante delicto into preventive detention, if the legal requirements are present and, in turn, revealed inadequate or insufficient the precautionary measures that are different from detention. As can be seen in the following excerpt from the trial of HC 597.536/GO:

> In such a situation, there is no properly unofficial activity of the judge, because, strictly speaking, not only does the law compel the judicial act but, in a certain way, there is also the referral, by the police authority, of the arrest warrant in flagrante delicto for its accurate analysis, in the expectation, derived from the legal device, that the judge, after hearing the indictment, adopt one of the measures provided for, said Minister Rogerio Schietti Cruz (VITAL, 2020, p. 2).

This divergence extends when it comes to the 5th Class of the Superior Court of Justice, which defined the matter in total agreement, with the legislative seeking the effectiveness of the accusatory criminal system. The decree of preventive detention when it comes to conversion of

the prison in flagrante delicto through the judge's own initiative lasted for a long period in the Brazilian legal system. Only after the evolution of the law was it possible to stop occurring. Having a legal setback after years of development is inadmissible in the face of the accusatory system instructing more and more within the criminal procedure. This setback would reach the defenses within the criminal prosecution.

In this sense, Lopes Junior (2020, p. 974) cautions

> Such a "conversion at the judge's initiative" of the arrest in flagrante delicto into a preventive detention is a procedural fraud that directly violates article 311 of the CPP (and everything that is known about accusatory system and impartiality), and here ends up being – fortunately - buried, to the extent that the Public Prosecutor's Office is at the hearing. If The Prosecutor's Office does not request the preventive detention, the judge can never order it at his/her own initiative.

It is not uncommon to find disagreement between higher courts in Brazil. Such a situation that was already almost overcome by agreement of two different classes of Courts, returns to debate after the non-observance of a theme that had already been overcome by the simple fact of being congruent with the accusatory system.

5. Legislative Divergencies

The Brazilian legal system, more precisely Law 11,340 of August 7th, 2006, known as Maria da Penha Law, shows conflicting situations between the Law and the Code of Criminal Procedure. Article 20 of Law 11,340/2006 is one such case, which allows preventive detention in the face of the aggressor by the judge at his/her own initiative, that is, without requiring a request.

Law 13,964/2019 did not bring any changes or caveats on cases of domestic violence. With the advent, preventive detention depends on a request from the Prosecutor's Office, the claimant, the assistant, or the representation of the Chief of Police. The Maria da Penha Law, based on the protection of women, must be applied in its entirety due to the principle of specialty. This is a presumptive and ideological case that aims to protect women. In this sense, the divergence between the criminal procedural standard is overcome.

The principle of the specialty established that the special standard distances the incidence from the general standard since the norm is said special when it contains the general elements and adds details. However, there are no absolute laws or special or general provisions.

The incidence of the principle of specialty, in the Brazilian legal system establishes practical outlines. The judge can thus decree the preventive detention on his/her initiative exclusively in cases of domestic violence. Thus, the magistrate will repeal, even if tacitly, the criminal procedural standard, specifically article 311.

But there must be arguments for article 311 of the Code of Criminal Procedure to be fully applied in cases of domestic violence. Therefore, it is up to the Judiciary to be provoked by

the legitimate parties so that the magistrate can promote preventive detention. The reasoning behind the judge's decision must be presented when the accused of domestic violence is segregated. Thus, it will not violate the accusatory system of criminal proceedings and will consequently respect the principle of the adversary proceeding and the right to a fair hearing, constitutional principles provided for in article 5 of the Federal Constitution of 1988 (PEREIRA, 2020).

The application of the general rule brings more legal certainty to the case. However, this does not mean that the victim will be left helpless in the face of the specific case since, if the judge is provoked either by the prosecution or the representation of a police authority, he/she must reason his/her decision, as explains the article 312 of the Code of Criminal Procedure. Thus, the opposite occurs since the provisions of Law 11,340/2006 are tacitly repealed.

In this sense, the Brazilian Criminal Code provides in article 12 that "the general rules of this code apply to the facts incriminated by special law, if it does not provide differently". What is observed is that article 20 of the Maria da Penha Law does not present anything new, nothing special regarding the Code of Criminal Procedure, consisting of a mere transcription, almost complete, of the original wording of article 311, in force at the time of its sanction (CUNHA; PINTO, 2020).

6. Conclusion

In the course of this study, the main nuances of the institute of preventive detention provided for in the Brazilian Code of Criminal Procedure, article 311, were presented, highlighting the changes that impacted the said device with introduced by Law 13,964 of 2019, better known as the "Anti-Crime Package". Notably, the possibility of the judge acting on his/her own initiative to decree the preventive detention without first having been provoked by one or more legal legitimates was removed.

Additionally, we sought to show that the removal of this initiative to declare the detention during the criminal prosecution or police investigation was welcomed. The Code of Criminal Procedure itself establishes in its article 3-A, that its structure is in fact accusatory and not inquisitorial.

Thus, because it is the most severe measure among precautionary measures, preventive detention must always be in line with the evolution of the law and society since the freedom of the individual is in line, a right that must be suppressed only as a last resort, just as criminal law is the *ultima ratio* in the legal system.

Finally, it was concluded that the Code of Criminal Procedure still present devices that approve the magistrate to act on his/her own initiative, a situation that is in dissonance with the very structure of the current accusatory system. Despite this, it is noteworthy that the changes introduced by Law 13,964 of 2019 generated significant impacts on criminal legal procedures,

especially regarding the impartiality of the magistrate. However, the impacts in future decisions must be expected to demonstrate their practical applicability beyond theory.

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