CRIMINOLOGICAL EXAMINATION IN BRAZIL: AN INTER-AMERICAN HUMAN RIGHTS-BASED APPROACH[1]

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ABSTRACT

The article seeks to contribute to the debate about risk assessments in the criminal justice system and their legitimacy, providing an Inter-American Human Rights perspective, specifically from the Inter-American System of Human Rights. To do so, the starting point will be the 'criminological examination', a risk assessment conducted in Brazil in the post-conviction stage. The article will start by laying out the legal framework and evolution of criminological examination in Brazil. Partial results of the author's Masters' dissertation will then be examined, specifically how the judges use and interpret the criminological examination, to understand its role in the practice of the criminal justice system. Academic criticism directed at these examinations will then be briefly shown, and focus will be given to the contributions of the Inter-American Commission of Human Rights in the case of *Víctor Saldaño vs. United States of America*. The criminological examination will be analysed in accordance with these contributions, namely regarding the unreliability of predictions of future behaviour and its incompatibility with the principle of legality. It concludes by pondering the debates around risk assessments that could be carried out based on these elements.

Keywords

Risk assessments, criminological examination, Brazilian post-conviction stage, Human Rights, Inter-American Commission of Human Right

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Introduction

This article seeks to contribute to the debate about risk assessments in the criminal justice system, what they consist of, how they are used, and their legitimacy. To do so, the risk assessment conducted in Brazil, in the post-conviction stage – 'criminological examination' (exame criminológico) –, will be the starting point.

Firstly, the article examines the legal framework and evolution of criminological examination, explaining the Brazilian 'Penal Execution Law' (PEL – Law n. 7.210/1984[3]), a law entirely dedicated to structuring and regulating the post-conviction stage. It will include brief explanations of the regime progression and parole, as well as the examination itself. This lays out what is the role of the criminological examination, at least from a formal and legalistic perspective.

The author's Masters' research partial results regarding criminological examination will then be presented aiming to illustrate how it is used in practice by judges, and how it comes to life in the Brazilian criminal justice system[4]. The research conducted, published as a monograph (Rosa, 2019), was broader and sought to analyse how the judges of the Court of Appeals of the State of Sao Paulo interpreted and applied the rehabilitation purpose of punishment, which is the primary aim of the post-conviction stage, according to the PEL. However, there were relevant findings regarding the use of the criminological examination and the role it has in the criminal justice system, and specifically in the post-conviction stage, which is why an article entirely dedicated to this debate, adopting a human rights-based approach, is needed.

Following the presentation of these results, there will be a brief analysis of some problems identified with the criminological examination, but the focus will be on contributions of the Inter-American System of Human Rights (IASHR) to the discussion regarding prediction of future behaviour and its impacts in the criminal justice system.

Many academic papers about this topic carry out their analysis, at least in part, through the lens and criticism provided by Michel Foucault's work (Bandeira, Camuri & Nascimento, 2011; Shimizu & Rodrigues, 2022). This article recognises the tools available in his theory, however, it focuses on some of the contributions of the IASHR (see a human rights-based discussion in

[3] This is called 'Lei de Execucoes Penais' and in this article the expressions 'penal execution' and 'post-conviction stage' will be used to name the phase which starts with the offender's definitive sentencing until the punishment imposed in entirely served.

[4] The dissertation has been published in its entirety as a monograph in Brazil (Rosa, 2019).

Snacken, Devynck & Uzieblo, 2022), with an in-depth analysis of a report issued by the Inter-American Commission of Human Rights (IACmHR) in the case of *Víctor Saldaño vs. United States of America*. This case involved several issues, from the application of the death penalty to the due process of law. However, this article will examine what are the arguments related to the 'future dangerousness as a criterion for imposing the death penalty' (IACmHR, 2017: 31). These arguments consisted, essentially, of two: (i) future behaviour cannot be predicted and any attempt in that direction will always be a matter of probability and not certainty or, in other words, prediction of future behaviour is not reliable; and (ii) prediction of future behaviour is incompatible with the criminal justice system, as it violates the principle of legality, punishing the convict for an act that may or not occur.

These arguments have the potential to contribute to a wider discussion about risk assessments, prediction of future behaviour and its impacts in the criminal justice system, and this article will try to participate in this debate.

Introducing the Brazilian Penal Execution Law

After many attempts (Dotti, 1991), in 1984, Brazil finally approved and promulgated the PEL, a law that structures all the system for the post-conviction stage. It establishes the aims of punishment, the rights and duties of the convicted and the State, the institutions involved in this stage and their roles, disciplinary norms and penalties, amongst others. Since its entry into force, the PEL has undergone several modifications, but its guiding principle remains the same: its first article establishes that the purpose of the penal execution is to put into effect the content of the sentence or criminal decision and to provide conditions for the harmonious *social integration* of the offender.

This aim, set from the beginning, affects the entire post-conviction stage, and the PEL contains several provisions dedicated to achieving it. For example, it adopts a progressive regime system for the serving of sentences, inspired by previous experiences, but especially Alexander Maconochie's in Norfolk Island (Pimentel, 1989; Bitencourt, 2011; Machonochie, 2012). This allows for the early release, even if gradually, of those convicts that have good behaviour and have already served part of their sentence.

The Brazilian legal system allows two types of early releases after a part of the sentence is served: *regime progression* ('progressão de regime'), detailed and provided for in article 112, PEL, and *parole* ('livramento condicional'), regulated in the Penal Code (PC), from article 83

onwards[5]. They have different rules and applications, but both possess two basic conditions provided by law to be granted: an 'objective condition' and a 'subjective condition'.

The objective condition relates to a minimum amount of time that needs to be served before the convict can request one of these 'benefits'[6]. This amount of time is provided by law either in fractions or in percentages, and is, therefore, proportional to the total sentence imposed; it also varies according to the crime committed and the offender (e.g. if they are first time offenders or recidivist), so as to reflect the concrete circumstances of each criminal act.

The subjective condition relates to the convict's prison behaviour, which is attested by the Prison Director in a document that classifies it as 'great', 'good', 'regular' or 'bad', depending on disciplinary misconducts and their severity (articles 85 to 92 of Resolution SAP n. 144/2010, which establishes the Standard Internal Regulations for Prison Units in the State of São Paulo). With a 'good' or 'great' behaviour, the convict should be, in the 'subjective' dimension, considered deserving of a benefit.

As can be seen, both conditions set in law are objectively verified and even the so-called 'subjective condition' is based on externalised acts by the prisoner, rewarding or punishing how they conduct themselves (Barros, 2004). Until 2003, the criminological examination was still legally required in some cases, but was then struck out by Law n. 10.792/2003 and, after much discussion, is now considered optional and dependant on the specific case, as will be shown in detail. Even with a broad legislative modification in 2019, with Law n. 13.964, the requirement of the criminological examination for these benefits was not restored.

The requests for these benefits are formulated to a judge, who decides on them (art. 66, III, 'b' and 'e', PEL) and is guided by the purpose of rehabilitation, as set in art. 1 of the PEL. It is worth noting that, in Brazil, the entirety of the post-conviction stage is overseen and decided by judges (article 65, PEL), who are also responsible for the lawfulness of the penal execution. This judicial oversight is essential for the correct and effective application of the PEL and in combatting violations of rights in prison, as can be seen in the provisions of article 66, VI, VII and VIII, of the PEL (Scapini, 2007).

[5] These two institutes have different rules and applications, but only a brief explanation of both will be given in this paper, to the extent relevant to the debate about criminological examination.

[6] These two institutes will be hereto called 'benefits', although there is much debate about this term and what it entails in terms of recognition of prisoners' rights. The option for this name is not an affiliation to the understanding that they are indeed mere benefits and, therefore, can or cannot be granted. It is adopted simply because it is the most common name used in the criminal justice system.

Criminological examination in the Penal Execution Law

The post-conviction stage in Brazil is also guided by the principle of individualisation of punishment, provided for in article 5, XLVI, of the Brazilian Federal Constitution (BFC), and deeply connected with the humanisation and proportionality of punishment (Batista, 2007; Brazil, 1983). This principle is equally provided for in several different articles of the PEL, such as article 5, which establishes that convicts will be classified according to their criminal record and personality, so to guide an individualised treatment in the post-conviction stage. The classification shall be carried out by a team of experts known as the 'Technical Classification Commission' ('Comissão Técnica de Classificação') (art. 6, PEL).

This Commission is also responsible for a first examination, provided by law (articles 8 and 9, PEL; articles 34 and 35, PC) known as the 'entrance criminological examination' ('exame criminológico de entrada') or 'personality examination' ('exame de personalidade'), which is inserted in this rationale of individualising punishment, aiming to shape the post-conviction stage for each individual according to their characteristics and needs (Brazil, 1983). The convicts go through a personality assessment to enable the development of an individual plan for each one. The Commission responsible for this is chaired by the Prison Director and composed of, at least, two heads of services, one psychiatrist, one psychologist and one social worker (article 6, PEL).

The second type of examination, called the 'criminological examination', is conducted when the convict is entitled to regime progression or parole, and since 2003 is no longer provided for in law, as previously introduced. After several debates about this legislative modification, the Superior Court of Justice and the Supreme Court decided that this criminological examination is no longer mandatory, but judges can determine it when they deem it necessary[7].

The criminological examination consists of two phases: firstly, the Commission carries out a criminological diagnosis and prognosis, which is then followed by a conclusion on whether to grant the regime progression or parole, all inscribed in an interdisciplinary approach (Sá, 2010). Therefore, the elements of the criminological examination can be divided in three: the diagnosis, in which the convict's personal aspects and psychological or biological predisposition are analysed to understand and contextualise the criminal behaviour; the prognosis, which seeks to predict the convict's future behaviour; and the experts' opinions, for

[7] These decisions have the status of a 'Precedent' ('Súmula'), specifically n. 439 of the Superior Court of Justice, and 'Binding Precedent' ('Súmula Vinculante') n. 26 of the Supreme Court.

example, on how to improve certain aspects of the post-conviction stage, or on whether the regime progression or parole should be granted (Shimizu & Rodrigues, 2022).

In a nutshell, the original idea of the PEL was to classify the convict and develop an individual plan for the post-conviction stage, which would be adequate to the convict's needs and guided by the purpose of rehabilitation. The convict and the rehabilitation process would then be accompanied by the Commission (Shimizu & Rodrigues, 2022).

However, due to the lack of infrastructure in Brazilian prisons, the Commission, as provided for in law, does not exist, and the first examination is rarely conducted. Consequently, there is no individual post-conviction plan and no means to compare if and how the convict is progressing regarding the purpose of rehabilitation (Silva, 2018; Barros & Junqueira, 2010; Sá, 2010; Shimizu & Rodrigues, 2022).

Thus, despite the reality of the prison infrastructure, the criminological examination for regime progression or parole is still conducted, even without a legal provision for it, whereas the 'entrance criminological examination', which is provided for in law, is rarely carried out (Shimizu & Rodrigues, 2022).

This situation raises many questions regarding the purpose of the criminological examination, why judges still determine them and rely on the results, how are these conducted and what are the categories used in them. These issues will be addressed in the following sections, which present the partial results of the author's Masters dissertation. This data will then be examined through an Inter-American Human Rights (IAHR) perspective, specifically with an analysis of the report issued by the IACmHR in the case of *Víctor Saldaño vs. United States of America*.

The analysis of how the criminological examination is conducted in Brazil, what categories are used by psychologists, social workers and psychiatrists, how the results are used by judges, and its impacts on the convict, all contribute to the debate around risk assessments and its legitimacy within the criminal justice system.

Criminological examination in practice

The original Masters' research conducted (Rosa, 2019) sought to analyse how the judges of the Court of Appeals of the State of Sao Paulo interpreted and applied the rehabilitation purpose of punishment, which is the primary aim of the post-conviction stage according to Brazilian law, as shown.

The research consisted of a theoretical part on the purpose of rehabilitation, Brazilian law, and the role of judges in a Democratic State committed with the rule of law and fundamental rights, with a focus on the post-conviction stage. With this framework in mind, 400 decisions by the Court of Appeals of the State of Sao Paulo were selected, all dating from 2010 to 2014, in the post-conviction stage, with a selection of five decisions per year and per Chamber[8]. Although the Brazilian legal system provides for different types of criminal penalties, such as fines and restriction of rights, since the decisions selected related to regime progression and parole, they were focused on the prison penalty.

These judicial rulings were then examined in their content, extracting from them the criteria used by the judges to decide on whether to grant regime progression or parole and how they related this decision to the purpose of rehabilitation. Due to the amount of data collected, only the most recurring positions were selected and examined, seeking to go beyond a linguistic analysis and understand what choices were made by the judges regarding criminal and prison policies and which contents were applied and justified in the post-conviction stage[9].

The following categories were identified: discourses related to rehabilitation, if the principle of legality was adopted or if the judges adopted criteria not provided for in law; how formalisms in law were regarded and if they were flexibilised and how; how parole was treated when compared to the regime progression; criminological examination, when it was conducted, how it was used by judges, and what categories were used by psychologists, social workers and psychiatrists when carrying out the examination and writing their report for the court; convict's personality; convict's dangerousness[10]; severity of crime committed and time yet to be served; *in dubio pro societate* (presumption in favour of society); and discourses related to the judicial activity.

[8] The methodology followed was based primarily on the following works on empirical legal research: Palma, Feferbaum & Pinheiro, 2012a, 2012b; Pires, 2008. The Court of Appeals of the State of Sao Paulo has 16 Chambers dedicated to Criminal Law matters, each one with five judges, and most appeals are decided by three judges.

[9] Here we refer to the difference made by Paul Ricoer between language and discourse, where discourse is message and language is the instrument through which this message is delivered (Lopes, 1989). About the decision process, we also refer to the work of Reale Jr. (2011), for whom the judge does not decide merely based on law, but is influenced by several factors such as cultural or from experience, firstly deciding in an intuitive way and then building a legal argument to justify the decision. Also on the topic of the motivation of criminal decisions, see Gomes Filho (2001).

[10] The concept of dangerousness is not provided for in Brazilian law, in any case, when the offender is *not* mentally disordered – for them, the principle of culpability is adopted (Carvalho, 2015). However, the presence of this criterion, applied for nondisordered offenders, without justification on the law, shows that the image of the offender as dangerous, predetermined to criminality, is still predominant, and makes its way into practices of the criminal justice system.

It was found that all the decisions accepted rehabilitation as the main aim of the post-conviction stage, and this was the guiding principle for the rulings. However, how the principle was interpreted and applied varied and the most evident difference in interpretation was between those decisions that adopted an understanding close to the principle of legality – so merely required the criteria set in law to grant parole or regime progression –, and the decisions that demanded additional criteria. These additional criteria were vague and diverse (abstract severity of crime, the amount of penalty still to be served, the personality or dangerousness of the convict, etc.), with the criminological examination being one of the most common additional requirements (Rosa, 2019).

This examination assumed an important role in the post-conviction stage, even though it is not mandatory and should only be conducted when regarded necessary and justified by the judge in a specific case. As will be detailed next, it plays a crucial role in allowing state interference in the individual's subjectivity, for outdated categories from Positivist Criminology to permeate modern day punishment, and as a gateway for subjective judgements furnished as expert opinions.

In this paper, we argue, based on IAHR, that no matter how technical a criminological examination may be, its use to deny or grant rights is incompatible with a democratic criminal justice system. That is because (i) criminological examination cannot predict future behaviour; (ii) even if it could, it can merely indicate a probability, which may or not occur; (iii) even if it could predict with certainty future behaviour, a more severe punishment based on this violates the principle of legality. This discussion will be carried out following the presentation of the data extracted from the published Masters' research, that is, the data obtained from judicial decisions (the original criminological examinations were not analysed) and already dissected in the Masters' research (the judicial decisions were not re-examined for this article).

The need for criminological examination

As already shown, the absolute need for criminological examination when deciding on regime progression is no longer a legal requirement and is now understood to be only a possible option, when deemed necessary by the judge. What the research results (Rosa, 2019) have shown is that there are three main positions in the Sao Paulo Court of Appeals regarding the need for this examination.

A first one does not deem the criminological examination necessary to decide on benefits, once

the criteria for them have been provided for in law (objective and subjective conditions), and given the examination is not one of them. This position is generally in line with judges that follow the principle of legality when it comes to the interpretation of the purpose of rehabilitation. For them, the law requires a good prison behaviour, which is proved by a declaration by the Prison Director and rules out the need for criminological examination (Rosa, 2019).

A second position is that the criminological examination is always needed to assess the subjective condition of prisoners, their personalities, if they are ready to go to a less restrictive prison regime and if society will be safe with their early release. They reject what would be an automatic progression and see in the criminological examination a way of revealing what the prison behaviour itself does not. For the judges who follow this approach, the prison behaviour does not show the prisoners' readiness to go back to society, since they can learn the rules of the prison without internalising the rules of society (Rosa, 2019). Thus, the process of prisonisation (Baratta, 2001) can be used to determine the criminological examination, as if this examination could see through the prisoners' behaviour and reveal something more about their personality and true values.

At last, a third position – and the most common one – is that judges can determine the criminological examination when they deem it necessary in a specific case. However, the reasons used to justify the examination are, in general, vague and the content of the decisions do not contribute to the predictability regarding the cases in which the criminological examination could be required.

There are cases of judges justifying this examination, for example, based generically on the convicts' presumed dangerousness, their personality, severity of crime committed, amount of penalty imposed in sentencing, convicts' recidivism, need to individualise the punishment, society's safety, etc. In some cases, judges even determine the criminological examination to be conducted in future requests for regime progression or parole, which demonstrates the lack of justification in concrete situations (Rosa, 2019).

A recurring argument for adopting this third position is that the penal execution is jurisdictional, so overseen by and under the responsibility of judges, who cannot merely ratify the prison behaviour declaration issued by the Prison Director. As shown previously in this article, the conditions for regime progression and parole are strictly objective (even the 'subjective condition' is provided by law), which limits judges' judicial discretion. The possibility of

determining criminological examination, and deciding based on its results, combined with the other elements chosen by the judges, would broaden their discretion.

The use of criminological examination

In the cases in which the criminological examination was determined (either by the judge at the Court of Appeals or in the first instance) and conducted, it is also possible to analyse how the results were used to decide on regime progression and parole.

The understandings also vary and can be divided into three different positions: cases in which the decision was linked to the result of the criminological examination (the experts' opinions); cases in which the content of the criminological examination (diagnosis/prognosis) prevailed over its result (experts' opinions), and judges chose which elements they would use for their decision; and cases in which judges did not use the criminological examination at all, either because they ruled based on other aspects of the penal execution or because they disagreed with the categories used in the examination (Rosa, 2019).

In the cases in which the decision was linked to the result of the criminological examination, judges treated the assessment as the most reliable proof to determine whether the convict deserved the benefit or was prepared for it. For example, the decisions would directly quote extracts of the criminological examination and rule based on them, following the expert opinions expressed there.

In the cases in which the content of the criminological examination prevailed over its result, this assessment was treated just like any other piece of evidence and the judge used the content of what was described in the examination, sometimes alongside other criteria. Therefore, even if the criminological examination was favourable, the benefit was denied, or it could be unfavourable, but the benefit was granted. The additional criteria used by the judges ranged from, for example, the length of penalty and severity of the crime to considerations regarding if the convict displayed regret or confessed the crime committed, or even further evidence of prison behaviour and engagement with labour or educative activities, amongst many others (Rosa, 2019).

In some of the cases in which judges did not use the criminological examination because they disagreed with the categories used in the assessment, there are rulings that, for example, point out how vague and imprecise are the expressions used, preferring more objective evidence, such as the convict's prison behaviour and dedication to labour and/or studies (Rosa, 2019).

Categories used in the criminological examination

So far, we have shown how criminological examination is conducted, what is contained in it, as well as when and how it is determined and used by the judicial authorities. However, to fully understand the role of the criminological examination in the post-conviction stage, it is necessary to comprehend its content, what are the categories used and described in it. This is even more relevant when we consider that, in most cases, judges do not question the categories, which means that these are regularly used as the basis for rulings, shaping the post-conviction stage and determining the future of individuals incarcerated (Rosa, 2019).

The criminological examination describes several aspects related to the convicts, such as their behaviour, their families, what are the discourses the convicts adopt when being interviewed by the experts, their personalities, their past, conditions of imprisonment and prison behaviour, and also contains subjective judgements about the convicts.

These elements will be detailed here and were extracted from the rulings that were analysed; so we cannot place exactly where in the criminological examination they are from, but it is still possible to identify when these are diagnostic or prognostic elements.

The experts analyse and describe, amongst other aspects: the convict's family; how is the convict's relationship with other inmates; how they understand the commission of the crime and its consequences; the discourse adopted in the interview with the experts; the convict's personality and dangerousness; if the family is structured or not; the parents' financial situation; how the convict was raised, their childhood and adolescence (including whether they have already been institutionalised); if any other family member has committed crimes; if the convict has a partner and/or children; if the convict has received support from family members during the sentence; whether they receive visits or maintain any other type of contact; the level of education; the profession/occupation in the past or intended in the future; future plans (e.g. if the convict has future plans, if they are in-depth and consistent with reality, or if they are too ambitious); if the convict works or studies in prison; how is their relationship with prison staff and other inmates; if they have already obtained benefits before and how they behaved; if the convict has a record of disciplinary faults; and which crimes were committed (Rosa, 2019).

Amongst the more subjective judgements made about the convicts in the criminological examinations, we can identify statements such as if they: have a 'structured criticism'; demonstrate commitment to the process of social readaptation; absorbed prison therapy; offer

indications that they will adapt to the new regime or parole; present stereotypes that they will commit a crime again; are dangerous; have structured judgment of ethical-moral values; accept responsibility for the crime (with what kind of criticism and whether they attribute it to external influences, for example); have self-criticism; show maturity; reflect on their actions and become aware of them; know how to deal with frustrations; are convincing in their proposals for resocialization; show signs that they will adjust to the new regime; display desire for change; demonstrate their commitment to the resocialization process; present desires to repair the victims; are benefiting from the re-socializing therapy of prison; have control of their impulses; demonstrate empathy or not; have mechanisms of self-control; show aggressiveness, impulsiveness or superficiality; orientate themselves in time and space; evidence disorders or have a dissocial personality; present a sincere discourse or if it is controversial or programmed; present satisfactory social projection; have internal resources to adapt to the sought benefit; need maturing and social reorganisation to deal with their internal contents; have guilt or regret (and the reasons for this regret, being considered negatively, for example, if the regret comes from their own personal losses and not as a result of reflections of their actions for the victim and for society) (Rosa, 2019).

The experts present opinions such as if: the convict presents a tendency to abandon the new prison regime; their resocialization will be put at risk with the granting of the benefit; they may commit more crimes; if there must be caution when granting benefits or if they need to remain longer in a more severe regime to continue absorbing social values or ‘prison therapy’ or, even, to better reflect on the crimes committed, to improve their critical sense or to contribute to the ‘process of correctional evolution’ (Rosa, 2019).

Critical analysis of the criminological examination

The data shown can be examined through different lens, and several researchers have indeed directed criticism at the criminological examination as it is carried out.

Firstly, criticism is made to how these criminological examinations are treated as if the Brazilian prison system was exactly as it is provided for in law, instead of acknowledging the reality of its lack of infrastructure (Barros & Junqueira, 2010).

Indeed, the criminological examination, as it is currently conducted in the criminal justice system, differs from its original purpose, which is to compare the rehabilitation progress of the convict based on the ‘entrance criminological examination’. Furthermore, it is not used to

identify deficiencies in the application of punishment and improvements that could be implemented, for example, in prison conditions and services offered, such as psychological and/or social support. In fact, the assessment reduces the complexity regarding the causes that lead to commitment of crimes, using criteria that focus solely on the individual.

The way in which it is conducted and used presents the characteristics of a criminal justice system that seeks to correct the person that committed a crime, which entails knowing not only the crime and the law, but the criminal, their passions, motivations, environment, and eventual diseases, shaping the punishment according to these aspects (Reishoffer & Bicalho, 2017).

It disregards that some of the negative aspects described in these assessments, such as immaturity and difficulties in elaborating consistent plans for the future, can be a result of incarceration itself (Sá, 2011). It takes out of context several of these negative aspects, ignoring the social reality of the people incarcerated, such as when assessing if the person maintains family contact, but not investigating further, for example, if the prison is far from the family's home and the financial impact of visitations (Silva, 2018). It can even adopt as a 'standard of family' one that ignores the realities of financially vulnerable homes throughout Brazil, which impacts negatively the punishment imposed on young black and/or poor people (Batista, 1997: 78).

The categories used are also criticised on technical grounds, such as with the catchphrase 'inhibitory control', which relates to a concept of the criminal that can be traced back to Italian Positivism and Lombroso's ideas, and shallowly and distortedly uses psychoanalytical concepts (Silva, 2018). In fact, a lot of criticism is directed at the persistence of a model that reduces crime to the result of sociobiological causes, with concepts of propensity to crime, causes of delinquency and personality turned to crime (Lopes Jr., 2007).

Despite all these criticisms directed at the criminological examination, it is still a popular method in the post-conviction stage, with some pointing out the convenience of the examination to the judges, that have at their disposal an expert document that is highly subjective, but difficult to refute, and offers them the possibility of avoiding responsibility for the decision made (Lopes Jr., 2007; Carvalho, 2003). Batista has broadly criticised the attribution of power to experts in criminal justice systems. According to her, this label allows criminal justice systems to hide their violence behind the mask of technicality, disguising as 'technical' what are in fact moralistic, discriminatory and racist contents, typical of a Lombrosian and Darwinist approach to crime (1997).

The approach adopted in the present work, however, will be one based on IAHR. Specifically, the discussion will be guided by the contributions provided by the IACmHR in its report on the case of *Víctor Saldaño vs. United States of America*.

A human rights-based approach

The case of *Víctor Saldaño vs. United States of America* is principally about the imposition of the death penalty, but the aspect that most interests us is the discussion about 'future dangerousness as a criterion for imposing the death penalty' (IACmHR, 2017: 31). This is because the IACmHR addresses two aspects that are integral to the criminological examination and also applicable to other types of risk assessments in the criminal justice system or even other policies that involve prediction of future behaviour.

The discussion presented here will, therefore, focus on two different aspects of the criminological examination: (i) it cannot predict future behaviour and any attempt in that direction will always be a matter of probability and not certainty or, in other words, prediction of future behaviour is not reliable; and (ii) prediction of future behaviour is incompatible with the criminal justice system, as it violates the principle of legality, punishing the convict for an act that may or not occur.

The case of Víctor Saldaño vs. United States of America

Víctor Hugo Saldaño was sentenced to the death penalty in the United States of America, in the state of Texas, and was on death row while waiting for a final decision on his criminal case. The IACmHR, after examining the merits of the case, concluded that the State was responsible for the violation of many of the human rights established in the American Declaration of the Rights and Duties of Man (ADHR), related to the punishment imposed and the reasoning behind it, which included racial discrimination, as well as to how the process was conducted, the time spent on the death row and the conditions of incarceration, to name some (IACmHR, 2017).

The aspect that will be examined to assist in the discussion surrounding risk assessments refers to the future dangerousness criterion that guided the imposition of the death sentence in this case, based on legislation still currently in force in the state of Texas[11].

In the case of Saldaño, a piece of evidence considered by the jury was the testimony of a clinical psychologist, who determined the 'future dangerousness' of the defendant, referring to 'three general categories and 24 factors that should be taken into account', with the three general categories consisting of 'environmental factors, clinical judgment factors, and statistical factors' (IACmHR, 2017: par. 102). The statistical factors included 'i) past crimes, ii) age, iii) sex of the person, iv) race, v) employment stability, vi) socioeconomic status of the person and vii) substance abuse, whether alcohol or other illicit drugs' (IACmHR, 2017: par. 103).

As can be seen, many of the criteria used to assess future dangerousness, and the use of this assessment within the criminal justice system to decide on the future of convicts, follow the same rationale of the criminological examination. These will also be used to decide on the prison regime or on early releases, having a direct impact on the punishment experienced by convicts.

In its report on the merits, the IACmHR has directed several criticisms to the element of future dangerousness that also applies to the discussion of risk assessments, as it is related to the uncertainty of the expert opinions, the principle of no crime or punishment without prior law, the lack of reliability of predictions of future dangerousness, and the high degree of discretionary authority it accords the jury. The IACmHR forms its opinion based on documents from different sources, such as other systems for the protection of human rights, domestic cases, academic research, etc. (IACmHR, 2017). In fact, one of the biggest contributions of systems of international human rights law (IHRL) is precisely how it allows the dialogue of different fields and systems, all tied together to develop rights and interpret law in accordance with these rights.

Unreliability of predictions of future behaviour

[11] The Criminal Code of the state of Texas determines that the jury, in the sentencing phase, shall answer 'whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society' (Article 37.071.2(b)(1)); and, if the answer is affirmative, then it shall answer '[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed' (Article 37.071.2(e)(1)).

The IACmHR points out the lack of reliability of predictions of future dangerousness, even when assessments of this type are conducted by experts. To do so, the IACmHR uses academic research conducted and an *amicus curiae* brief by the American Psychiatric Association (APA), which has already declared that 'psychiatric predictions of long-term dangerousness have little or no probative value and yet exact an incalculable cost in the application of prejudice to a capital defendant' (IACmHR, 2017: par. 183).

The brief by the APA was presented in yet another case involving the prediction of violent behaviour, in which it clearly states the lack of accuracy of long-term predictions of violent or assaultive behaviour. It also explains that these predictions are not an expert psychiatric determination and 'can only be made on the basis of essentially actuarial data to which psychiatrists (…) can bring no special interpretative skills' (APA, 1982: 3).

The problem (pointed out earlier in this paper) of the undue weight given to expert opinions, with the avoidance of responsibility, also appears here when APA states that by 'dressing up the actuarial data with an "expert" opinion, the psychiatrist's testimony is likely to receive undue weight' and 'permits the jury to avoid the difficult actuarial questions by seeking refuge in a medical diagnosis that provides a false aura of certainty' (APA, 1982: 3). The author's Masters' results show that many judges still base their decisions entirely on the result of the criminological examination in Brazil (Rosa, 2019). Furthermore, other works that have analysed the role of the criminological examination in Brazil have argued that expert opinions allow judges to exempt themselves of responsibility, basing their rulings in these 'microdecisions' that will provide 'scientific' justification to the judicial decision (Carvalho, 2003: 163-164).

One of the studies cited by the IACmHR refers to research conducted in Oregon to assess the ability of juries to predict future violence, in which the researchers concluded that '[c]onsistent with random guesses, predictions that offenders would be violent were in error 90–98% of the time, depending on the severity of violence specified. Similarly, through no special predictive talent, rejection of the special issue was accurate 90–98% of the time' (Reidy, Sorenson & Cunningham, 2013: 301). The cited research does not only criticise the ability of the juries in predicting violent behaviour, but the concept of violent behaviour itself, when, based on other research, it states that the 'context-free assessment of "theoretical" violent acts that "would" occur if the stars aligned' is problematic and cannot be sustained from a scientific perspective,

as ‘violence is always a function of context’ and individuals are not inherently dangerous (Reidy, Sorenson & Cunningham, 2013: 287-288).

As can be drawn from other sources (Shimizu & Rodrigues, 2022; Sá, 2011), criminological examinations are still a gateway to ideas that understand the offender and the criminal act in a relation of cause and consequence. If causes of a crime can be identified and used to predict future behaviour, this relates to some degree to the idea of criminal behaviour being predetermined, which is related to the concept of dangerousness, understood as an inherent condition of the individual that would lead them to commit crimes (Sá, 2011). In the criminological examination, when there is a prognosis of recidivism based in intrinsic characteristics of the offender, although it is not the same as dangerousness, the idea that a person is predetermined to commit crimes is present, and therefore all these outdated concepts are connected (Sá, 2011).

Even the Federal Council of Psychology (FCP) in Brazil has opposed the criminological examination: in 2010, it issued a resolution that regulated how psychologists should work in the prison system and forbid them from conducting criminological examination or taking part in any actions or decisions of a punitive nature, as well as issuing any written document with a psychological assessment to be used in a judicial decision in the post-conviction stage (FCP, 2010: art. 4, *a*). The resolution was challenged by the Federal Public Prosecution and ended up being suspended. The topic was then subject of many debates that divided even psychologists and eventually the resolution was replaced by a new one, in 2011, which represented a compromise, and forbid psychologists from elaborating prognosis of recidivism, the assessment of dangerousness and the establishment of a causal link between crime and criminal (FCP, 2011: art. 4.1) (Reishoffer & Bicalho, 2017). This second resolution was also challenged by the Federal Public Prosecution, which understood that these prohibitions would hamper the criminological examination, since it has essentially an etiological approach and aims to predict behaviours. The new resolution was ultimately struck down by a court ruling (Shimizu & Rodrigues, 2022).

The insistence of the criminal justice system (prosecution and judiciary) in conducting and using these risk assessments and the prediction of future behaviour are clear and supported by the data presented earlier in this article. As seen, although no longer provided for in law, the criminological examination is still present in the post-conviction stage and can determine the granting or denial of benefits, shaping the punishment and the lives of the convicts.

However, considering the impact that these assessments have on the convict, we argue that they are incompatible with a criminal justice system committed with fundamental rights. Sá, a psychologist who had a long career as an expert in the prison system, explains that the diagnosis conducted in the criminological examination consists of assessing the prisoner in all their complexity, such as their personal, organic, psychological, family, social and environmental conditions in general, which could help the professional to understand the criminal behaviour. However, it does not necessarily assume an intrinsic relationship between personal conditions and crime in an ontological sense. The prognosis, on the other hand, follows the diagnosis and consists of the expert's assumption of the possibility of future behaviour by that prisoner. In the case of the criminological examination for benefits in the post-conviction stage, the prognosis concerns the probability of recidivism. This would be, in his opinion, undoubtedly, the weakest and least defensible part of the exam. Sá goes on to point out some of the problems with the prognosis, such as the fact that the Judiciary expects and requires it to be specific and to offer considerable certainty about the probability of the future criminal behaviour. However, the future is unknown, so any level of certainty about the probability of a future behaviour offers the risk of being misleading; even so, it is still seen and treated as a technical and flawless document, which will be then used to base decisions that have an immense impact on the convict and their family (2010).

Prediction of future behaviour as a violation of the principle of legality

The analysed section of the IACmHR's report starts with the Communication issued by the Human Rights Committee (CCPR) on the case of *Robert John Fardon vs. Australia*, where the matter of the deprivation of liberty grounded on alleged future dangerousness is dealt with. In this case, an Australian law authorised additional detention for an indefinite period based on offenders' rehabilitation needs[12] (CCPR, 2010). The CCPR found that the grounds in which the

[12] The mentioned law is the Queensland Dangerous Prisoners (Sexual Offenders) Act 2003. We once again draw attention to the language and categories used by this law to justify this additional imprisonment, not as a legal consequence of the conviction for a crime, but because of the danger the convict supposedly represents to the community, treated in the same context as the purpose of rehabilitation. For example, it establishes, in its Section 13, that when 'deciding whether a prisoner is a serious danger to the community', the court must take into account, for example, psychiatric reports, or any other medical, psychological or other assessment of the prisoner, information about the 'propensity on the part of the prisoner to commit serious sexual offences in the future', 'any pattern of offending behaviour on the part of the prisoner', 'efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs', if the 'participation in rehabilitation programs has had a positive effect on the prisoner', antecedents and criminal

author's detention was maintained after the conclusion of his 14-year term of imprisonment were arbitrary and a violation of article 9.1 of the International Covenant on Civil and Political Rights (ICCPR), which establishes the right to liberty and security. Amongst many reasons for this finding, the CCPR recognised the inherent punitive character of imprisonment, which was not grounded on a conviction in this case, but on a 'predicted future criminal conduct which had its basis in the very offence for which he had already served his sentence', in violation of article 15 of the ICCPR (CCPR, 2010: par. 7.4(2)).

The CCPR also stated, as cited by the IACmHR in its report:

> (…) The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science (…) on the one hand; [this] requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behavior of a past offender which may or may not materialize. (…) (CCPR, 2010: par. 7.4(4); IACmHR, 2017: par. 181)

The IACmHR also used domestic legal advances in its report, such as a ruling by the Constitutional Court of Guatemala, which considered 'the future dangerousness criterion to impose the death penalty (…) unconstitutional' (IACmHR, 2017: par. 182). In this case at the Constitutional Court, the applicants challenged the constitutionality of article 132 of the Guatemalan Penal Code, which establishes the death penalty for the crime of murder if the circumstances related to the crime, the occasion, the way the crime was committed, and the determining motives reveal a particular dangerousness of the offender (Guatemala, 2016). The applicants argued the violation to many constitutional and international principles, including the presumption of innocence and right to defence, but the article was examined and declared

history, etc. As if these categories are not vague enough, it even allows the court to use 'any other relevant matter' (Queensland, 2003: Section 13(4)). The State, during the proceedings before the CCPR, used the argument of a non-punitive detention: 'The State party thus submits that the civil proceedings under the DPSOA do not relate to the initial offence by the author. The State party submits that the author's preventive detention did not have punitive character. The protective character of the author's imprisonment was, in addition to providing individualized rehabilitation assistance, further derived from the need to protect public safety' (CCPR, 2010: par. 4.3).

unconstitutional according to the *principle of legality*, as can also be seen in the IACmHR's report.

The reasoning adopted by the Constitutional Court to analyse future dangerousness is very valuable for this discussion. Firstly, it conducts an in-depth analysis of the evolution of the concept of dangerousness in the criminal justice system. It begins with the Italian positivists, such as Ferri, Garofalo and Lombroso, heads to Stools and his proposition for a different treatment to certain types of criminals, to the structure of criminal law today and the principle of culpability (*culpabilidad*) as the basis and the limit to punishment (Guatemala, 2016).

When addressing the violation of the principle of legality, the Guatemalan Court stated, as cited by IACmHR, that:

> (...) the term dangerousness contained in the contested phrase as a decisive factor for imposing the death penalty undermines the principle of no crime or punishment without prior law (*principio de la legalidad*), because the only acts punishable are those characterized as a punishable crime or offense by law prior to their perpetration. Given that dangerousness constitutes an endogenous characteristic, the inherently potential nature of which makes it impossible to specify exactly the protected juridical right that could be impaired, any punishment imposed would be linked to hypothetical behavior, which under the aforementioned constitutional provision, would not be punishable. (IACmHR, 2017: par. 182)

The Guatemalan Constitutional Court also recognises that the imposition of the death penalty based on personal characteristics of the offender, and not on the crime committed, is a remnant of the positivist school and should be overcome. Is also uses the case of *Fermín Ramírez vs. Guatemala*, by the Inter-American Court of Human Rights (IACHR), in which the *principle of legality* leads the IACHR to announce that the evaluation of the offender's dangerousness by a judge is not acceptable from the perspective of human rights, as it punishes not a criminal act, but what the offender is (Guatemala, 2016).

Ramírez was sentenced to death precisely based on article 132 of the Guatemalan Penal Code. The IACHR, when examining the use of the offender's dangerousness for the legal determination of the sentence, did so in light of article 9 of the American Convention of Human

Rights (ACHR), which establishes the right to freedom from *ex post facto* laws[13], recognising the illegitimate exercise of the punitive power of the state, as it is justified by future and uncertain criminal behaviour:

> (…) it clearly constitutes an expression of the exercise of the state's ***ius puniendi*** over the basis of the personal characteristics of the agent and not the act committed, that is, it substitutes the Criminal System based on the crime committed, proper of the criminal system of a democratic society, for a Criminal System based on the situation of the perpetrator, which opens the door to authoritarianism precisely in a subject in which the juridical rights of greatest hierarchy are at stake.
>
> (…) The assessment of the agent's dangerousness implies the judge's appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur. The State's criminal function is based on this principle. In the end, the individual will be punished – even with the death penalty – not based on what he has done, but on what he is. It is not even necessary to weigh in the implications, which are evident, of this return to the past, absolutely unacceptable from the point of view of human rights. The prediction will be made, in the best of cases, based on the diagnosis offered by a psychological or psychiatric expert assessment of the defendant.
>
> (…) Therefore, the introduction in the criminal text of the dangerousness of the agent as a criterion for the criminal classification of the acts and the application of certain sanctions is not compatible with the freedom from *ex post facto* law and, therefore, contrary to the Convention. (IACHR, 2005: par. 94-96)

Other scholars have pointed to the incompatibility of prediction of future behaviour with fundamental principles of the criminal justice system (Karam, 2008), such as the principle of legality. A landmark on the reaction to abuses in the enforcement of criminal laws, this principle is central to any system that intends to be rational or fair, and has as one of its dimensions the predictability of the intervention of the punitive power (Batista, 2007). This implies that everyone should know previously what the criminalised behaviours and punishment are, and that the individual will not be punished in a way that is not set in law (Batista, 2007).

[13] 'No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom'.

The individual, therefore, knows what behaviours are forbidden and what are the consequences for each one of them, in a way that they can then understand how they should behave, and can choose to act in accordance with the law or not. However, as the data above has shown, the criminological examination is an instrument that allows the very violation of this principle. Firstly, because it shapes punishment not based on a criminal behaviour previously set in law, but on the convicts' personal characteristics, such as their personality, family life, etc. Secondly, to grant or reject regime progression and parole based on the results of these examinations means that the punishment is shaped by vague determinants that flexibilise the conditions established in law. These determinants prevent the convict from knowing what the expected behaviour is and acting in accordance with it.

The way in which the criminological examination is used contributes to the absolute lack of predictability of the punishment in the post-conviction stage. As was shown previously, when a convict requests the benefit of regime progression or parole, the criminological examination may or may not be determined. If it is determined, the categories in it consider numerous aspects of the convict's life, such as his family, and may also try to dive into their subjectivities, which can then be freely interpreted by the expert. After it is conducted, the expert opinion and the examination results may be rejected or may fully motivate the judicial decision or may even be used partially and combined with other evidence presented (Rosa, 2019).

Therefore, this practice of the criminological examination is in evident conflict with one of the founding principles of modern Criminal Law, preventing the individual from knowing and understanding the forbidden behaviours so that they then can decide if they will comply with the rules or not. On the other hand, the convict's prison behaviour is provided for in written norms, regulated, and its classification depends entirely on how the prisoner complies with prison rules, if they commit disciplinary faults and how serious they are, which allows for more predictability as to what is expected of them (although they are not exempt from other problems).

Returning to the Guatemalan Constitutional Court's ruling, it is worth noting that the article 132 challenged also states that in the cases in which the death penalty is not imposed, a reduced sentence cannot be granted for any reason, therefore requiring the imposition of the maximum prison sentence. The applicants argued that this prohibition violated the purpose of rehabilitation of punishment, which was accepted by the Constitutional Court. According to the ruling, rehabilitation is recognised as the guiding principle of punishment, both

domestically in Guatemala, and in several human rights treaties that place the person as the subject and purpose of the social order. The applicants argued that this principle would be violated by the imposition of disproportionate and arbitrary prison sentences, which denies from the start any sentence reduction, even during the post-conviction stage, through work or good behaviour, for example, what would be closer to a punishment that serves as a private revenge than one that seeks to prevent crimes (Guatemala, 2016).

When it comes to the criminological examination and its use as means to foresee future behaviour, despite being typical of correctionalism, we argue it is contrary to the purpose of rehabilitation, at least considering how it is used in the Brazilian criminal justice system. That is, these examinations are not conducted only for psychological or social reasons, to contribute with the individualised punishment or to identify necessary improvements to the prison system, for example, by offering services that will assist the convict in their rehabilitation process[14]. They are, instead, used to deny prisoners their early release based on the generic fear that they will commit new crimes, thus being more compatible with the purpose of neutralising these individuals and 'protecting' society (Rosa, 2019).

Returning to the IACmHR's report, it concludes its analysis by stating that 'the element of future dangerousness accords the jury a high degree of discretionary authority to impose the harshest possible penalty and may prove problematic, given the likelihood that a future act will occur, exceeding the scope of the crime actually committed by the person in question' (IACmHR, 2017: par. 184). It also recognised that this criterion 'depends on a subjective and speculative decision by the jury' and 'the mere fact that it is required under internal law (…) constitutes a permanent risk that human rights violations could be committed against the person convicted (…)' (IACmHR, 2017: par. 184).

Therefore, the provision and application, in the criminal justice system, of prediction of future behaviour cannot be deemed compatible with IAHR. Drawing its conclusions from numerous sources, such as legal documents, international instruments, domestic and international rulings, and academic research, the IACmHR provides us with a concise and on point opinion. Attempts at predicting future behaviour are unreliable, even when conducted by experts, and are incompatible with one of the most fundamental principles of criminal law, which is that only

[14] In some cases, the criminological examination suggested that services were offered, such as psychological and social assistance, or educational and professional capacitation, but they are rarely addressed by the judges (Rosa, 2019).

past external behaviour can be criminalised, and never a state of being or speculations of acts that may or may not happen. The extracts of the IACmHR report in the previous paragraph sum up the analysis: prediction of future behaviour in the criminal justice system provides room for discretion by the jury, it cannot be based on a concrete act, but is always of speculative nature, and it exceeds the criminal act being tried and punished.

These elements are of importance to the discussion of the compatibility of the criminological examination in Brazilian practices with IAHR: it affords not the jury, but the judge, a space for unlimited discretion when deciding on benefits; it is speculative, if not about dangerousness itself, then about future criminal behaviour, i.e. of the risk of recidivism; used to base the granting/denial of benefits, it is essentially an assessment of the individual's past, present and future, their family context and psychological elements, therefore exceeding the criminal act punished; and, in the end, because of the use of this examination by the judges, it impacts the punishment being experienced by the individual.

Although the case analysed was about the death penalty, its contributions are not limited to these cases. As shown, the IACmHR's report starts with a Communication issued by the CCPR on a case of deprivation of liberty grounded on alleged future dangerousness, finding it a violation of article 9.1 of the ICCPR, and recognising the inherent punitive character of imprisonment. To reaffirm prison as a punishment is to recognise that it must be limited by principles such as legality and (can only be imposed after the) due process of law.

What we argue is that punishment varies not only in its nature (e.g. prison vs. death), but also in its quantity (as is the basis of the prison penalty) and quality (e.g. prison regime, prison with or without parole and even prison conditions). Therefore, regarding the prison penalty, the amount of punishment is not calculated only by time (quantity), such as in the case of *Robert John Fardon vs. Australia*, where there was additional detention, but also by the quality of the punishment.

This is not new and can be seen in IHRL, such as when decisions use as a criterion to determine if there was a violation of human rights the amount of suffering caused by imprisonment, thus recognising the punitive nature of this criminal penalty, but also the various degrees of suffering involved depending on the conditions (see ECHR, 2000, par. 94). It was this criterion that motivated the IACHR's Resolution of November 22nd, 2018, on the Penitentiary Complex of Curado (Brazil), in which the IACHR recognises that the overcrowding in that establishment increases the amount of suffering imposed by the prison penalty. This excess of suffering is

unlawful and, therefore, must be compensated, leading the IACHR to determine that the time served in that prison should be considered in double, i.e. one day served in that prison (unlawful degree of suffering and punishment) should count as two days of the penalty imposed (initially thought to be served in lawful conditions) (IACHR, 2018).

Therefore, the maintenance of a convict in a stricter regime than the one he is entitled to by law represents an increment in the punishment imposed for the crime committed, not in quantitative, but in qualitative terms. When this is done based on the criminological examination and its results, it is unlawful, in conflict with fundamental principles of criminal law and incompatible with IAHR, according to the discussions set out in this paper.

Conclusion

Most criminal justice systems seek to eliminate crime and, for that, have developed systems and practices that aim to understand criminality, its causes, how to prevent people from committing crimes, and how to avoid recidivism and 'protect society'.

One common practice are the risk assessments and means of predicting future behaviour. May it have the label of 'dangerousness', 'risk of recidivism' or 'future violence', to name a few, there are still mechanisms in domestic legal systems that seek to predict future behaviour. This can then be used to impose the death penalty, to justify additional incarceration or to deny early release, thus incrementing punishment and amplifying the punitive reach, not as an objective and rational reaction to the past offence, but based on an assumption of future behaviour.

As was shown, these attempts are based on an outdated conception of crime and criminal, which seeks to find the causes of crime in the individual, so as to then try and predict future commission of new crimes.

This practice has received many criticisms by scholars for several different aspects, as was shown in this article. To take the debate further, the analysis carried out here focused on the contributions of IAHR, namely the report issued by the IACmHR on the case of *Victor Saldaño vs. United States*. Based on this, we conclude that, in line with academic criticism, the incrementation of punishment based on prediction of future behavior can be deemed incompatible with fundamental rights to which many States have committed to upholding.

The main arguments developed there and analysed in this article – the uncertainty of expert opinions, the principle of no crime or punishment without prior law, unreliability of predictions of future dangerousness, and the high degree of discretionary authority it accords – do not need

to be restricted to that specific case or others that are similar (the prediction of future dangerousness to impose the death penalty). They can inform broader debates surrounding prediction of future behavior to increase punishment, and the use of risk assessments in the criminal justice system, for example.

This paper sought to initiate this debate by doing so with the criminological examination in Brazil. It involved presenting how the law formally treats it and how it is used in the criminal justice system, drawing from part of the author's Masters' results. After an analysis of these results and the contributions of the IAHR, we argue the criminological examination, in addition to all the other critiques directed at it, is also incompatible with a democratic criminal justice system committed to respecting human rights.

REFERENCES

American Psychiatric Association (1982). *Barefoot v. Estelle: brief amicus curiae*, 1982. Available at: https://www.psychiatry.org/File%20Library/Psychiatrists/Directories/Library-and-Archive/amicus-briefs/amicus-1982-barefoot.pdf (Accessed: 03 August 2023).

Bandeira, M. M. B. B., Camuri, A. C. & Nascimento, A. R. (2011). "Exame criminológico: uma questão ética para a psicologia e para os psicólogos". *Mnemosine*, 27-61. (in Portuguese)

Baratta, A. (2011). *Criminologia crítica e crítica do direito penal*. Rio de Janeiro: Revan/ICC. (in Portuguese)

Barros, C. S. de M. (2004). "As modificações introduzidas nos arts. 6. e 112 da LEP pela lei 10.792/2003 e a jurisdicionalização e a individualização da pena na execução penal". *Revista Brasileira de Ciências Criminais*, 179-193. (in Portuguese)

Barros, C. S. de M. & Junqueira, G. O. D. (2010). *Exame criminológico – hora de por fim ao equívoco!* Available at: https://www.ibccrim.org.br/noticias/exibir/5124/ (Accessed: 03 August 2023). (in Portuguese)

Batista, N. (2007). *Introdução crítica ao direito penal brasileiro*. Rio de Janeiro: Revan. (in Portuguese)

Batista, V. M. de S. W. (1997). "O proclamado e o escondido: a violência da neutralidade técnica". *Discursos Sediciosos: crime, direito e sociedade*, 77-86. (in Portuguese)

Bitencourt, C. R. (2011). *Tratado de Direito Penal*. São Paulo: Saraiva. (in Portuguese)

Brazil (1983). *Exposição de Motivos nº 213*. Available at: https://www2.camara.leg.br/legin/fed/lei/1980-1987/lei-7210-11-julho-1984-356938-exposicaodemotivos-149285-pl.html (Accessed: 04 August 2023). (in Portuguese)

Carvalho, S. de (2003). *Penas e Garantias*. Rio de Janeiro: Lumen Juris. (in Portuguese)

Carvalho, S. de (2015). *Penas e medidas de segurança no direito penal brasileiro*. São Paulo: Saraiva. (in Portuguese)

Dotti, R. A. (1991). Execução Penal no Brasil: aspectos constitucionais e legais. In: J. M. de, Araújo Junior (org.). *Sistema penal para o terceiro milênio: atos do colóquio Marc Ancel*. Rio de Janeiro: Revan, 80-101. (in Portuguese)

European Court of Human Rights (2000). *Kudla vs. Poland*. Available at: https://shorturl.at/awMZ2 (Accessed: 04 August 2023).

Federal Council of Psychology (2010). *Resolution n. 009/2010*. Available at: http://site.cfp.org.br/wp-content/uploads/2010/07/resolucao2010_009.pdf (Accessed: 04 August 2023). (in Portuguese)

Federal Council of Psychology (2011). *Resolution n. 012/2011*. Available at: https://site.cfp.org.br/wp-content/uploads/2011/06/resolucao_012-11.pdf (Accessed: 04 August 2023). (in Portuguese)

Gomes Filho, A. M. (2001). *A motivação das decisões penais*. São Paulo: Revista dos Tribunais. (in Portuguese)

Guatemala (2016). *Expediente 1097-2015*. Inconstitucionalidad General Parcial. Available at: http://138.94.255.164/Sentencias/831227.1097-2015.pdf (Accessed: 04 August 2023). (in Spanish)

Human Rights Committee (2010). *Robert John Fardon vs. Australia*. Communication No. 1629/2007, U.N. Doc. CCPR/C/98/D/1629/2007. Available at: http://hrlibrary.umn.edu/undocs/1629-2007.html (Accessed: 04 August 2023).

Inter-American Commission of Human Rights (2017). *Report n. 24/17*. Case 12.254. Report on the merits (publication). Víctor Saldaño vs. United States. Available at: https://www.oas.org/en/iachr/decisions/2017/uspu12254en.pdf (Accessed: 03 August 2023).

Inter-American Court of Human Rights (2005). *Fermín Ramírez vs. Guatemala*. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.pdf (Accessed: 03 August 2023).

Inter-American Court of Human Rights (2018). *Resolution of November 2018*. Provisional measures (Brazil). Penitentiary Complex of Curado. Available at: https://www.corteidh.or.cr/docs/medidas/curado_se_06_por.pdf (Accessed: 03 August 2023). (in Portuguese)

Karam, M. L. (2008). Disciplina do livramento condicional no ordenamento jurídico-penal brasileiro e violações a direitos fundamentais. In: Marchi Jr., A. de P. & Pinto, F. M. (coord.). *Execução Penal: constatações, críticas, alternativas e utopias*. Curitiba: Juruá, 149-182. (in Portuguese)

Lopes Jr., A. (2007). Revisitando o Processo de Execução Penal a Partir da Instrumentalidade Garantista. In: Carvalho, S. de (coord.). *Crítica à Execução Penal*. Rio de Janeiro: Lumen Juris, 371-406. (in Portuguese)

Lopes, J. R. de L. (1989). "Hermenêutica e completude do ordenamento". *Revista de informação legislativa*, 237-246. Available at: http://www2.senado.leg.br/bdsf/handle/id/181976 (Accessed: 04 August 2023). (in Portuguese)

Machonochie, A. (2012). *Australiana; thoughts on convict management and other subjects connected with the Australian penal colonies*. Memphis: General Books LLC.

Palma, J. B. D., Feferbaum, M. & Pinheiro, V. M. (2012a). Como organizo informações da jurisprudência que leio? In: Queiroz, R. M. R. & Feferbaum, M. (coord.). *Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso*. São Paulo: Saraiva, 295-312. (in Portuguese)

Palma, J. B. D., Feferbaum, M. & Pinheiro, V. M. (2012b). Meu trabalho precisa de jurisprudência? Como posso utilizá-la? In: Queiroz, R. M. R. & Feferbaum, M. (coord.).

Metodologia jurídica: um roteiro prático para trabalhos de conclusão de curso. São Paulo: Saraiva, 137-173. (in Portuguese)

Pimentel, M. P. (1989). "Sistemas Penitenciários". *Revista dos Tribunais*, 265-277.

Pires, A. (2008). Amostragem e pesquisa qualitativa: ensaios teóricos e metodológicos. In: Poupart, Jean et. al. (orgs.). *A pesquisa qualitativa: enfoques epistemológicos e metodológicos*. Petrópolis: Vozes, 154-211. (in Portuguese)

Queensland (2003). *Dangerous Prisoners (Sexual Offenders) Act 2003*. Available at: https://www.legislation.qld.gov.au/view/pdf/2020-05-25/act-2003-040 (Accessed: 04 August 2023).

Reale Jr., M. (2011). "O juiz das garantias". *Revista de Estudos Criminais*, 99-115. (in Portuguese)

Reidy, T. J., Sorenson, J. R. & Cunningham, M. D. (2013). "Probability of Criminal Acts of Violence: A Test of Jury Predictive Accuracy". *Behavioral Sciences and the Law*, 286–305.

Reishoffer, J. C. & Bicalho, P. P. G. de (2017). "Exame criminológico e psicologia: crise e manutenção da disciplina carcerária". *Revista de Psicologia*, 34-44. (in Portuguese)

Rosa, P. N. M. (2019). *A função ressocializadora de acordo com o Poder Judiciário: encarceramento em massa e responsabilidade estatal*. Belo Horizonte: D'Plácido. (in Portuguese)

Sá, A. A. de (2010). *Criminologia Clínica e Psicologia Criminal*. São Paulo: Revista dos Tribunais. (in Portuguese)

Sá, A. A. de (2011). *Criminologia Clínica e Execução Penal: proposta de um modelo de terceira geração*. São Paulo: Revista dos Tribunais. (in Portuguese)

Scapini, M. A. B. (2007). Execução Penal: Controle da Legalidade. In: Carvalho, S. de (ed.). *Crítica à Execução Penal*. Rio de Janeiro: Lumen Juris, 307-318. (in Portuguese)

Shimizu, B. & Rodrigues, C. P. G. P. (2002). "O exame criminológico como instrumento do binômio saber-poder: a judicialização da resolução n° 012/2011 do Conselho Federal de Psicologia". *Revista de Direitos Humanos e Desenvolvimento Social*, n.p. (in Portuguese)

Silva, R. A. T. M. L. da (2018). *Exame criminológico: estratégias, resistências e o curto-circuito do conservadorismo*. Masters in Social Service. (in Portuguese)

Snacken, S., Devynck, C. & Uzieblo, K. (2022). "Dignity, Social Reintegration of Prisoners, and the New Penal Power: European Human Rights, Experiences of Belgian Prisoners, and Professional Practices". *International Journal of Offender Therapy and Comparative Criminology*, 980–1000.