Kenarik Boujikian

Alternatives to the punitive culture of the Brazilian judiciary

Cristiane Checchia

| Brazil |

translated by Nicole Froio

A granddaughter of a survivor of the Armenian genocide, Kenarik Boujikian was born in Kessab, Syria, in 1959. She immigrated with her family to Brazil when she was three years old, lived most of her childhood in São Paulo, and some in São José do Rio Preto. Kenarik has a degree in law from the Pontifical Catholic University of São Paulo, and she developed her career as a first instance and appeals court judge in the São Paulo Court of Justice, from which she retired in 2019.

An important human rights defender, Kenarik Boujikian was one of the founding members of the Association of Judges for Democracy (AJD), an institution that has been acting for over 30 years in defense of democracy, human dignity and the internal democratization of the judicial branch. Within the AJD, she was part of the Incarcerated Women study group and task force, which acts to expose the effects of incarceration policies especially with regards to women, and to emphasize alternatives to assuage the issue.

In this interview for **Periferias** *held on an online platform on November 2021, Kenarik critically analyses the role of the judiciary branch as a "conductor of the violent system that structures Brazilian society" and which further weakens populations that are already*

vulnerable and exposed to an inheritance of racism, of patriarchy, and of poverty. Her tireless journey and her activism with other human rights defenders, however, continues to inspire us to seek alternatives for a kinder, more compassionate world, where everyone is granted their rights.

Mass, selective incarceration affects the most vulnerable populations in Brazil. We know that mass selective incarceration is about issues around structural racism, patriarchy, and poverty. Unfortunately, proposals to think through decarceration are still met with distrust: prisons are still seen as a commonsense solution for innumerable problems, a variety of them. Society invests in prisons as a solution for very complex problems. Why is there so much resistance to thinking through alternatives?

Historically, society sees prison as the only solution to crime. This is Brazil's history. It is reinforced by all kinds of press. Increasing prison sentencing time is likewise always presented as a solution. Society becomes increasingly misled every time this is proposed, be it by the judiciary, which can elaborate tougher laws, or by the media. Thus, a long-existing discourse is formed. Breaking with that way of thinking is very difficult.

In college, we had to read the famous book On Crimes and Punishment by Beccaria, from the 18th century, who already concluded that there is no point in increasing prison sentencing times. Afterwards, I ended up experiencing that because I practiced law: I was a judge and I was there for the boom in the prison system, after the heinous crimes law.

Why can we not think of alternatives? Because it's much more convenient to simply throw people in prison, which is to do nothing. It's as if the State gave up everything that is absolutely necessary in terms of having real security policies for citizens. The press plays a fundamental part in establishing that discourse. And that's not all: the left can be punitive too – simply look at the criminal governance projects put forth during progressive administrations.

Recently, a poor and famine-stricken mother of five was arrested in São Paulo on charges of having tried to steal two packets of instant noodles from a supermarket to feed her children. After being convicted in two instances, on the grounds of recidivism and dangerousness, this woman remained in prison for two weeks, until a judge reviewed her case. What can we say about the symptomatic invisibility of these cases, these bodies, these voices? Would you say this is an exceptional case or, to the contrary, that these cases are symptomatic of how the criminal justice system works in Brazil?

This case is a portrait of the prison system. How can they think that a woman who practiced this crime needs to be imprisoned to guarantee the safety of our society? That is delusional. This case is absolutely shocking, but it reveals a little about the game people play when they're in the system. What goes through the mind of a judge who sees social danger as a result of this theft, a judge who leaves a woman who has five children in prison?

And it was not just one judge, because after the first instance, there was an appeal and the case went to the São Paulo Court of Justice. Then, the defense had to appeal to the Superior Court of Justice (STJ), which is yet another instance, to reverse it. The judge clearly stated, in her decision, that this woman who stole Tang juice, Coca-Cola and noodles, if freed, would risk public order and further aggravate the instability of the country.

Therefore, I think this dramatic situation reveals how much the judiciary is only available for impoverished people when it comes to opening prison doors, as if they could find justice in there.

The judiciary, the Justice System, and all our other rights that are written in our Constitution do not intersect in any way to provide impoverished people with basic rights such as health, education, housing.The doors to access those rights are closed. But the doors that lead them to prison are wide open.

We have barely had progress – to the contrary. This is a sad observation, because the truth

is that we have a kind of judiciary system that has never taken on the role attributed to it in the 1988 Constitution, which is to guarantee fundamental rights. That is the role of the judge in all procedures, and with regards to all rights.

There is no point in there being a judiciary system, with all its resources, like judicial independence, irrevocability, salary irreducibility, and all guarantees, if the constitutional duty of guaranteeing rights is not fulfilled. Within criminal law and criminal procedure and criminal enforcement, we have a series of rules described in the Federal Constitution: where are they? We look inside prisons, and we ask ourselves, where is human dignity?

In 2016, you had to respond to a disciplinary process at the São Paulo Court of Justice simply for having enforced the law by issuing release orders for people in pretrial detention who had been in prison for a longer period than their sentences. What considerations can you offer about this case?

I already worked at the Justice Tribunal, in the appeals court and, when I received a specific case, I noticed that that person's sentence had already been served. That's when I felt despair. I was the reporting judge for that case, so it was under my responsibility, and there are cases where a second-instance magistrate can and should make an individual, monocratic decision. These are provisional, urgent measures.

Then, these decisions may or may not be confirmed by the judging panel. In this case, I had release order expedited, because the given sentence had already been served. It went through the court as normal and finally, the case reached the judging panel. A while later, the appeals judge still could not accept this, arguing that I decided singlehandedly, by myself, and that in a court, decisions are made by the collegiate, which really is the rule.

But there are these exceptions for urgent cases, which are always submitted to the panel post-fact. In his complaint, he said that I had done this in eleven cases, although there were more: there were 50. So, I reported how many cases there had been and what my orders had been. Well, I was punished for that. It is crazy, being punished for fulfilling a duty! Because a judge cannot allow it, the State cannot allow anyone to be in prison for one extra

day! The State has a duty to offer reparations to anyone who stays in prison for even one extra day!

So that situation revealed some issues. In the end, I ended up resorting to the National Council of Justice, which made a very good decision: they removed my punishment and questioned the São Paulo Court of Justice for doing something so absurd, because in that case I was simply doing my duty, when, normally, everything that reaches the Council are cases of judges who failed to fulfill their duty.

I was being careful with the case. It is our obligation to act immediately in these cases with irregularities, where a person needs to be released. All this reveals that, first, our culture is extremely punitive, because what bothered them the most was that I had let someone free. If I had arrested, or kept someone in prison, no one would complain. And this isn't a recent phenomenon.

I remember when I was in the Criminal Enforcement Court, in the 90s, and promoters did not like some decisions regarding regime progression for heinous crimes, if there was no impediment, and my granting humanitarian pardons for HIV-positive, terminally ill people. They were bothered by that, filed a complaint in the Court of Justice, and I was removed from that office. Look, this happened in 1993, and it has happened again towards the end of my career, but, this time, a lawsuit was filed against me.

Often, some judges make certain decisions and end up being sanctioned, prosecuted, or displaced from jurisdiction. They just take you out of there. This is because we have a system that wants to control how all judges think, which is absolutely wrong. This case ended up being positive because it showed two things: it showed the issue of Judicial Independence, how it is violated by the Court of Justice itself, and it showed, with real data from the prison world, that there were many people inside who did not have to be there.

The Anti-Drug Law, enacted in Brazil in 2006, follows a broader trend in Latin America. What is the meaning of this law and what are its effects on the most vulnerable population, especially the black and poor population of urban

peripheries?

The war on drugs — without even getting into the specifics of the law — makes no sense because it neither solves the issues around people who are users, nor the issue of drug trafficking, which circulates a lot of money worldwide, or even the issue of “petty dealers”. This policy originates in the United States, and it affects the whole of Latin America. In Brazil, it hasn’t been any different: it has been absorbed as a solution, but ended up being included in the same sphere and logic as the heinous crimes law.

For many who participated in creating the Anti-Drug Law, there was an idea that it would be more beneficial for the so-called petty dealers, since the law itself provides mitigating resources for those dealing small amounts of drugs, and not involved with criminal organizations, which would allow a reduction of prison sentences down to as little as 1 year and 8 months.

It also provided for the replacement of prison sentences, that is, our system allows for replacing a sentence with penalties other than imprisonment. Indeed, many thought that this would favor extrication, but they forgot to check who the operators of justice are: this judge who leaves a woman in prison for the theft of a Coke, a packet of Tang juice and noodles, which altogether cost about R$21.00.

And then, judges, instead of not applying the prison sentence and replaceing it with other penalties, increased imprisonment, which also resulted from the Executive's policy of carrying out arrests, regardless of anything.The Executive branch started enacting this policy left and right, motivated by electoral politics that misleads the people and nothing else.

The effects are felt by the most vulnerable populations, the ones most exposed to violence, because there is a complex chain that impacts not big drug traffickers, but those individuals caught with small quantities of drugs.

I had a case that was very symbolic – Cintia's. She was arrested with less than 1 gram of crack, sentenced to eight years in prison, in a closed regime. This was a young, 24-year-old woman with good precedents, no police record, and she had a child. What changes in society's security if this woman is arrested? She was in prison for about four years. I was the reporting judge for that case and thought she should be absolved; I didn't think there was evidence that the drug belonged to her. But I was defeated, I lost in the trial, since the two other judges maintained the decision and reduced the sentence to five years. I proposed: "Wouldn't you even like to apply the sentence reducer, which this law has provided for since 2006?" And they responded: "No, we don't apply that here".

The people who suffer most from this war on drugs are those in a situation of greater social vulnerability. Anyone from an upper-class neighborhood in São Paulo who gets caught with this amount of drugs won't suffer any consequences. Depending on where you live, it will be considered trafficking and the penalty will be harsh, since the Anti-Drug Law increased the minimum sentence for trafficking from three to five years, in a closed regime. The few good things the law provides are rarely used.

Superior courts are very critical of the decisions by the São Paulo Court of Justice, for simply disregarding that there is a law that provides for reduction, for a certain penalty and circumstances, as well as for sentence replacement. Prison must be, in fact, according to our system, a last resort. But it turns out that this rule is not applied. Those who will suffer the most from this are the people who live in peripheries, the impoverished, most of them black.

There is no point in the "war on drugs", and its effects on the population living in conditions of inequality are to make them even more vulnerable and more subject to the violence that the police system and the criminal enforcement system impose.

What are the effects of the mass selective incarceration policy on women?

For women, it's even worse. With regards to incarcerated women, the percentage of violent crimes in which they are involved is minimal. Most of them are young, the vast majority are

women who take on the role of head of the family, most have children. A large percentage of women who are arrested are there for drug-related crimes. In fact, the incarceration rate for women has spiked in the last decade and a half by about 500%. If those cases are surveyed on the amount of drugs, which I have already done with my cases, the quantity is minimal. I am not saying this is true in all cases, I refer to the general rule.

There is a lack of understanding of the Brazilian reality, and the effects of this are perverse. A study by a former counselor of the CNPCP [National Council for Criminal and Penitentiary Policy] shows that the effects of a woman being imprisoned are very different from those of a man being imprisoned.

This has an impact on family life, because these women are heads of their families in some capacity. There is an impact all around the community because of these incarcerations. An old survey conducted by Funap in São Paulo asked men who managed to work in prison what they did with the money they earned. They spent it on themselves. On the other hand, women prisoners who worked sent the money to their families, to take care of their children.

This shows how imprisoning women is reflected in family and community life. Who takes care of the children when a woman is arrested? That woman's family, meaning that another woman takes over. Who goes through invasive searches in a prison? Women who visit men – women in prison are not visited by men, in general. They are visited by their mothers and sisters. The percentagem of women in prison who receive male visitors is minimal. The issue is aggravated by social expectations on the role of women. We expect a degree of “sanctity” from women, which entails infinitely more social disapproval when they deviate. Convicted women are more invisible.

It is worth mentioning a decision that has been met with a lot of resistance from judges on both instances: the first decision by the Federal Supreme Court (STF) for a collective Habeas Corpus for women who were under provisional detention. This type of procedure affects an entire group, in this case, all women incarcerated without a definitive conviction

who fit some descriptions, such as not being a repeat offender, having children and not being charged with some specific crimes. The Supreme Court established that they should remain under house arrest, and I heard appeals court judges say they would do everything in their power to avoid applying that decision! Note that in the case of the woman sentenced for stealing Tang juice, Coca-Cola and instant noodles, there was no compliance with this decision by the Federal Supreme Court.

At the time we conducted this interview, according to Infopen data, the prison population in Brazil is of around 688 thousand people. There were almost 800 thousand people before the pandemic. If no changes in legislation were made and only the law and alternative penalties were enforced, a very considerable proportion of these people could be out of prison. What benefits would this bring to society?

I think an important thing to say about all these people who are imprisoned is that many of them are imprisoned for no reason. Pre-trial detention should be an exception. And how many of these incarcerated people are going through this specifically? Around 40%[1]"In the last Infopen census, this number fell to around 25%, due to the facilitated releases during the pandemic. This decrease, in our view, even reinforces the argument that the judge develops here". . There is a disqualification of our system, when prison should be an exception and isn't. According to our normative system, we should only arrest people as a last resort, if it is absolutely necessary. Prison is an exception, during procedures and afterwards.

So, we have a high number of people who shouldn't be incarcerated as a preventative measure. It is very common for judges to end up using provisional incarceration as if it were an anticipation of the sentence, but the law does not provide for that, the law sets other parameters. There is also the social impact, which we can calculate based on economic impact. The average monthly cost per person in prison is around three times the minimum wage.

Suppose the minimum cost to maintain a person within the prison system is twice the

minimum wage. With Cintia's arrest alone, which lasted four years, the State spent around R$105,000.00, if we round it down. What benefit to society does this imprisonment offer? What about this child who spent four years without their mother, without someone to take care of them directly? How can we even measure the emotional effects of it? And for this woman, who could not work during that period?

In economic terms, there is an expense that is not made explicit to society in general. Prison generates very high costs, even with its terrible conditions. And the prison system, as was proven once and again, is not the solution for social violence and our security system. Personally, in certain cases, I cannot see na alternative to prison, but currently the Judiciary branch is obviously abusing prison sentencing.

We can theorize that a vast portion of the Brazilian population has remained subject to the discretionary and discriminatory action of the police and the penal and prison system, which maintained a series of factors of continuity in relation to the dictatorship (64-85), or, from a broader perspective, in relation to our slaveholding, racist and patriarchal past.How could we put the prison problem on the radar of priorities of social sectors committed to democracy? Are there possible alternatives for thinking about a fairer, less violent world with fewer prisons? What would be good examples of how to deal with the problem of imprisonment? Are there countries that are ahead in this discussion? Where can we look?

How can we make people see this? We need to reflect on the larger role that prison has served in Brazilian society – who does it serve? Social sectors that are effectively committed to democracy should start making these kinds of reflections so we can follow different paths. The justice system is another conductor of our system of violence that exists in Brazilian society, and we could never really get out of this slaveholding mess.

Organized civil society tries to advance through certain principles, certain international documents that exist about this topic, but we can’t always make them concrete in real life. In real life, this is very difficult, especially in this catastrophic time where our basic rights

are being wiped out.

Speaking of this legacy, there's a quote by Darcy Ribeiro of Brazil from the *The Brazilian people, the formation and meaning* that really impacted me: "Descendants of slaves and slave masters will always be subdued by that evil distilled and instilled in us, both from feeling a pain intentionally caused to hurt more, and from the brutality enacted against men, against women, against children who were converted into fodder for our rage. The most terrible part of our heritage is to always carry the mark of torturers, imprinted on our souls and ready to burst into racist and classist brutality. This mark is what instigates, even today, in so many Brazilian authorities willing to torture, to harm and to hurt the poor who fall into their hands…" These are the reflections we must engage in — finding those marks in ourselves.

How can we move forward? We won't be able to move towards another society until we come to terms with the scars on our people who were tortured in the dictatorship and the slavery eras. There is no way forward if we do not reflect on that. We urgently need to make the reflection articulated by Darcy Ribeiro in his book, which I really like. I think it gives us a path to look at ourselves in the Brazilian mirror, in different periods in history.

There is an expressive part of the legal field in our country that ends up supporting multiple forms of violence. However, in your training and professional performance, you have acted in the opposite direction. How do you see your trajectory in the judiciary, as well as your activism?

I usually say that in my veins runs a history of survival, because my grandmother is a survivor of the Armenian Genocide, which took place in 1915, when she became an orphan. I believe that that is where I get my ancestral commitment to Human Rights from. I was a judge for thirty years without ever giving up my concomitant civic duties and activism. In all my relationships, whether at work or in activism, I was always driven by Human Rights. In legal processes I oversaw, my first priority, and an obligation of any judge, was to be the guarantor of rights, and outsite of the legal system to contribute within my limites to help effectively build a more humane world.