# THE PROGRESSION OF THE REGIME AFTER THE ENTRY INTO FORCE OF THE ANTI-CRIME PACKAGE – LAW NO. 13,964/2019, PROGRESSION OF THE SPECIAL REGIME AND ITS BENEFICIAL ASPECTS

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## ABSTRACT

The main proposal of the article is to analyze the change that the Anticrime Package, Law No. 13,964/2019, in force since 01.23.2020, brought in the scope of penal execution, with regard to regime progression, analyzing the beneficial aspect for re-educating inmates, from the interpretation of the Superior Courts, as well as the progression of the special regime, with regard to women, and the interpretation of the Federal Supreme Court in the use of analogy in malam partem. And in order to achieve the desired proposal, the following are specific objectives: to make a retrospective of the fractions applied in the progressions of the regime, in common crimes and heinous crimes, recidivist or not, highlighting the changes that have occurred, research in doctrines and jurisprudence.

**Keywords:** Regime Progression. Anti-Crime Package. Heinous crime. Common Crime. Stricter rules. Easing.

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## INTRODUCTION

In December 2019, Brazil accompanied the approval of the Anticrime Package – Law No. 13,964/19, which was sanctioned on 12.24.2019 and entered into force on 01.23.2020. A broad reform in criminal law and criminal procedure, covering criminal execution, which was part of a set of measures, whose objective was to combat corruption and organized crime, in addition to responding to society with the advance of crime in the country.

With the publication of the aforementioned law, discussions were generated between indoctrinators and professionals in the criminal area due to the wording, considered by many to be flawed, with gaps that were reasons for debates and discussions in the courts, generating jurisprudence that, little by little, was interpreted in a beneficial way in favor of the re-educating, especially with regard to Penal Execution, in the part of Regime Progression, which was the one that underwent the greatest change.

In this sense, the following question arises: What are the impacts on the regime progression process after the entry into force of the anti-crime package – law no. 13,964/2019? In order to answer this question, the general objective is to analyze the impacts on the process of regime progression after the entry into force of the anti-crime package and, in order to achieve this objective, the following specific objectives are presented: to understand the operation of the increase in penalties, to reflect on the rights of the accused within the scope of precautionary measures and, Finally, analyze the implementation of the guarantee judge.

Therefore, the present research will adopt the methodology based on bibliographic review and data collection from official agencies, combined with the methods of descriptive and deductive procedure.

## GENERAL ASPECTS OF THE PENAL EXECUTION LAW – LAW NO. 7,210/84 AND REGIME PROGRESSION

Starting the analysis of the LEP, it is important to reflect on the text expressed in its article 1:

> Article 1 – The purpose of penal execution is to enforce the provisions of a criminal sentence or decision and to provide conditions for the harmonious social integration of the convicted and the interned." (Law No. 7,210/1984)

When observing the normative text of the provision above, it is understood as a description of the main objective that arises from a criminal decision. Thus, article 1 of the Penal Execution Law prescribes the concept of penal execution and its objectives. About the concept, Guilherme de Souza Nucci's notes are important:

> This is the procedural phase in which the State asserts the enforceable claim of the penalty, making the punishment of the agent effective and seeking the concreteness of the purposes of the criminal sanction. There is no need for a new summons – except for the execution of the fine, as it is now collected as if it were an active debt of the Public Treasury – considering that the convicted person is already aware of the criminal action filed against him, as well as has been notified of the conviction, when he can exercise his right to the double degree of jurisdiction. In addition, the punitive claim of the State is cogent and unavailable. With the final and unappealable decision, the judgment becomes a judicial enforceable title, moving from the process of cognizance to the process of enforcement. Although this is a special process, with particularities that a typical executory process does not have (e.g. It has its beginning determined ex officio by the judge, in most cases) it is the phase of the criminal process in which the State asserts its punitive claim, broken down into an enforceable claim." (Penal Laws and Criminal Procedure Commented – Volume 2. 6th Edition, Editora RT, page 175).

It is then observed that the Penal Execution Law aims to dictate the rules that guide the execution of the sentence, through the Executive Branch, responsible for the prison system, with the effective participation of the Judiciary, very well described in the words of Ada Pellegrini Grinover:

> "In fact, it is not unknown that criminal enforcement is a complex activity, which is developed, intertwined, in the jurisdictional and administrative spheres. Nor is it unknown that two state powers participate in this activity: the Judiciary and the Executive, through the intermediary, respectively, of the courts and penal establishments." (Penal Execution, Ada Peligrini Grinover, São Paulo: Max Limonad, 1987, p.110 in, Renato Brasileiro de Lima, Manual de Execução Penal, Single Volume, Editora JusPODIVM, 3rd Edition, 2024, p.34).

Having understood the introductory phase, we will focus on the main point of this study, namely, the progression of the regime, which can be defined as a gradual change of sentence regime, where the re-educating person leaves a more rigorous, closed, isolation regime, and gradually moves to the less rigorous, semi-open and open regimes, until obtaining conditional release, which is the last stage of serving the sentence, in appropriate cases, since the Anti-Crime Package restricted the granting of conditional release in relation to some crimes. It is the way that the re-educating person has to return to social life.

The progressive system of punishment serves as a thermometer, a meter of the recovery of the re-educating person who is serving his sentence, and so that he can obtain regime progression, it is necessary to comply with the requirements of the legal order.

Thus, from the time of imprisonment, that is, the entry of the re-educating person into the prison system, whether provisionally (arrest in flagrante delicto or temporary imprisonment), or in compliance with the conviction, the period for obtaining benefits from the penal execution begins, which, as we have already seen, is regulated by Law No. 7,210/84. And this article is not intended to exhaust the subject, but only to a more detailed analysis, based not only on the law, but on doctrine and jurisprudence, of the changes that

have occurred in the progression of the regime, whether in heinous or common, recidivist or primary crimes, since the entry into force of the Anti-Crime Package, Law No. 13,964/19, which came into force on January 23, 2020, also making a brief analysis of the special progression of the regime, provided for in Law No. 13,769/2018, in view of the repeal of paragraph 2, of article 2, of the Law of Heinous Crimes, by the aforementioned Anti-Crime Package.

In Brazil, the progressive system is defined both in the Penal Code, article 33, paragraph 2, which regulates**:** "custodial sentences must be executed progressively", as well as in article 112, of the Penal Execution Law, which provides that "the custodial sentence will be executed progressively with the transfer to a less rigorous regime...".

The regime of execution of the sentence is set by the prosecuting court which, when sentencing, must indicate the initial regime of execution of the sentence. And for the establishment of the regime, the judge must stick to the judicial circumstances provided for in article 59 of the Penal Code, analyzing culpability, antecedents, personality, motives, the consequences of the crime, and also the behavior of the victim. And after the sentence has been applied, according to the "quantum" set and the judicial circumstances analyzed, the regime will be fixed, which may be CLOSED, SEMI-OPEN or OPEN. Depending on the conviction of the open regime, if it is not a crime with violence and serious threat to the person, up to 04 years, it may be replaced by a restrictive sentence of law – article 44, of the Penal Code.

Once sentenced, the regime has been fixed, and has already been taken to prison, the re-educating person must meet the requirements provided for by law, in order to obtain regime progression. The execution of the sentence is based on the individualization of the sentence, where the requirement must initially be met by the objective criterion, which is the quantum that must be served of the sentence in the previous regime, and the merit, which is the subjective criterion, the prison behavior.

Article 112 of Law No. 7,210/84, which regulates the progression of the regime, underwent the greatest change in the Anti-Crime Package Law, which had its wording as follows:

> "Article 112 – The custodial sentence shall be executed in a progressive manner, with the transfer to a less rigorous regime, to be determined by the judge, when the prisoner has served at least one sixth of the sentence in the previous regime and his merit indicates progression."

And with the amendment of Law No. 10,792, of 12.01.2003, it now reads as follows:

> Article 112 – The custodial sentence shall be executed in a progressive manner with the transfer to a less rigorous regime, to be determined by the judge, when the prisoner has served at least one sixth of the sentence in the previous regime and shows good prison behavior, proven by the director of the establishment, respecting the rules that prohibit progression."

And currently, with the entry into force of the Anti-Crime Package, on 01.23.2020, it has the following wording:

> **"**Article 112 - The custodial sentence shall be executed in a progressive manner with the transfer to a less rigorous regime, to be determined by the judge, when the prisoner has served at least:
>
> I - 16% (sixteen percent) of the penalty, if the offender is a primary offender and the crime has been committed without violence to the person or serious threat;
> II - 20% (twenty percent) of the penalty, if the convict is a repeat offender in a crime committed without violence to the person or serious threat;
> III - 25% (twenty-five percent) of the penalty, if the offender is a primary offender and the crime has been committed with violence to the person or serious threat;
> IV - 30% (thirty percent) of the penalty, if the convict is a repeat offender in a crime committed with violence to the person or serious threat;
> V - 40% (forty percent) of the penalty, if the convict is convicted of committing a heinous crime or equivalent, if it is a primary crime;
> VI - 50% (fifty percent) of the penalty, if the convict is:
> (a) convicted of the practice of a heinous or equivalent crime, resulting in death, if it is primary, conditional release is prohibited;
> (b) convicted of exercising command, individually or collectively, of a criminal organization structured to commit a heinous or similar crime; or
> c) convicted of the crime of constituting a private militia;
> VII – 60% (sixty percent) of the penalty, if the convict is a repeat offender in the practice of a heinous or equivalent crime;
> VIII – 70% (seventy percent) of the penalty, if the convict is a repeat offender in a heinous crime or equivalent resulting in death, conditional release is prohibited. (BRAZIL, 2020)

The deadlines set for each type of crime, with violence, without violence, common, heinous, recidivist or not, are regulated in that article. Until recently, before the entry into force of the Anti-Crime Package, the progression of the regime in relation to heinous and similar crimes was regulated by the Law of Heinous Crimes itself, Law No. 8,079, paragraph 2, of article 2, repealed by the law of the anti-crime package, providing that in heinous, primary crimes, the progression would occur after the completion of 2/5 of the sentence,  and if a repeat offender, 3/5.

With the new law, new objective requirements were set and that must be met, as it is an objective, mandatory requirement. In relation to heinous crimes resulting in death, they now have the requirement of compliance with 50% for regime progression, and in relation to specific repeat offenders, resulting in death, 70%. Both, conditional release is prohibited. At this point there was a well-deserved aggravation of the penalty.

With the publication of the law, there was much debate about the need to comply with 60% of common and non-specific recidivists, that is, only in heinous crimes, since it

had been applied to all convictions, common and heinous. The understanding was pacified, and the Superior Court of Justice expressed itself in the following terms:

> "The Fifth Panel, in line with what was already being judged by the Sixth Panel of this Eg. Superior Court, in the judgment of HCs No. 613,268/SP and No. 616,267/SP, came to understand that the entry into force of Law No. 13,964/19 (Anticrime Package), which amended article 112 of the Penal Execution Law, brought significant changes in the regime progression system, so that those convicted of a heinous or equivalent crime who are generic recidivists, by the use of the analogy in bonam partem, the percentage equivalent to that provided for the primary should apply, that is, 40% (forty percent) or 50% (fifty percent), in the form of article 112, items V and VI, paragraph a, of the LEP, depending on the case (whether or not there was a result of death)." (AgRg in REsp 1919672/MG, Rel. Minister Félix Fischer, 5th Panel, judged on 03.30.2021).
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> "In recent judgments of both Criminal Panels, the position was established according to which the amendment promoted by the Anticrime Package in article 112 of the LEP does not authorize the application of the percentage of 60% related to repeat offenders in heinous crime or equivalent, to non-specific repeat offenders. This is because, in view of the legislative omission, it is necessary to use the analogy in bonam partem, in order to apply in the hypothesis, item V of article 112, which provides for a time lapse of 40% for the primary and for the convicted of a heinous or equivalent crime." (AgRg no HC 640.014/AC, Rel. Minister RIBEIRO DANTAS, 6th PANEL, judged on 03.23.2021).

With the pacification of the jurisprudence, there was a benefit in relation to the re-inmates who were serving time for a heinous crime and were repeat offenders in common crime. The calculations were made at the rate of 3/5 because it was provided for in Law No. 8,079/90 (Law of Heinous Crimes), and in this way, the percentage of 40% percent or 50% percent in case of death was redone and applied, applying the most beneficial rule, which we can highlight that was a benefit for thousands of inmates in the prison system.

The fractions for regime progressions vary according to the crime, whether there is violence or not, recidivist or primary, heinous or simple. And for non-violent, primary crimes, which are the most common, crimes of theft, which are not aggravated, article 155, paragraphs 4, A, and following of the CP, introduced by Law No. 13,654, of 04.23.2018, illegal carrying or possession of firearms, reception, among others, the previous fraction was 1/6 and became 16%, that although the difference is small, it exists and the calculations are redone, considering that the law, in this case, retroacts to benefit.

A change that occurred in the anti-crime package and had a lot of repercussions on the prison system, was the transformation of the crime of robbery, with the use of firearms, which became considered a heinous crime. Before, only the crime of robbery, robbery followed by death, was considered heinous, and now in addition to robbery with the use of a firearm, robbery with restriction of the victim's freedom is also considered a heinous crime.

In relation to the crime of robbery in general, except only robbery followed by death, 1/6 was served for the progression of the regime, and now, the crimes of simple robbery

and with cause of increase, without being heinous, require the fulfillment of 25% because it is a crime with violence or threat, and the crime of robbery with the use of a firearm, As it is a heinous crime, he must comply with 40%.

Another discussion was that the rule that the law cannot retroact to aggravate in cases that were practiced prior to the entry into force of the law should be applied. And on this topic, which is very relevant, even when the sum of the penalties occurs, let us see the understanding of Prof. Renato Brasileiro de Lima:

> The rule, therefore, is that the convict is only entitled to regime progression if these objective requirements are observed, and it is worth remembering that when adding up the penalties, the principle of legality requires that the differentiated calculation be observed for the purposes of regime progression (Statement n. 13 of the I Conference on Criminal Law and Criminal Procedure of the Center for Judicial Studies of the Federal Justice Council). (Manual of Penal Execution, single volume, 3rd edition, 2024, page 317).

A fair criterion, that if there is no compliance, the re-educating person will comply with the fraction of 40% for crimes with the use of firearms, committed before the entry into force of the Anti-Crime Package.

A brief comment is necessary in relation to the recent Law No. 14,843/2024, known as the Sergeant PM Dias Law, of 04.11.2024, which amended the Penal Execution Law, and among others, instituted the obligation of criminological examination in all regime progression. See:

> "Article 112. Paragraph 1 - In all cases, the convict will only be entitled to regime progression if he or she displays good prison conduct, proven by the director of the establishment, and by the results of the criminological examination, respecting the rules that prohibit progression." (BRAZIL, 2024)

In spite of the good intention of the legislator to want to prevent the freedom of re-inmates considered to be highly dangerous, the Prisons are overcrowded, and the criminological examinations are carried out by psychiatrists, who previously carried out in Psychiatric Custody Hospitals, most of which have already been closed due to the Anti-Asylum Policy, and to carry out such an examination, which requires a specialized team, it is waited around 03 to 04 months, due to the deficiency of personnel qualified to carry out the examination, and it was in good time that the STJ decided that it only applies to cases after the law. For application to the previous cases, the decision must be motivated. See:

> "APPEAL IN HABEAS CORPUS. REGIME PROGRESSION. CRIMINOLOGICAL EXAMINATION. LAW NO. 14,843/2024. NOVATIO LEGIS IN PEJUS. IMPOSSIBILITY OF RETROACTIVE APPLICATION. CASES COMMITTED UNDER THE AEGIS OF THE PREVIOUS LAW. PRECEDENTS.1. The requirement to carry out a criminological examination for any and all regime progression, under the terms

> of Law No. 14/843/2024, constitutes novatio legis in pejus, as it increases the requirement, making it more difficult to achieve prison regimes that are less severe to freedom.2. The retroactivity of this rule is unconstitutional, in view of article 5, XL, of the Federal Constitution, and illegal, under the terms of article 2 of the Penal Code.3. In this case, all the patient's convictions are prior to Law No. 14,843/2024, and the legal provision in question is not applicable retroactively.4. Appeal in habeas corpus granted to dismiss the application of paragraph 1 of article 112 of the Criminal Execution Law, as amended by Law No. 14,843/2024, determining the return of the case to the Execution Court so that it can proceed with the analysis of the request for regime progression. (RHC No. 200.670/GO, Rapporteur Justice Sebastião Reis Júnior, Sixth Panel, judged on 8/20/2024, DJe of 8/23/2024).

There are cases in which it is necessary to carry out a criminological examination, which will give the judge greater security in granting the benefit, but in the vast majority, the monitoring by the management of the prison unit, on a daily basis, can attest to good behavior, and be sufficient.

## PROGRESSION OF THE SPECIAL REGIME

Although it was not included by the anti-crime package, but by Law No. 13,769/2018, it was impacted by the Anti-Crime Package that revoked paragraph 2, of article 2, of the Law of Heinous Crimes, and deals with regime progression, our theme.

It is necessary that we make a brief analysis of this benefit that was introduced by the aforementioned law, which is the progression of the special regime, provided for in article 112, paragraph 3, of Law No. 7,210/84. Intended for pregnant women, mothers or guardians of children or people with disabilities, who now have the right to a special regime progression. Benefit created in order to protect the family. See:

> "Art. 112 - .....
> ……..
> Paragraph 3 - In the case of a pregnant woman or a woman who is a mother or guardian of children or persons with disabilities, the requirements for regime progression are, cumulatively:
>
> I - not to have committed a crime with violence or serious threat to the person;
> II - not having committed the crime against his child or dependent;
> III - have served at least 1/8 (one eighth) of the sentence in the previous regime;
> IV - be primary and have good prison behavior, proven by the director of the establishment;
> V - not to have been part of a criminal organization." (BRAZIL, 1984)

The legislator was concerned with protecting the family, in the face of so many cases that occur, standing out from companions of inmates who are forced, or not, to take drugs to prison units, are often arrested and convicted, and end up penalizing the family, abandoning those who depend on them. These are not isolated cases, they occur frequently in prison units and when they are heard in the instruction, they report that most of the time they are threatened by their partners to take the drug.

Undoubtedly, it was an advance in favor of incarcerated women who find themselves in the situations mentioned in the law, which does not distinguish between common and

heinous crimes, which has generated discussions. Let us see the understanding of Prof. Rafael de Souza Miranda:

> "Law No. 13,769/18 now provides for the Penal Execution Law for a new hypothesis of regime progression, called special progression (LEP, art. 112, third paragraph). As it is a more beneficial criminal rule, it should be applied to crimes committed before its validity.
> .....
> "Even with the repeal of article 2 of the Law of Heinous Crimes operated by Law No. 13,964/19, the special progression continues to apply to heinous and similar crimes. And the reason is simple, when regulating the special progression, the law did not make any distinction between common, heinous and equivalent crimes. Thus, it is not up to the interpreter to read what has not been written. Here the maxim applies that what the law does not prohibit, the law allows." (Manual of Penal Execution, Theory and Practice, 7th edition, Editora JusPODIVM, pages 232, 236)."

There are several understandings, including those of the STJ – Superior Court of Justice – regarding the scope of the crime of criminal organization, understanding that association with drug trafficking also qualified as an impeding crime not to grant the benefit, but in a recent decision, the STF – Federal Supreme Court decided, clarifying the situation.

> "In the specific case, therefore, the defendant is not entitled to the benefit of article 112, paragraph 3, of the Penal Execution Law, insofar as she was convicted of the crime of association for drug trafficking, provided for in article 35 of Law No. 11,343/2006. The Supreme Court has established jurisprudence in the sense that the extension of the expression "not having been part of a criminal organization", provided for as a requirement for the special progression of article 112, paragraph 3, of the Penal Execution Law, to cover convictions for the crimes of criminal association or association for trafficking constitutes an undue analogy to the detriment of the defendant, not admitted by Criminal Law, in honor of the principle of strict legality. This understanding is exemplified by HC 216.310 AgR, Justice Ricardo Lewandowski; HC 183.610 AgR, Minister Edson Fachin; and HC 210.667 AgR, Minister André Mendonça, from which I extract the following summary: INTERLOCUTORY APPEAL IN HABEAS CORPUS. PROGRESSION OF THE SENTENCE REGIME. ARTICLE 112, paragraph 3, item V, of the Penal Execution Law. CRIMINAL ORGANIZATION. PRINCIPLE OF STRICT LEGALITY. PROHIBITION OF ANALOGY IN MALAM PARTEM. 1. The jurisprudence of the Second Panel of the Federal Supreme Court has established that article 112, paragraph 3, item V, of the Criminal Execution Law covers only the criminal type of article 2 of Law No. 12,850, of 2013, and it is not appropriate to expand the scope of the rule, under the use of analogy in malam partem, to cover the crimes of criminal association (article 288 of the Criminal Code) or association for trafficking (article 35 of Law No. 11,343, of 2006), under penalty of violation of the principle of legality. Previous. 2. Interlocutory appeal dismissed. Thus, the Superior Court of Justice decided in disagreement with the point exposed. 3. In view of the foregoing, I deny the habeas corpus, but grant the ex officio order, to reinstate the judgment of the Court of Justice of the State of São Paulo. 4. Summons. Publish yourself. Communicate. Brasília, March 12, 2024 Minister NUNES MARQUES Rapporteur" (HC 235587).

Although the law refers only to women, there are already decisions that can also be extended to male prisoners, who fit the conditions provided for in the law, which is very fair, because the family is the main objective of the law.

## PROGRESSION TO HEINOUS CRIME RESULTING IN DEATH

The analysis of the topic will start from article 112 of the LEP, mentioned above, but the focus will be on items VI and VIII, as provided.

> VI - 50% (fifty percent) of the penalty, if the convict is:
> (a) convicted of the practice of a heinous or equivalent crime, resulting in death, if it is primary, conditional release is prohibited;
> VIII – 70% (seventy percent) of the penalty, if the convict is a repeat offender in a heinous crime or equivalent resulting in death, conditional release is prohibited.

These changes to the anti-crime package came with the purpose of tightening the rules for those convicted of heinous crimes resulting in death, making it difficult to progress the regime and prohibiting the granting of conditional release.

Regarding the progression of the regime for generic repeat offenders, in crimes of death, the STJ has already decided, through topic 1,196:

> "The retroactive application of the percentage of 50% (fifty percent), for the purposes of regime progression, to a person convicted of a heinous crime, resulting in death, who is a generic recidivist, is valid, in accordance with the legal amendment promoted by Law No. 13,964/2019 in article 112, item VI, paragraph a, of Law No. 7,210/84 (Penal Execution Law), as well as the subsequent granting of conditional release, and may be formulated later based on article 83, item V, of the Penal Code, which does not constitute a combination of laws in the retroactive application of a more beneficial material criminal rule".

The decision was fair, considering that re-educating in this situation they were serving the fraction of 3/5 and drop to the level of 50%, and may also have the benefit of conditional release, which is prohibited for heinous crimes, resulting in death, committed after the entry into force of the anti-crime package.

## FINAL CONSIDERATIONS

The study comprised the analysis of regime progressions in a broad way, with the changes to the Anti-Crime Package, which, despite having tightened the rules, benefited the re-educating in several aspects.

It is necessary, in view of the longer time they will spend incarcerated, that the State complies with the requirements provided for in the Penal Execution Law, providing the necessary means so that they can work, study, read, among other benefits, in the prison unit, so that they can, not only fill the time, but also and mainly, prepare themselves for the return to social life, with a profession, leaving better than when they entered the prison unit.

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