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They're talking about penal abolition: The urgency of re-imagining different paths as alternatives to the criminal justice system

Eles estão falando sobre abolicionismo penal: a urgência de re-imaginar caminhos alternativos ao sistema de justiça criminal

Jehanne Hulsman¹

¹ Hulsman Foundation, JR Dordrecht, Países Baixos. E-mail: info@hulsmanfoundation.org. ORCID: <https://orcid.org/0000-0002-4091-9797>.

Diogo Justino²

² Faculdade Vale do Cricaré, São Mateus, Espírito Santo, Brasil. E-mail: diogopjs@gmail.com. ORCID: <https://orcid.org/0000-0003-0313-2482>.

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Resumo

Este artigo pretende afirmar a centralidade dos temas da segurança pública e do populismo penal para a compreensão da conjuntura política atual. A partir desta premissa, mostraremos como estes temas são trabalhados por setores antagônicos da sociedade. Então, a partir da crítica da pena de prisão e do controle, será possível oferecer chaves para compreensão do momento em que vivemos e respostas que rompam com o punitivismo.

Palavras-chave: Abolicionismo penal, populismo penal, segurança pública.

Abstract

This article affirms the centrality of the themes of public security and penal populism for the understanding of the current political situation. From this premise, we will demonstrate how these themes dealt with by antagonistic sectors of society. Then, based on the criticism of the prison and control, it will be possible to offer keys for understanding the moment in which we live and responses that oppose punitivism.

Keywords: Penal abolitionism, penal populism, public security.



"Don't you Know? They're talking about a revolution".

Tracy Chapman

Introduction¹

Last year an unpublished letter from Primo Levi went public. It had been written in 1945 and sent to his family in Brazil. Its content is impressive today: *"fascism has shown to have deep roots, changes its name, style and methods, but it is not dead, and the material and moral ruin to which the people have led remains acute. (...) The war is over, but there is still no peace"*². Levi thought about how the seeds of fascism were germinating even in the countries to which the world owes the defeat of Nazifascism (like Brazil and the USA) - each era has its fascism - says Levi when he recalls the Soviet labor camps, Vietnam War, dictatorships and tortures in Latin America.

The concentration camp survivor pointed out to the world the existence of prisons, juvenile institutions, psychiatric hospitals where, as in Auschwitz, the human being loses his name and face, dignity and hope - *"Above all, fascism did not die: consolidated in some countries, cautiously awaiting retribution in others, has not stopped promising the world a New Order"*³. If Primo Levi is right, and we believe he is, then the foundations that constitute today's neo-fascisms have always been present in our societies, creating situations of violence, racism, xenophobia and various forms of discrimination. It would be a case of unraveling these phenomena, which in the paper presented here, are shown in the new and old speeches for public security and incarceration of vulnerable sectors.

In recent times, we have seen the rise of authoritarian and neo-fascist ideas and practices around the world. They are movements that are globally articulated and affect each society differently, causing a series of tensions, debates and possibilities of

¹ We thank Antonio Bastos, Renata Davis and Thayla Fernandes, for the review and suggestions to the paper.

² "Il fascismo ha dimostrato di avere radici profonde, cambia nome e stile e metodi ma non è morto, e soprattutto sussiste acuta la rovina materiale e morale in cui esso ha indotto il popolo. Fa freddo, c'è poco da mangiare, non si lavora; fiorisce il banditismo, e mentre si parla di democrazia sociale, crescono mostruosi nuovi capitalismi nati dal traffico nero: è l'aristocrazia più antisociale. La guerra è finita, ma non c'è ancora la pace." LEVI, Primo. Non Eravamo piu uomini. Available at: <<https://www.agenziacomunica.net/2019/02/24/non-eravamo-piu-uomini/>>. Access on: 16 jan. 2021.

³ LEVI, Primo. A os Jovens. Prefácio a É isto um homem?. In: A assimetria e a vida: artigos e ensaios (1955-1987. (tradução: Ivone benedetti) São Paulo: Editora Unesp, 2016, p. 50.



ruptures. Analyzing this moment is not an easy task, although it is essential. There are many ways to look at each case, but demands for order, punishment, increased penalties, security, personal weaponry and repression seem to underlie the rise of the extreme right in the world - it is possible to perceive these speeches and practices of penal populism⁴ from Brazil to the Philippines, passing through the US, Europe and many other places where the Extreme-Right gains strength.

However, two premises must be stated: First, penal populist discourses are not recent. Understanding the rise of authoritarianism means, first of all, understanding the presence of authoritarianism in our societies for a long time. Second, if, on the one hand, there is an increase in violent and anti-democratic discourses and practices in the criminal justice system, on the other hand, it is also evident the rise of protest movements, which are also not new, but which have publicly affirmed - with even greater strength - the possibilities of alternatives to a justice system that historically showed an extraordinary capacity to reproduce injustice, racism, xenophobia, sexism and other forms of violence, without offering positive results with regard to its declared functions.

These two premises guided the present work so that, from them, it is possible to offer some paths in the complex political moment in which we live.

1. Consciousness of the use of systemical language

In the relative framework of this paper, it is not possible to go into all the reasons, all the underlying work done by countless professionals in various interdisciplinary scientific areas, as to why the legitimacy of the criminal justice system as a concept should be questioned in all its functions and in its very existence.

History repeats itself is a well-known phrase. The significance of this phrase seems to elude, time and again. There appears to be a form of collective oblivion, about prior loss of humanity, known suffering and all the consequences thereof. South America has an ancient and recent history of abuse of power by governments, so has

⁴ "Penal populism" or "punitive populism" is the discourse or political practice based on the idea that various problems of public insecurity can be solved with more arrests, police and legislative changes that toughen the criminal justice system. In general, they are speeches widely used by mass media outlets to get more audiences and politicians to get more votes, showing that they are acting against criminals.



Europe, in countries like Romania, Spain, Portugal and there is of course the lingering knowledge of the period of occupation by the Nazi regime to all those living under occupation, this not being a restricted summary. Even in periods of relative peace, there will be an unequal balance of power, regarding vulnerabilities with people being less recognized or less represented within a state or a society. The basic principle of democracy, that it would protect the rights of minorities, has yet to be embodied and fulfilled.

Donald Black made it abundantly clear that the basic system of law making and the enforcement of law are direct consequence of the power balance of that particular time and state:

The seriousness of an offence by a lower against a higher rank thus increases with the difference of wealth between the parties, whereas the seriousness of an offence by a higher rank against a lower rank decreases as this difference increases. The wealthier thief is, for instance, the less serious in his theft. Thus in modern America, department stores are less likely to prosecute shoplifters who are middle class and white than those who are lower class and black, and, in court, the same applies to the likelihood of conviction, a jail sentence, and a sentence 30 days or more⁵.

Politicians want tangible, direct results, when they are faced with a social problem and the easy way to show their commitment is to give the solution in the form of a criminal law, to be enforced by the criminal justice system. The intent, any idealism that forms the basis for the desire to change the problematic situation perceived by them, may even stem from integrity and a genuine wish to improve the situation addressed. However, no evaluations of those criminal laws take place in regard to the problematic situations addressed. Enforcement can pose a serious problem and experience teaches that more often laws are used for another purpose, than the ones they were supposedly designed for. The process compares to making a baby and leaving it into the care of someone else without looking back. The other problem is, that in the law making process, there appears to be only focus on the intended result. There is during that process as far as known, no attention for any side effects of the law. In trying to influence the behavior of people, unintended effects occur that are not registered, because they were not intended. Thus laws often appear to have the effect of a canon shot, to kill a fly: the fly might well die, but all around the fly everything is also dead or

⁵ BLACK, Donald. Behavior of law. New York: Academic Press Inc, 1976, p. 25.



affected. Therefore, to rely on criminal laws and the criminal justice system, to 'improve' problematic situations in society, appears unrealistic and very idealistic.

The systemical language used⁶ legitimizes the institution by which it is used. Viktor Klemperer has painfully described how the language of the Third Reich (Nazi regime) could change the legitimacy of dehumanizing certain groups and people to the point where they could be treated as objects and in great numbers could be killed.⁷ Louk Hulsman objects to the use of systemical language stating that you cannot escape from the logic of the criminal justice system, if you do not also discard the use of wording underlying this logic. Thus, Words as 'crime', 'criminal' and 'criminal policy', etcetera, belong to the criminal dialect and they reflect the 'a priori' of the criminal justice system.

An occurrence labeled as 'crime' will instantly be taken out of its context, removed from the ligament of individual and collective interactions and presupposes a guilty perpetrator. No longer has to be proven how important the use of words is: everybody knows to which extent someone's inner status can change if not any longer called 'maid', but 'housekeeper', or if someone is no longer 'an unmarried mother' but becomes 'a single parent'. It also goes without saying that also in a scientific indicated context, terminology like, criminology, sociology of criminal behavior, crime sciences, etcetera, are in a negative way connected to the discriminating notions of the criminal justice system, that will be unconsciously adopted.⁸

To call an event a "crime" means to limit extraordinarily the possibilities of understanding what happened and providing answers. Each event has a value and an explanation. If the events are completely different, the answers should also be. We will have to teach ourselves a new use of language, fit to express a non-stigmatizing outlook on people and the situations experienced by them. Thus, you could enter into a new mentality, using expressions like 'unwanted behavior', 'involved persons' and 'problematic situations'.

In that respect and as a legacy to independent thinkers, as an avenue towards inclusion instead of labeling, dehumanizing and exclusion, it would be very appreciated

⁶ Many all over the world yet have memories of encounters with Louk Hulsman, heated discussions with him. He has cautioned many to be extremely careful as to the wording and type of language they used in those encounters. If in a seemingly innocent discussion, someone would for instance say, *most people would...*, he most probably would stop that person in their tracks and ask what he meant, which 'most people' was that person speaking about, how would he know that (if one could define the people that he had in mind when he started talking) there was a majority of people involved and the final blow would come, when he would say to that person, whatever would give him the idea that the fact that a majority would have an opinion, would make that opinion more true.

⁷ KLEMPERER, Viktor. LTI: Notizbuch eines Philologen. Stuttgart: Philip Reclam jun, 2007.

⁸ HULSMAN, Louk & DE CELIS, Jacqueline Bernat. Afscheid van het strafrecht. Houten; Unieboek BV, 1986.



if the reader would try to ‘translate’ any systemic language used in this article, to imaginable actual problematic situations, and its actors, the involved persons, in the hope of awareness of all who are part of those problematic situations, be it institutional, be it representatives of minorities or vulnerable groups, or individuals.

2. Former and current developments, inequality and the use of the criminal justice system

In the 60s, when the Black Panthers published their Ten-Point Program, there were already several demands related to the justice system. Understanding that a racist society would create a racist criminal justice system which, on its turn, would reflect racist discrimination in its sentences, the movement asked, among other things: an immediate end of police brutality and the killing of black people; liberty to all incarcerated black people, because they never got a fair, impartial trial; that all black people presented to trials should be judged in a jury formed by their peers or people from their black communities. Meanwhile, in others parts of the world, a range of social actors, activists, movements and academics set in motion theories and practices that delegitimize penalty and prison, also entailed in antiprison struggles, in a movement that has been academically consolidated in the fields denominated “critical criminology” and “penal abolitionism”. This wary approach to the penal system produced several movements of abolition or reform⁹, not to mention academic research that put the doctrine of punishment, its limits and functionalities, in its due historical place.

It is possible to say that current antifascist and antiracist struggles make part of a tradition that for a long time points for the centrality of the criminal justice system in promoting discrimination and injustice. From there, concrete demands of reform or abolition of police and prisons have reappeared, reanimating the anti-punitive ideal. In 2013, during the great popular demonstrations in Brazil, a watchword was “it did not end, it has to end, I want for the military police to end”, and today, after the brutal

⁹ There are many organizations and movements; among the most notorious we can mention: Copel (Spain), Krum (Sweden), Krom (Norway), PROP (UK), Os Cangaceiros (France), Mothers Reclaiming Our Children (USA), Coornhert-Liga (Netherlands), Krak (Germany), Liberarsi (Italy), Sasid (Argentina). See more: ALVES, Tamires Maria. Enjaulados: escolha punitiva brasileira e perspectivas desencarceradoras. Curitiba: Appris, 2020, p. 160-161.



murder of João Alberto in a Carrefour supermarket, all the structure of public and private security in the country is put in question. The same has happened in the USA with demonstrations against police violence after several cases of racism. The relationship between Black Lives Matter and the topic of public security and penal abolitionism can be seen from a variety of perspectives¹⁰, but it seems to us that it can be well summarized in the sentence “if black lives matter, we must abolish prisons”¹¹.

The penal abolitionist¹² struggle is a constant struggle, it was present in the Black Panthers, it is present in the Black Lives Matter movement, and it will exist as long as injustice is practiced in the justice systems; but it does not come from a moral opinion over the inhumanity of prison, but from the scientific and social finding of its sounding failure.

3. Populist movements and use of the criminal justice system

At the same time, conservative sectors in several countries are increasingly proposing populist measures within the scope of the criminal justice system, expanding its scope, punishments and violence. This event challenges us, because such proposals, although innocuous, appear convincing for most people who still believe in the power of legislation to change behavior. For politicians introducing or changing legislation is the fastest and most easy solution, to problematic situations that through media attention demand a political solution.

¹⁰ For two different and interesting perspectives, see: PORTER, Nicole. Expanding Public Safety in the Era of Black Lives Matter. Available at: <<https://www.sentencingproject.org/wp-content/uploads/2016/05/Expanding-Public-Safety-in-the-Era-of-Black-Lives-Matter.pdf>>. Access on: 16 jan. 2021, and LAWRENCE III, Charles. The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law. Journal of Legal Education, Volume 65, Number 2 (November 2015).

¹¹ PRASHAR, Ashish. If Black Lives Matter, we must abolish prisons. Available at: <<https://www.theneweuropean.co.uk/brexit-news/if-black-lives-matter-we-must-abolish-prisons-86396>>. Access on: 16 jan. 2021.

¹² The terms "penal abolitionism" and "prison abolitionism" are common and may depend on certain contexts and places. We prefer the term "penal abolitionism" because it is not limited to the prison space, but it expands our scope of looking and analyzing other forms of control and incarceration. In the current American movements the expression "prison abolition" has been more common, but it is possible to find references to the expression "penal abolitionism" in English as well, such as in Ruth Morris. See: MORRIS, Ruth. Penal Abolition, the Practical Choice : A Practical Manual on Penal Abolition. Toronto: Canadian Scholars Press. 1995.



In Europe, far-right parties also approach themes such as public security and criminal justice in a populist and expanding way. The Alternative for Germany¹³ has an entire chapter in its program about Security and Justice, called “National Security and Justice”, stating that the “national security is increasingly on the decline” and the police force is “over-stretched”. They demand to lower the age of criminal responsibility, a populist measure that is commonplace in this debate. Besides that, they demand a new statutory offense to be instituted to punish attacks on officials and police officers; they claim for no restrictions regarding personal firearms legislation, as to guarantee the freedom for people to own and use their weapons; and they advocate for the simplification of the processes of eviction of immigrants, considered to be the main source of criminality in the country by them.

In Spain, the Vox¹⁴ party considers safety to be the first obligation of the government, demonstrating its centrality in their discourse. As a means to obtain the desired safety, this far-right party also demands measures of penal populism such as the establishment of life imprisonment; the end of “penitentiary privileges” to incarcerated illegal immigrants and general propositions of police improvement. In a document for city electoral campaigns¹⁵, Vox advocates for camera surveillance and repression to the *okupas* and islamic persons, clearly demonstrating who are the targets of potential security policy.

Likewise, the program of the Portuguese party *Chega!*¹⁶ contains several spanish Vox’s program copies. The far-right Portuguese party only bothered to translate most of the Spanish party’s propositions, demonstrating that this is indeed about penal populism, with generic demands that repeat themselves and are not based in local conjuncture analysis, as to bring any effectiveness in terms of security of the citizens, including vulnerable citizens. Among the propositions fully copied are, for example: the suppression of any financing to radical feminist organizations and effective prosecution

¹³ AFD. Manifesto for Germany. The Political Programme of the Alternative for Germany. Available at: <https://www.afd.de/wp-content/uploads/sites/111/2017/04/2017-04-12_afd-grundsatzprogramm-englisch_web.pdf>. Access on: 16 jan. 2021.

¹⁴ VOX. 100 medidas para la espana viva. Available at: <https://www.voxespana.es/biblioteca/espana/2018m/gal_c2d72e181103013447.pdf>. Access on: 16 jan. 2021.

¹⁵ VOX. Programa electoral para las elecciones municipales de 2019. Available at: <<https://www.voxespana.es/wp-content/uploads/2019/05/Programa-Municipales-2019-1.pdf>>. Access on: 16 jan. 2021.

¹⁶ CHEGA!. Programa político 2019. Available at: <<https://partidochega.pt/programa-politico-2019>>. Access on: 16 jan. 2021.



of fake complaints (labeling complaints fake when hard to prove in a domestic situation); withdrawal of all privileges in prisons for prisoners convicted for terrorism and any illegal immigrants; reform of the Justice System for a real independency of the political power; all the members of the Supreme Court shall be elected by merit contest by and among those who make part of the Justice community; and enlargement of the possible plea for self-defense for cases of break in and entry.

In France, Le Pen's party¹⁷ produced a specific document about police forces, in which it insists on comparing the French and American experiences regarding police violence and racism cases. As for the French far right, they claim there is no racism in France, which puts them in a different situation from the USA. Thus, the problem with the police forces is not racism, but the lack of decent work conditions. Because of that, the party proposes a series of measures of protection for the police officer, transforming him/her into a super civil servant, with a series of rights, guarantees and privileges.

In Brazil the same sentiment is happening, with the speech by the public security being determinant for the elections of Jair Bolsonaro. In fact, this theme is not new and has been present in Brazilian political debates for a long time, making it possible to characterize the rise of the current government as an aggravation of a logic that already existed, it imposes on us a rethinking of politics towards a critique of punishment and control. The difficulty in producing and consolidating an alternative discourse on public security is a historic challenge for the progressive wing and for all those who wish to live in democratic societies. There is no democracy with mass incarceration, indefinite to provisional detentions, police violence in poor neighborhoods and the extermination of black people.

In this sense, the investigation by the Grupo Clandestino de Estudos em Controle, Cidade e prisões¹⁸ becomes an essential document to understand the election of Jair Bolsonaro in 2018, in particular, and the rise of authoritarianism in Brazil, in general. This is because it focuses on the fundamental issue of the political history of the Bolsonaro family and on one of the key issues of the elections (and of the Brazilian

¹⁷ RASSEMBLEMENT NATIONAL. Plan de confiance républicaine pour la Police. Available at: <<https://rassemblementnational.fr/telecharger/publications/Plan-confiance-republicaine.pdf>>. Access on: 16 jan. 2021.

¹⁸ BARRETO, Ana Luisa et all (orgs). Política sob gatilho. A questão criminal nos discursos eleitorais de 2018. Grupo Clandestino de Estudos em Controle, Cidade e Prisões. Rio de Janeiro: Editora Revan, 2021. In press.



political debate in general), presenting the speeches of all the candidates on the subject of public safety.

During the campaign, the inability of the far-right candidate to answer basic questions about politics and everyday life (equal pay for men and women, investment in basic education, economics) was redirected, leading everyone to the public security debate. - "We will play hard on the issue of security, because without security there is no economy", said the candidate while directing another debate to punitive populism.¹⁹ Proposals to increase penalties, to allow citizens to carry weapons, to exclude the illegality of the actions of the police, among other examples, were part of Bolsonaro's vocabulary in any public intervention. According to the aforementioned research, the themes "urban violence", "organized crime" and "fight against corruption" colonized the Brazilian public debate even before the elections, being decisive for the electoral debate on these issues to be conducted by the candidate from the extreme right, accompanied by everyone else (from left to right).²⁰

The main reason for mass incarceration in Brazil is its drug policy²¹, that is, the policy of repressing the retail trade of substances proclaimed illegal by the state. Rosa del Olmo shows how it developed in Latin America - in the period of transitions to democracy - the transformation from the internal "communist" enemy to the internal "trafficker" enemy. In order to connect the two wars, two main enemies were spoken of and terms such as narcoguerrilla, narcoterrorism, narcosubversion or narcoinsurgency were spread out²². The war on drugs trade would then promote a re-militarization in countries that were making a transition to democracy, allowing police advances, relegitimation of executions and torture in exchange for combating the new internal enemy.

¹⁹ ATHAYDE, Juliana; BARRETO, Ana Luisa. "A dança das direitas: a questão criminal reposicionando o cenário político". In: BARRETO, Ana Luisa et al (orgs). *Política sob gatilho. A questão criminal nos discursos eleitorais de 2018*. Grupo Clandestino de Estudos em Controle, Cidade e Prisões. Rio de Janeiro: Editora Revan, 2021. In press. p. 86.

²⁰ The candidacy that collided with the others on this issue was that of the PSOL (Socialism and Liberdade Party), which obtained only 0.58% of the votes. Despite the fact that this candidacy presented important criticisms of the current logic of public security, it has not yet managed to completely break with the criminalizing discourse. See: FERNANDES, Daniel & MATOS, Lucas. *Encruzilhadas da punição: encontros e desencontros da esquerda institucional brasileira*. In: BARRETO, Ana Luisa et al (orgs). *Política sob gatilho. A questão criminal nos discursos eleitorais de 2018*. Grupo Clandestino de Estudos em Controle, Cidade e Prisões. Rio de Janeiro: Editora Revan, 2021. In press. p. 58, 62-63 y 68.

²¹ The same is true of many other countries in the world, including the USA as shown by Ruth Gilmore. GILMORE, Ruth Wilson. *Golden gulag: prisons, surplus, crisis, and opposition in globalizing*. California, University of Califórnia Press, 2007, p. 18.

²² DEL OLMO, Rosa. *Geopolítica de las drogas*. Revista Análisis. Vol. 2. Nº 1. Medellín. 1998, p. 61.



In the same way, the use of the decrees of "Guarantee of Law and Order" has been a constant in the Brazilian democratic period, whether by center-left or right-wing presidents, such as Fernando Collor in the 1990s, and Michel Temer latter, which means a continuity of militarized social control strategies, commonly directed at marginalized communities²³. This violent process permeated all democratic governments in Brazil and the discourse culminated with the election of Bolsonaro in 2018.

The populist discourse of public security has a rhetoric of fear, of the amplification of the police control apparatus over society, of repression, of mass incarceration, of the hardening of criminal legislation and of criticism of human rights. These ideas have not emerged now, but have always been latent in any society, that is organized in inequality where its citizens are daily witness to structural conflicts and structural violence.

4. Dealing with problematic situations, political selection of the criminal justice system

The world is vast and ancient. An indeterminable amount of peoples and territories have preceded us, to get to the point we are now. In each place and time, humanity has thought of different ways of dealing with problematic situations like conflict, unwanted situations, violence and differences. These many ways have been communal or individual, violent or appeasing, destructive or restorative. The juridical way, or penal legal way, is somewhat recent²⁴, and, ever since it exists, its countercharge is well known. There have always been voices contesting its goals and operability, and aiming to expose its selectivity, brutality and inefficiency. In a more elaborate manner, the critique of the prison dates back at least to the 18th century, with William Godwin.

The critique of the punitive models and the punishment culture grew substantially in the 20th century, and hit in the 60s and 70s its peak in terms of formulation and agglutination of ideas. From this movement has risen what we call *critical criminology* and *penal abolitionism*. The Critical Criminology emerges from the sociological criticism of etiological criminology's (based on searching for the criminal

²³ FERNANDES, Thayla. "O rio da segura deságua na guerra": integração, comando, controle e Intervenção militar no Rio de Janeiro contemporâneo. Revista de Estudos Empíricos em Direito. Vol. 7. n. 2, jun 2020.

²⁴ Prisons, for example, were only disseminated in the XIX century.



ethos). Thus, traditional criminology has searched for explanations of the motivations of the offenses, the causes of criminality. The critical criminology's²⁵ reverse the object of research, observing the processes of criminalization and social control, that is, why some people or social groups are the targets of the penal system and others are not. This is explained, greatly, by the selectivity of the penal system.

Every penal system is selective. The State proposes a criminalizing program (primary criminalization) which itself cannot fulfill its intended goals because of the lack of material conditions. Thus, many people who commit acts that are criminalized (crimes) do not get the formal-state response. Those who are selected by the agencies of the State (secondary criminalization) the process of enforcement, represent a minority. The difference between the number of crimes committed and the number of crimes that come to the knowledge of the State and receive formal treatment is called dark (or hidden) figures of crime.

5. Assumed Justification of punishment

In terms of justifications of punishment, as Frederic Gros²⁶ shows us, the concepts multiply: expiation, rehabilitation, regeneration, retorsion, education, restoration, reform, restructuring, revenge, recognition, defense, mourning of victims, improvement, security, exemplarity (Without forgetting other terms like prevention, retribution, deterrence, incapacitation)²⁷. Nilo Batista²⁸ sums up very well the legitimations of the penalty in one phrase: *attributing a utility to suffering* (a principle that also legitimates torture). The utilities of suffering vary, deviate or articulate to one another depending on historical and political conjectures, not always easily explainable.

By and large, academics try to group the many meanings of punishment to better understand the phenomenon. An interesting division is that which addresses the

²⁵ Amongst what is conventionally called *critical criminology* are heterogeneous theoretical movements, that sometimes agree with each other and other times do not, having as paradigm the symbolic interactionism and the idea of the selectivity of the penal system. The radical criminology, which has a marxist focus, can be cited as an example.

²⁶ GROS, Frederic. "Os quatro centros de sentido da pena". In: Punir em democracia – e a Justiça será. Lisboa: Instituto Piaget. 2001. p. 12.

²⁷ GILMORE, Ruth Wilson. Golden gulag: prisons, surplus, crisis, and opposition in globalizing. California: University of Califórnia Press, 2007, p. 16.

²⁸ BATISTA, Nilo. "Relembração de Louk Hulsman". In: BATISTA, Nilo & KOSOVSKI, Ester (Org.). Tributo a Louk Hulsman. Rio de Janeiro: Revan, 2012. p. 61.



theories that answer the question *why punish?*. They split into *absolute* and *relative* theories. The absolute theories are those, which advocate *retribution*, which, theoretically, would be an equal response. Historically, it arises in the model of primitive vengeance in interpersonal and intrafamily relationships. Vengeance has always been one of the ways of dealing with problems. And not necessarily was worse or more violent than prison. For Klaus Gunther, the idea of *an eye for an eye, a tooth for a tooth* was a limitation of vengeance²⁹. For a lost tooth, nothing more than another tooth. There was an idea of proportionality in vengeance. The main risk was disproportionality in the answer (retribution), which could cause an escalation of infinite retribution. Gros, on the other hand, reminds us, from Verdier and Courtois' studies, that the idea of vengeance as the monstrous childhood of a pre-juridical and pre-social humanity is like the *state of nature*: historically inapprehensible and coming from a modern conception posterior to the State.³⁰ Also in the words of Ignacio Anitua:

There was no public reaction to the damage caused, but the one who claimed to have suffered it should indicate the person allegedly responsible for it as an opponent. In any case, the group answered to the damage - and to the complaint of the damage - with the loss of the offender's peacefulness, who was, accordingly, expelled from the community and at the mercy of the victim's or the victim's family's reaction. This did not always mean that death would occur; in truth, the ones affected used to demand compensation.³¹

The *Talion principle*, distorted by Kant³² to fit in the modern juridical reason, appears in many ancient texts. From the Bible to the Quran, passing by the roman Law of the Twelve Tables and the Code of Hammurabi. An universal law which, according to François Ost, must be read with the separation of the *vindictive system* (blind desire of vengeance) from the *vindictory system* (that arises from the idea that the offense involves a duty of reparation)³³. Thus, the vengeance of the past may mean a

²⁹ GUNTHER, Klaus. Teoria da responsabilidade no estado democrático de Direito. São Paulo: Saraiva, 2009. p. 58.

³⁰ GROS, Frederic. "Os quatro centros de sentido da pena". In: Punir em democracia – e a Justiça será. Lisboa: Instituto Piaget. 2001. p. 116

³¹ ANITUA, Gabriel Ignacio. História dos pensamentos criminológicos. Rio de Janeiro: Revan. 2008. p. 43-44.

³² In Kant, the *ius talionis* must be applied by a Court (and not by private trials) and the crime would mean that the law which was violated ceases to have validity to the offender. If you steal, you cease to have the right to property. See KANT, Immanuel. A metafísica dos costumes. Tradução Edson Bini. Bauru, SP: EDIPRO, 2003. p. 175-176.

³³ OST, François. O tempo do Direito. Lisboa: Instituto Piaget. 2001, p. 132.



requirement of Justice, with a new temporality that carries meaning and hope³⁴. Reyes Mate seeks for an understanding similar to the category of resentment, beyond its relation to vengeance.³⁵ It would be understandable a desire of the executioner sharing with the victim the feeling that the violence produced should not have happened.

The substantial change of this model happens after the Modern State takes to itself the right to retribution³⁶: having in sight the insufficiency of private vengeance³⁷, the State must intervene through a serene, just, balanced and rational retribution. This is a common thought and many authors talk about how the punitive power confiscated the conflict from the victim (Foucault³⁸, Zaffaroni³⁹, Batista⁴⁰), withdrawing them from the resolution of the problem and leaving them in a disadvantageous position⁴¹. What is at stake is not the conflict characterized by the damage to a person, but the offense, the violation to the legal rule⁴². Thus teaches Zaffaroni:

During the 13th century, when, definitely, it ceased to be a trial of parties with mediation of the authority to convert itself in an exercise of power in which the authority suppressed one of the parties (the victim), and even more so, since its modern reformulation from the 18th century on, the penal-juridical discourse has always been based in fictions and metaphors, that is, in made up elements or brought from outside, without ever operating with concrete data from the social reality.⁴³

On its more contemporary phase, the Theory of Punishment is substituting the retribution for preventive justifications; these are the relativistic theories. The prevention theories are divided in *negative special prevention* and *positive special prevention*, and *positive general prevention* and *negative general prevention*.

³⁴ OST, François. O tempo do Direito. Lisboa: Instituto Piaget. 2001, p. 138.

³⁵ The victim would not want the other's suffering, but to feel the immorality of his actions. See MATE, Reyes. La herencia del olvido. Ensaio en torno de la razón compasiva. Madrid: Errata Naturae Editores. 2008, p. 174.

³⁶ Kant, for example, relocates the Talion principle in legislative reasoning. If you break a law, that law does not apply to you anymore. In the example used by him; if you steal, you are deprived of your assets. Hegel, in turn, thinks about this question in terms of value. If you remove a tooth, you deserve to have removed from you something that has the same value of another tooth.

³⁷ The thesis that affirms a penal system was originated in the vindicative system is, at the very least, controversy. According to Mauss, the origin of the public penalty is sacred/religious. GROS, Frederic. "Os quatro centros de sentido da pena". In: Punir em democracia – e a Justiça será. Lisboa: Instituto Piaget. 2001. p. 16.

³⁸ FOUCAULT, Michel. A verdade e as formas jurídicas. 3. Ed. Rio de Janeiro: NAU editora, 2002, p. 65-66.

³⁹ ZAFFARONI, Eugenio Raúl. Em busca das penas perdidas. Rio de Janeiro: Revan, 2001. p 30-31.

⁴⁰ Nilo Batista talks in terms of *expropriation of the conflict*. BATISTA, Nilo. Matrizes ibéricas do sistema penal brasileiro. Rio de Janeiro: Revan. 2002, p. 13.

⁴¹ HULSMAN, Louk & CELIS, Jacqueline Bernat de. Penas perdidas: o sistema penal em questão. Niterói. LUAM, 1993. p. 154.

⁴² ACHUTTI, Daniel. Justiça restaurativa e abolicionismo penal. São Paulo: Saraiva. 2014, p. 38.

⁴³ ZAFFARONI, Eugenio Raúl. Em busca das penas perdidas. Rio de Janeiro: Revan. 2001, p. 48.



The positive special prevention seeks the resocialization of the subject, while the negative special prevention has an intimidating and/or neutralizing character. They are both directed at the criminal. First, it is necessary to take into account the selectivity of the penal system and the dark figures of crime, that is, that most people who commit crimes are not the object of state intervention. This means that, despite the fact that people selected by the penal system are considered criminals and, thus, should be resocialized or neutralized, this assessment is false once it is measured up only to the smallest part of the authors of actions considered crimes.

Even if this fact is not taken into account and the theories of special prevention are analyzed, one can observe that they do not hold up: resocialization assumes that there is an asymmetry among the incarcerated people and the *common citizens*, with the prison being an instrument of improvement, that is, of construction of positive values within the incarcerated person. Contrary to what the theory suggests, the prison system can be seen increasingly more as a form of degradation of the subject, that ends up *desocialized*. The rates of recidivism indicate that; which also rebuts the intimidating character of the passage through prison. Equally, it would be ethically questionable that part of the society imposed on another an education so that the latter lived according to the imposed social morals. In that case, in practice, the subject ends up apprehending the existing moral in prison.

The negative special prevention, with its neutralizing craving, is based on an indemonstrable premise: that the subject, when free, be it after punishment or not, will necessarily go back to committing crimes. If there really was any way to verify with precision that someone will commit a crime, we would have, in fact, a form of preventing crimes. With the absence of precision, the referred theory becomes a justification to create penalties increasingly greater, that violates individual guarantees and human rights, which will affect the usual targets of the penal system.

General prevention suggests an educational function of punishment, betting on Criminal Law's communicative capacity to strengthen positive values in the society, so that other people do not repeat the convicted subject's conduct. The *negative* side of the prevention is the discourse of the fear of punishment, when the penalty would serve to dissuade other people not to commit the same conduct of the one who was convicted.



In Zaffaroni, Nilo Batista, Alagia & Slokar, it is seen that negative general prevention does not find grounds if compared to social reality and brings us to consequences that are incompatible with the Rule of Law⁴⁴, because (1) it works with a market-rational-mechanic notion of men, that in all cases will evaluate the cost-benefit of his conduct; (2) it does not have dissuasive capacity proved, the only experiences of dissuasive effect of the punitive power capable of verification being those of the states of terror, with cruel and indiscriminate penalties; and (3) it mistakes the power of Law in general, of social ethics and culture with punitive power and it is not convenient for a society that people stop engaging in problematic situations out of the fear of punishment and not because they are conflicted acts, nor it would be possible to sustain a society whose members performed only actions they know are not criminalized⁴⁵.

The notion of positive general prevention indicates (1) a reaffirmation of the norm protective of legal goods that are important to reinforce the trust in the legal order and (2) the promotion of socially important values; which brings us to the question of whether the imposition of a harm is a valid instrument to promote desired social values. The answer must also take into consideration the historical load of oppression of the punishment, that has vicious effects of exclusion and selection⁴⁶.

It has not been proven that the penal system prevents criminal attitudes from people who have not committed crimes (from Hannah Arendt to Louk Hulsman)⁴⁷, since the criminal statistics themselves are flawed on that subject. Normally, when *criminality* statistics are discussed, in reality they are *criminalization* statistics, the actual criminality being impossible to demonstrate. Hence criminology mentioning the dark or hidden figures⁴⁸.

Besides, we should take into account that the idea of general prevention thoroughly demonstrates the negligence of Criminal Law towards the victim, since even

⁴⁴ ZAFFARONI, E. Raul, BATISTA, Nilo. ALAGIA, Alejandro. SLOKAR, Alejandro. Direito Penal Brasileiro: Primeiro volume – Teoria Geral do Direito Penal. Rio de Janeiro: Revan. 2003. p. 121.

⁴⁵ ZAFFARONI, E. Raul, BATISTA, Nilo. ALAGIA, Alejandro. SLOKAR, Alejandro. Direito Penal Brasileiro: Primeiro volume – Teoria Geral do Direito Penal. Rio de Janeiro: Revan. 2003. p. 118.

⁴⁶ MARTINS, Antonio. "Sobre Direito, punição e verdade: reflexos acerca dos limites da argumentação jurídica". In: DIMOULIS, D. et al. Justiça de Transição no Brasil: Direito, Responsabilidade e Verdade. São Paulo: Saraiva. 2010. p. 86.

⁴⁷ "No punishment has ever possessed enough power of deterrence to prevent the commission of crimes." ARENDT, Hannah. Eichmann em Jerusalém: um relato sobre a banalidade do mal. São Paulo: Companhia das letras. 1999. p. 296.

⁴⁸ The difference between the crimes that were committed and the crimes that make it to social awareness, normally through the penal system. Most crimes do not get known by the authorities and do not get punished.



if the penalty does not heal their wounds or repair the damages, it is necessary to impose a harm to the author of the crime to promote *social cohesion* or *consensus*⁴⁹. There are also victimless criminalized behaviors like traffic offences or drug offences, which are tended to be forgotten in those theories. The penalty is aimed at the public opinion, which means that crimes that are not enforced by the penal systems will never be seen as crimes, and the responses are directed at the executioners or possible executioners for future victims, so that the victim's suffering is not taken into consideration. As for the result, the positive general prevention does not differ from the negative general prevention, and the more quarrelsome is a society because of its structural injustice, the less consensus there will be, and we will always need higher forms of punishment.⁵⁰

On the insufficiency of the theories that justify the punishment, Klaus Gunther teaches us that both retribution and prevention do not resist a more detailed analysis, leaving us the issue of non-official justifications, in a context of great confidence and demand of punishment, a demand that would be beyond evidence and would still be waiting for the arrival of enlightenment.⁵¹ Going further on punishment justifying theories, Salo de Carvalho states that before asking "*why punish?*" we should ask whether or not to punish, that is, *do we need to punish?* Here, penal abolitionism appears as a negative answer⁵².

6. Abolition of the criminal justice system, the development

Penal abolitionism is a broad movement that escapes from dogmatism. There can be no precise definition. Abolition of prison, of punishment and control culture, of punitive power; these are common grounds of abolitionism criticism. A *minimalism*⁵³ with an

⁴⁹ ZAFFARONI, E. Raul, BATISTA, Nilo. ALAGIA, Alejandro. SLOKAR, Alejandro. Direito Penal Brasileiro: Primeiro volume – Teoria Geral do Direito Penal. Rio de Janeiro: Revan. 2003. p. 121.

⁵⁰ ZAFFARONI, E. Raul, BATISTA, Nilo. ALAGIA, Alejandro. SLOKAR, Alejandro. Direito Penal Brasileiro: Primeiro volume – Teoria Geral do Direito Penal. 2003. p. 122-123.

⁵¹ GUNTHER, Klaus. Teoria da responsabilidade no estado democrático de Direito. São Paulo: Saraiva. 2009. p. 57.

⁵² CARVALHO, Salo. Antimanual de criminologia. São Paulo: Saraiva. 2015. 243-44.

⁵³ Maximum limitation to the punishing power and progressively diminishing criminal offenses as defined by law.



abolitionist orientation of the future, or even an abolitionism as *a way of life* - abolishing the punishment within ourselves and in our relationships - also arises.

In Louk Hulsman's abolitionism, personal accountability does not need to be suppressed, but would only be used for civil rules on reparation that are already applied to many fields. There would not be the need to refer to the concept of culpability - to the Dutch criminologist, an ambiguous, imponderable, incomprehensible, metaphysics and scholastic. The proposition would be to abolish punishment as it is applied by the penal system, a state organization invested in the power of producing evil without taking into consideration the voices of interested parties. This does not mean rejecting any coercive means, making it necessary to investigate in which conditions the application of certain restraints to individuals may have any effect on pacifically reactivating the social fabric.⁵⁴

Another of Hulsman's idea is that the existence of guilty persons is not indispensable to the reparation of the damages that were caused; the insurance systems, for example, work with the notion of *risk* and not *culpability*⁵⁵; add to that the fact that many crimes (perhaps, most of them) do not even get to be solved, that is, their authors shall remain unknown; and in other cases, not addressed by the penal system, such as workplace accidents, the ultimate goal is the compensation of the victim and not the punishment of a guilty person⁵⁶. By criticizing the bureaucratization of the penal system, which does not allow a satisfactory agreement among the parties and that puts front to front the state organization and an individual, being therefore unbalanced, the conclusion is that such a model lacks the conditions to produce a *humane* punishment and that, at the macro level, the ideas of punishment and individual responsibility end up fictitious, unfruitful, traumatizing⁵⁷. There are many forms of responding to undesirable behavior. Hulsman points to the existence of the punitive

⁵⁴ HULSMAN, Louk; CELIS, Jacqueline Bernat de. *Penas perdidas: o sistema penal em questão*. Niterói. LUAM, 1993. p. 86-87.

⁵⁵ HULSMAN, Louk; CELIS, Jacqueline Bernat de. *Penas perdidas: o sistema penal em questão*. Niterói. LUAM, 1993. p. 72.

⁵⁶ HULSMAN, Louk; CELIS, Jacqueline Bernat de. *Penas perdidas: o sistema penal em questão*. Niterói. LUAM, 1993. p. 73

⁵⁷ HULSMAN, Louk; CELIS, Jacqueline Bernat de. *Penas perdidas: o sistema penal em questão*. Niterói. LUAM, 1993. p. 87.



model, the reparatory model, the therapeutic model and the conciliatory model⁵⁸. The punitive solution simply excludes the other possibilities.⁵⁹

A ponderation about “the right” or “the need” to punish, that intends to be situated on this level is, therefore, aberrant. Only in the closest contexts, where concrete meanings can be attributed to the ideas of individual responsibility and of “punishment”, is where it will eventually be possible to resume such ponderation, be it at mezzo level of relations among individuals and groups or institutions to whom they are close, be it at the micro level of interpersonal relationships - there, where it is possible to recover what was lived by the persons.⁶⁰

Mireille Delmas-Marty inscribes abolitionism in the desire of seeing conflicts being dealt with outside of the State and under the responsibility of the people directly implicated and the community of which they are part⁶¹. The question would be whether such a community exists or meets the conditions to exist. The author mentions the appearance of two distinct species of community networks, which have in common resorting to instances of societal regulation. The *comrades’ courts* or *people’s courts*⁶², established in the USSR to respond to small conflicts in the work, family and societal areas (cases such as indiscipline in the workplace, drunkenness in public places, insulting, minor wounds and small equity litigations). Those courts did not enforce penalties, but social influence measures - such as warnings, reprimands, apologies and fines. According to Delmas-Marty, however, despite the comrades’ willingness of making themselves liable for the infraction-wrongdoing, it was the State that imposed such a framework through a regulation, firmly controlling its functioning⁶³. Another model, the *neighborhood communities*⁶⁴, would theoretically be freer from the State.

The aforementioned case appeared in San Francisco (USA), where the *community boards* reach over a third of the population, composed of voluntary members belonging to the neighborhood, who mediate local conflicts. This system is

⁵⁸ ZAFFARONI, E. Raul & PIERANGELI, José Henrique. Manual de Direito Penal brasileiro – Parte Geral. 2004. p. 59

⁵⁹ ZAFFARONI, E. Raul & PIERANGELI, José Henrique. Manual de Direito Penal brasileiro – Parte Geral. São Paulo: Revista dos Tribunais. 2004. p. 60.

⁶⁰ HULSMAN, Louk; CELIS, Jacqueline Bernat de. Penas perdidas: o sistema penal em questão. Niterói. LUAM, 1993. p. 88.

⁶¹ DELMAS-MARTY, Mireille. Os grandes sistemas de política criminal. Barueri: Editora Manole. 2004, p. 308-309.

⁶² DELMAS-MARTY, Mireille. Os grandes sistemas de política criminal. Barueri: Editora Manole. 2004, p. 309-310.

⁶³ DELMAS-MARTY, Mireille. Os grandes sistemas de política criminal. Barueri: Editora Manole. 2004, p. 310.

⁶⁴ DELMAS-MARTY, Mireille. Os grandes sistemas de política criminal. Barueri: Editora Manole. 2004, p. 311-313.



based on four principles: a) searching for and accepting the positive side of each conflict; b) pacific manifestations in the interior of the community reduce the existing tensions and increase the chances of finding a real solution; c) that the individual and the community accept the responsibility of their own conflicts; and d) the voluntary solution of a conflict is necessary and encourages a spirit of cooperation within the community.

According to Nils Christie, in the current model we are trapped by the necessity of punishment, and we are not able to think of alternatives. For him, the penalty may be an option, but it should not be the only one, nor the first one. Punishment should be used in rare cases when the non-utilization ends up causing greater damage⁶⁵. To Matías Bailone, this possibility is incredibly rare, because, in the best case scenario, the penalty leaves conflict as it is, and in the worst case, it worsens the situation⁶⁶. To the conflicts we do not know how to solve, but to which, as a false solution, we attribute a criminal nature, Zaffaroni proposes answering with the so-called *grocer* logic. Thus, if a person goes to the grocery looking for antibiotics, the grocer will tell them to go to the pharmacy, because he only sells greens. Penalists would have a lot to learn with the grocer⁶⁷.

Christie mentions the case of a Nazi hanged at the door of a concentration camp after the liberation of the inmates, and proposes a solution with attribution of responsibility. There would be a judgment. Day after day, survivors would describe what had happened and express their drama. The commander would be able to defend himself, in front of the survivors and of who else would be judging. If the judge were *free*, he could deliver the following sentence:

You have clearly done it. You have administered the death of more than a million human beings. You are guilty. Your acts are morally repulsive to an extent beyond what can be imagined. We have heard it. Everyone in the civilized world will get to know about your horrible acts carried out at this horrible place. No more can be said and done. Go away in shame.⁶⁸

⁶⁵ CHRISTIE, Nils. Uma razoável quantidade de crime. Rio de Janeiro: Revan. 2011. p. 131.

⁶⁶ BAILONE, Matías. Abolicionismo, o cómo destruir el arrogante imperio del poder punitivo. Available at: <<http://www.terragnijurista.com.ar/doctrina/abolicionismo.htm>>. Access on: 16 jan. 2021.

⁶⁷ The penalty is not the only form of state coercion. Batista and Zaffaroni indicate us that the state coercion can be (1) the reparatory or restitutive, normally used in private law, where the State imposes by force the fulfillment of a debt, by garnishment, for example; (2) the direct or police coercion, in cases where it is necessary to deter an imminent injustice or one that is in course, the latter being the case of the imprisonment of a person caught in the act; (3) finally, the penalty by which the state force imposes a suffering because of a past act. ZAFFARONI, Eugenio Raúl; BATISTA, Nilo; ALAGIA, Alejandro; SLOKAR, Alejandro. *Direito Penal Brasileiro*: primeiro volume. Rio de Janeiro: Revan, 2003, p. 101.

⁶⁸ CHRISTIE, Nils. A suitable amount of crime. New York: Routledge, 2004, p. 88.



If guilt and shame must be applied, then it should be in a restorative model, that reconstructs the house and maintains the community⁶⁹, keeping distance from the ideals of the criminal law⁷⁰. Close to this idea, Antoine Garapon understands that punishment was not entirely absent from the Truth and Reconciliation Commission from South Africa; it may have taken the form of *shame*, that took over the great number of persons who had to publicly confess their crimes⁷¹. Shame played as a substitute to penalty. The forgiveness requests were judged in public audiences, with television and radio transmissions. Friends, neighbors and family wound up knowing what those people had done⁷². Likely, Klaus Gunther points out that if the goal is to publicly state that there has been an injustice and to attribute it to a person, a declaration of guilt should be enough, being unnecessary an additional infliction of harm⁷³. Juarez Tavares stands for something similar when reckoning the illegitimacy of the penalty, and, considering that legality is nothing but a symbolic appeal of justification of power, it would only be up to the State to deplete the guilt also through a symbolic proceeding, without any other consequence. Then, we would have a *declaratory judgment of guilt*, without the consequential imposition of a penalty. This should be the true and only mission of the penal system⁷⁴.

Sebastian Scheerer says that punishment has always existed and will always exist. The idea of a negative sanction is a part of any society. He affirms that punishment must exist (as well as the legal system that makes living together as society possible) and questions if there should exist a criminal Law⁷⁵. Among the main concerns of abolitionists is the reinclusion of the victim in the process of conflicts resolution. Thomas Mathiesen, for example, states that the victim does not get anything from the current model, and, instead of worsening the punishment according to the gravity of the transgression, he proposes increasing the support to the victim according to such

⁶⁹ To Garapon, the reconstruction of the legal community weighs on the legal process, through the acknowledging of the victims, honoring the memory, telling the story and preventing a war. GARAPON, Antoine. Crimes que não se podem punir nem perdoar. Lisboa: Piaget. 2004. p. 17.

⁷⁰ CHRISTIE, Nils. Uma razoável quantidade de crime. Rio de Janeiro: Revan. 2011. p. 147

⁷¹ GARAPON, Antoine. Crimes que não se podem punir nem perdoar. Lisboa: Piaget. 2004. p. 240.

⁷² GARAPON, Antoine. Crimes que não se podem punir nem perdoar. Lisboa: Piaget. 2004. p. 240-241.

⁷³ GUNTHER, Klaus. Teoria da responsabilidade no estado democrático de Direito. São Paulo: Saraiva. 2009. p. 61

⁷⁴ TAVARES, Juarez. Os objetos simbólicos da proibição: o que se desvenda a partir da presunção de evidência. Available at: <<http://anima-opet.com.br/pdf/anima5-Seleta-Externa/Juarez-Tavares.pdf>>. Access on: 16 jan. 2021.

⁷⁵ SCHEERER, Sebastian. A punição deve existir! Deve existir o Direito Penal? Revista Brasileira de Ciências Criminais: RBCCrim, São Paulo, v. 23, n.117, p. 363-372, nov./dez. 2015.



gravity⁷⁶. He seeks ways of supporting victims, such as financial compensations from the State, insurance systems, financial support in case of mourning, shelters and help centers.

7. Some paths on abolition and reform

In this work, we affirm the centrality of the theme of public security and prison in the current political scenario, whether from the demands of progressive movements in a critical perspective or, on the other hand, in the populist-punitive proposals of conservative sectors. This tension between dissonant ideas forces us to think of solutions that break a punitive almost-consensus that we have observed for some time.

According to Angela Davis⁷⁷, the most difficult and urgent challenge today is to creatively explore new terrains of justice, where prison no longer serves as our major anchor. Similarly, to Vera Malaguti Batista one of the challenges in the near future will be formulating a radical critique of the penal system and its constituent functions: the control of resistant ones and the maintenance of capital accumulation process' order⁷⁸.

For that, it will be necessary to put before us the old dilemma between abolition and reform. While there was no horizon for the abolition and production of new ways to do justice to problematic situations, reforms were thought to improve the system, making it less violent. Some of these proposals were made to emerge in scenarios where the minimum dignity of prisoners was denied. Other reforms contributed to increased control and increased incarceration.

We believe that an important key to thinking about this theme is the idea of non-reformist reforms, expressed by Patrisse Cullors⁷⁹, one of the founders of the Black Lives Matter movement. These are changes in the system that contribute to its decline, not to its reorganization. Reforms that are going to get us closer to abolition.

⁷⁶ MATHIESEN, Thomas. "A caminho do século XXI — abolição, um sonho impossível?". In: PASSETTI, Edson & BAPTISTA, Roberto. (orgs.). *Conversações abolicionistas: uma crítica do sistema penal e da sociedade punitiva*. São Paulo, IBCrim/PEPGCS-PUC/SP, 1997, p. 276.

⁷⁷ DAVIS, Angela. *Are prisons obsolete?* New York: Seven Stories Press. 2003, p. 21.

⁷⁸ BATISTA, Vera Malaguti. "Adesão subjetiva à barbárie". In: Loic Wacquant e a questão penal no capitalismo neoliberal. Rio de Janeiro: Revan, 2012.

⁷⁹ Interview available at: <https://www.teenvogue.com/story/black-lives-matter-patrisse-cullors-interview-prison-abolition-angela-davis-yara-shahidi>.



In this sense, there are requests for Defund the Police, which gained strength in the USA and directly affect the police budget, redirecting them to communities and other public policies. In the State of Rio de Janeiro, for example, the budget of the Department of Public Security corresponds to the budgets of the Departments of Health and Education combined.

The redirection of the police budget to the communities poses another way of responding to conflicts diametrically opposed to the legal form, which individualizes the problem and the supposed solutions. Because of this, critics of the criminal justice system should look carefully at alternative proposals to the system that use an individualizing logic, as can happen in restorative models or in civil responsibility. One of the tasks of critics of the prison will be to think of other forms of accountability that go beyond individual responsibility, to think in multi-disciplinarity.

One of the problems of the simplification that inevitably is a consequence of using such a complex and vast system as the criminal justice system to address social problematic situations, is that those situations are often not that clear cut. In public space when young people challenge each other, it is not always the one injured that is the victim, the person injured might even have started the fight. In domestic situations it is not always easy to find out where the real problem lies, and who would be responsible for that problem. In cases where society does not answer to the needs of people that are excluded and without housing or enough means to feed themselves and their children, could you really see them only as 'breakers of the law' and therefore responsible or could you also see them as a victim of those shaping policies that exclude and use people, taking their land and properties, abusing their labor potential for fast profit at the expense of the health of the workers.

In the abolitionist struggle many tools are good. At the same time that it is important to formulate radical criticisms of punitivism, denouncing its innocuous violence and above all its dysfunctionality, it is also necessary to intervene politically to create spaces for change that will move us towards the end of prisons.

The Breath Act⁸⁰, for example, presented at the US Congress, formulates several policies of new, non-punitive, non-carceral approaches to community safety that lead states to shrink their criminal-legal systems, with an abolitionist horizon. It is a proposal for legislative change that not only changes the laws, but puts the public

⁸⁰ Learn more: <<https://breatheact.org/learn-more/>>. Access on: 16 jan. 2021.



debate the way it should be put: in terms of overcoming the current criminal justice system. In Brazil, several platforms against incarceration have been produced in the last few years, with proposals for concrete measures, such as the *Agenda Nacional pelo Desencarceramento*⁸¹, which claims fund suspension in order to stop new prisons' construction and also the resumption of community autonomy for non-violent resolution of conflicts; and pressure on politicians in national and municipal elections. It would also be important for abolitionists to support and elect representatives who are committed to this cause.

Furthermore, it is mainly important to conduct this debate honestly with the general public; that is, clearly affirming penal abolitionism as an answer to what to do about the events that we call "crimes". Otherwise, we will always be hostages to populist agendas, always placed against a wall, formulating restraining responses, which alleviate the problem or serve to reorganize and nurture the control and prison system. Don't you know? They're talking about a revolution.

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About the authors

Jehanne Hulsman

Journalist, Writer and Attorney. Director of the Hulsman Foundation. Board Member of the Human Rights Foundation (2005 - 2010). Invited lecturer on postgraduate courses in Dubrovnik (Croatia), in Johannesburg (South Africa), in New Delhi (India), and in the European Group of Critical Criminology and at ICOPA (International Conference on Penal Abolition). Guest Teacher at the Free University in Berlin and in Kiel University. E-mail: info@hulsmanfoundation.org

Diogo Justino

Master and PhD in Theory and Philosophy of Law (State University of Rio de Janeiro), with sandwich period at the Superior Council of Scientific Investigations (CSIC - Spain). Coordinator of the Working Group on Law, Memory and Transitional Justice at IPDMS (Institute for Research, Rights and Social Movements). Member of the Laboratory of Critiques and Alternatives to Prison (LabCap). Master's Professor at Vale do Cricaré University (FVC-ES). E-mail: diogopjs@gmail.com

The authors equally contributed to the writing of this article.

