

**THE PENAL ABOLITIONISM AND RESTORATIVE JUSTICE:
UTOPIA OR A DEVELOPING REALITY? ***

Abstract

With this proposal, it is our intent to refer to the failure of the present criminal system. We will try to corroborate our ideas through the penal abolitionism theory and the subsequent birth of new forms of Criminal Politics, namely the restorative justice. We'll make a brief overview of what the abolitionism consists in and its relation with the minimal criminal law, as well as the restorative justice as an alternative way for resolving the *so called* criminal conflicts. So, it is our intent to question if the criminal punishment is inevitable or if it is possible to avoid it, especially as far as incarceration is concerned.

Key-words: abolitionism; punishment; criminal penalty; prison; alternative measures; restorative justice; reinstatement; reintegration.

* Joint presentation

I – Penal Abolitionism

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Abolitionism, what is it?

The word "abolition" emerges as an answer to criminal problems. Through controversies solutions, repair and social justice, attempts to delegitimize the State power and the conduct of its institutions.

In other words, it is not intended to suppress, at all, the police and the court, the matter is whether the punishment is an inevitability.

Abolitionists did not intend to end the social control because then, the social life would become impossible, but question the legitimacy of the State and its right to punish (*ius puniendi*).

Abolitionists defend the extinction of criminal punishment (extinguish the criminal liability) and decriminalize some facts (become non-criminal).

Abolitionism is then a way of thinking about social control, offering an alternative to the problem of crime and the consequent punishment based on a criminal reform.

The 'failure' of imprisonment and the rise of abolitionist movements

It should be noted that the emergence of criminal law had its genesis on the idea of ending the medieval model of justice in which the ecclesiastical power applied corporal punishment and the death penalty, as brilliantly as MICHEL FOUCAULT described.

BECCARIA on his book "*On Crimes and Punishments*", called into question the application of cruel punishment, basing his theory on the principle of human dignity. This author came to defend a liberal and humane criminal law.

Analyzing the current criminal law, we easily perceive that it applies criminal penalties feeding the vicious cycle of violence. In other words, applying a sentence, we

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are being led to the starting point. We know that an individual subjected to a prison sentence will never again be as he was before, the effects that the criminal penalty should have on that individual, often are not produced.

The prison will never be able to educate or improve the individual, much less reintegrate him, since, in our opinion, to occur resocialization, the individual should remain in his comfort area, because by removing him from his environment, we will only contribute for his un-socialization.

Let it be noted that the major critic towards criminal law is its selectivity. The Criminal law is heavily focused on particular communities, races and socio-economic conditions, with its formal instances, including the police, towards control of these masses, it is called The Labelling Approach. We will also criticize to the abolitionists, so called Zero Tolerance, a model where public safety authorities, not discretion, apply pre-determined patterns, strongly punishing small and medium crime, regardless of individual guilt or peculiar circumstances of the case.

In LOUK HULSMAN's point of view, the penal system is a problem itself because it has not been able to resolve the issues within its remit.

Therefore we face the problem of justification of criminal law, but also the legitimacy of its actions. Thus, the abolitionism arises as a radical movement founded on the idea of abolishing the penal system (formal instances of social control) and criminal law itself.

As we already said, abolitionism comes from the idea that the response to crime should abandon the State's formal instances and the *ius puniendi* that comes from the criminal law, building conciliatory mechanisms between the individuals involved, advocating the dialogue.

Abolitionism appears as an alternative to the Criminal Law, trying to narrow the punitive violence and the future sentences effects.

According to what JEAN JACQUES ROUSSEAU called "*the common good*", society is based on brotherhood and solidarity, so it's easier to reach the conciliation between the victim and offender, with an horizontal and informal character, relinquishing the State's formal forms of control, among them, the Courts, the police, etc.

It might be odd to comprehend the conciliation idea between the victim and the offender, but if we remind ourselves the attempted murder the Pope João Paulo II was subjected to in 1981, he forgave its offender, and called him "brother". In this case, we had a social (and religious) justice, and no longer a criminal one. As LOUK HULSMAN

says, “*this is abolition, first, the abolition of criminal justice within ourselves: change perceptions, attitudes and behaviors*”.

The abolitionist theory raises five main points in socialization: compensation (the individual capacity to offer something to another, as a mean to repair de damages); therapeutic mean (repulses the therapeutic treatment, but defends the talent’s stimulation and the aggressor’s potential); revisited punishment (removes the need to apply imprisonment through the parties agreement, looking to promote a change of behavior from the individual, avoiding relapses and leading to social peace); conciliation (based upon the agreement of the parties, promoting the dialogue and understanding as a way of resolving problems, in order to achieve the most appropriate solution); education (it’s given the possibility to reeducate the individual, integrated in his social group where he feels more accepted).

Conclusions

We can say that maybe the society isn’t ready to accept the penal abolitionism... (We aren’t ready yet!), but we think that we can extract good advantages from it.

Using the NILS CHRISTIE’s words, “*if the Netherlands can, why not the rest of Europe?*” because “*besides tolerance, there is a Netherland characteristic mechanism to deal with the conflicts (...) the people have learned to live with their internal differences. They have learned the art of negotiation*”.

Maybe we shouldn’t begin with the penal abolitionism; why not, reduce the Criminal Law ambit first, using the “*Criminal Law Minimal*” or “*Minimal penal intervention*” ideas?

We think that we have to find a point of balance between *ius puniendi* and *ius libertatis*.

LUIGI FERRAJOLI had already defended that the penal system abolishment could arise extremely vengeful reactions because not every citizen has the same idea of justice.

We conclude with the phrase of LOUK HULSMAN, “*the penal abolitionism is a life style. It isn’t a utopia; It should happen now, in the world and inside each one*”. For him, “*the end of the punishment begins with its abolition within ourselves*”.

II – Restorative Justice

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Criminal penalty has evolved overtime, and it mirrors the criminal politics of a certain society and in a certain time. The punitive mechanisms have developed: formerly, death penalty and torture were among the major penalties applied to those who drift away from the path of righteousness and law-abiding. Later on, imprisonment took its place, no longer as mere place of surveillance, where the offenders awaited execution or the torture that would be inflicted upon them, but as a penalty itself.

Prison emerged along the XIX century, with a retributive and preventive character, and in the 2nd half of the XX century, the ideas of rehabilitation and reconciliation arose and gained strength. However, some refer that prison as a product of modern and civilized societies³ is not consistent with rehabilitation and resocialization concepts, and that incarceration is a known enemy of any reinstatement attempt.

According to Michel Foucault, “prison’s disadvantages are well known, it can become dangerous and sometimes pointless. Meanwhile, we don’t see what to replace it with. It is the awful solution [prison] that we cannot give up”⁴. The custodial sentence is viewed by some not only as a failure, but also as an impeller, under Claus Roxin point of view: “(...) it is no overstatement to say that the short custodial sentence, instead of preventing criminal offence, promotes it”⁵.

Restorative Justice was born based on these beliefs, and on the ideals of certain movements, such as abolitionism and victimology. Those who defend abolitionism advocate the abolition of criminal punishments, their intention is to reform the criminal justice system, to replace criminal penalties, such as prison, with alternative measures. It’s proposal? The State's lowest possible intervention and the criminal system, only applied to the most severe cases. Why? Because prison, incarceration inflicts suffering, it feeds the stigma and the “relapses”.

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³ FOUCAULT, Michel – *Vigiar e Punir*, p.207

⁴ FOUCAULT, Michel – *Vigiar e Punir*, p.208

⁵ ROXIN, Claus *Apud* BITENCOURT, Cezar Roberto – *Pena de prisão perpétua*, p.7

Victimology focuses the attention on the victim's rights during the criminal process. Truth be told that the victims needs are sometimes forgotten, neglected along the way, and it is based upon some of these ideas that restorative justice comes to light.

Around the 60's United States, Canada and New Zealand engaged in this alternative means to resolve and deal with conflicts, spreading from then on through Europe (90's). Restorative Justice is seen as "an option for doing justice after the occurrence of an offence that is primarily oriented towards repairing the individual, relational and social harm caused by that offence"⁶. This new form of Justice, based upon the agreement, searches for a meeting point between victim and aggressor, as they actively try to find a solution to restore the damages that have been caused. Its target: to take the State's intervention to its minimum, to inspire and stimulate citizen's participation, to enhance the victim's position and reintegrate the aggressor back in to society.

The main goal of Restorative Justice is reinstatement and resocialization, both victims and aggressors, and its final intent's to restore confidence, to provide interpersonal pacification and the pacification between victim and offender. It guarantees that the victims needs are attended, to feel safe, secure, protected. Let us remind ourselves that sometimes the victim doesn't want the justice that the traditional criminal system has to offer: the aggressor might be a victim's relative, or she might not want to expose herself, facing the publicity of a trial. That being so, this alternative mean allows the victims to rehabilitate, to heal, and provides them a follow up.

Trough this mechanism, the State tries to assure the offender and the victim's wellbeing, and the reinstatement and recovery of their social bonding⁷. It helps "(...) prisoners understand the impact of their crime on victims, families and the community, and encourages prisoners to accept personal responsibility for their actions and try to make amends"⁸. The offender is seen as someone who is worth rehabilitating, and it doesn't require necessarily imprisonment, since "society does not question why you were in jail for, but only if you have ever been there"⁹. Therefore, as Heleno Frago mentions "(...) prison represents a tragic historical

⁶ WALGRAVE, Lode - Advancing Restorative Justice as the Ground for Youth Justice, p.5

⁷ COSTA, Sónia Isabel Teixeira - Mediação Penal e Justiça restaurativa. O debate em Portugal, p.6

⁸ LIEBMANN, Marian - Restorative Justice in Prisons: an International Perspective, p.1

⁹ MOLINA *Apud* BITENCOURT, Cezar Roberto - Pena de prisão perpétua, p.7

mistake, it constitutes the most characteristic expression of the current criminal justice system. You can only validly claim that it is exclusively reserved for the cases where there's currently, no other solution”¹⁰.

For restorative justice the answer to crime relies not on imprisonment, but in the solutions presented and pointed by the parties involved. The State still plays its role, he provides the resources and means that are needed in order to solve the conflict¹¹.

Critics point out some disadvantages of restorative justice: the sentence agreed by the parties may not be proportional to the crime committed, so the perpetrator might become hostage of the victim's will; the crime regains a private character; the term “restorative” lacks precision; critics also believe that a behavior change cannot be achieved by restorative justice, nor it avoids relapses¹².

On the other hand, those who defend it, try to show its benefits: it's less formal, faster and prevents the stigma associated to the criminal justice system; the justice system is expensive, slow, resulting in delays; there's an active engagement of the victim, that leaves her passive role as a simple viewer (idea of empowerment of the victim)¹³; this mechanism provides an answer to those cases that would never meet the Court, especially for those who do not want a judicial action; multi-cultural societies present a problem for the traditional penal system, because a certain behavior can be seen as a crime or not, depending on the country or religion: for instance, genital ablation is considered a corporal offense, but it's a cultural and traditional issue in several African countries. So cultural and traditional problems can be solved or mitigated using this alternative method;

Restorative Justice in Portugal

There are several types of instruments used in restorative justice, conferencing, community reparation boards, but the most common are penal mediation, family group conferences, and circle sentencing. The instruments and its application field is different

¹⁰ FRAGOSO, *Apud* BITENCOURT, Cezar Roberto - Pena de prisão perpétua, p.6

¹¹ COSTA, Sónia Isabel Teixeira - Mediação Penal e Justiça restaurativa. O debate em Portugal, p.13

¹² ASHWORTH; HIRCH *Apud* COSTA, Sónia Isabel Teixeira - Mediação Penal e Justiça restaurativa. O debate em Portugal, p.8

¹³ COSTA, Sónia Isabel Teixeira - Mediação Penal e Justiça restaurativa. O debate em Portugal, p.14 e 15

according to the country, specially regarding those who are active involved and participate in it. In Portugal, for instance, we use mediation, and while in the United Kingdom the police takes the leading role in this matter, in Portugal the initiative is on the Public Prosecutor hands, although the victim or the offender can also require it. Mediation can take place in different phases: it can either be at the beginning of the process, before the accusation, or after the sentence, with a therapeutic effect.

Mediation in Portugal can be used for adults and for minors, mostly used when the law-offender is far too young, and has no criminal history, in which case the criminal penalty presents more disadvantages than advantages.

The Portuguese law (Lei nº21/2007 de 12 de Junho) defines mediation as an “informal and flexible process led by an unbiased party, the mediator, which promotes approach between the defendant and victim, and supports and helps them to achieve an agreement, allowing the repair of the damages that have been caused, contributing to restore social peace” (article 4º, nº1). It establishes that the defendant and the victim can revoke their mediation consent, at any time (article 4º, nº2). According to this law, mediation cannot take place when the defendant is sentenced to a prison term of over 5 years, nor it can be applied to sexual crimes, or if the defendant is under 16 years old. Also the sessions are confidential, and cannot be used against the defendant in the criminal process.

Criminal policies are in constant development, mirroring each society’s guidelines. Prison was seen as an “improvement” comparing to corporal punishments and death sentences, and these alternatives instruments must also be seen as an improvement in comparison to prison. Perhaps it’s a matter of time, evolution, of acceptance from society. But society must be prepared for this acceptance, and willing to embrace it.

Must we not rethink our traditional criminal justice system? Has it been efficient? Does prison term work? It’s clear it does not rehabilitate the ex convict, but prison wasn’t made for resocialization or reintegration. How can we expect to rehabilitate someone by removing him from his environment, from society, through segregation? The State should reject *zero tolerance* policies, and act only as a last resort. Its

intervention shows us that the informal institutions have failed at some point: family, school, community. We should ask ourselves “where have we failed”?

Prison term can be avoidable in some cases. It’s not inevitable. We need to find an alternative path, a point of balance between the conservative and traditional path, and the radical one (abolitionism). Lode Walgrave said “Restorative justice focus on what binds us, rather than what divides us”¹⁴. Perhaps that point of equilibrium is already here, in the shape of restorative justice.

¹⁴ WALGRAVE Lode – Why Restorative Justice, p.15

References

- Part I:
 - ARAÚJO, Dyellber Fernando de Oliveira – *Institutos penais de emergência – “novas” fórmulas para velhos dilemas – Uma análise dos novos estudos de política criminal voltada aos indesejados pela sociedade*. Direito Penal Hoje – Novos desafios e novas respostas. Organizadores: Manuel da Costa Andrade e Rita Castanheira Neves. Coimbra: Coimbra Editora, 2009. ISBN 978-972-32-1692-9;
 - BECCARIA, Cesare – *Dos delitos e das penas*. [S.L]: Edição *Ridendo castigat mores*. [s.d].
 - CHRISTIE, Nils – *A indústria do controlo do crime*. Rio de Janeiro: Editora Forense, 1998. ISBN 978-85-309-0392-7;
 - CHRISTIE, Nils – *Conflicts as property*. The British Journal of Criminology. Vol. 17, n.º 1 (1977);
 - CHRISTIE, Nils – *Crime control as Drama*. Journal of Law and Society. Vol. 13, n.º 1 (1986). ISSN 0263-323X;
 - CUSSON, Maurice – *Criminologia*. Alfragide: Casa das Letras. 3ª Edição, 2011. ISBN 978-972-46-1620-9;
 - FERRAJOLI, Luigi – *Derecho y Razón: Teoría del Garantismo penal*. Madrid: Editorial Trotta. 1995. ISBN 84-87699-94-4;
 - FOUCAULT, Michel – *Vigiar e punir: nascimento da prisão*. Trad. de Raquel Ramalhete. Petrópolis: Editora Vozes. 20ª Edição, 1987. ISBN 85.326.0508-7.
 - HULSMAN, Louk – *A perspectiva abolicionista: apresentação em dois tempos — qual abolição?*. Revista Verve (NU-SOL). N.º 15 (2009). ISSN 1676-9090
 - HULSMAN, Louk/ Celis, Jacqueline Bernet de – *Penas perdidas. O sistema Penal em questão*. Rio de Janeiro: LUAM Editora. 1ª Edição, 1993.
 - MATHIESEN, Thomas – *Response: The Abolitionism Stance*. Journal of Prisoners on Prisons. Vol. 17, n.º 2 (2008).
 - PASSETI, Edson – *Ensaio sobre um abolicionismo penal*. Revista Verve (NU-SOL). ISSN 1676-9090. N.º 9 (2006) pp. 83-114.

- Part II:

- BITTENCOURT, Cezar Roberto – *Pena de Prisão Perpétua*, Revista CEJ, Brasília, v.4 N°11, Available at:
<http://www.egov.ufsc.br/portal/sites/default/files/anexos/22371-22373-1-PB.pdf>
- COSTA, Sónia Isabel Teixeira - *Mediação Penal e Justiça restaurativa. O debate em Portugal*, Dissertação para obtenção de grau de Mestre, ISCTE-IUL, 2009
- FOUCAULT, Michel – *Vigiar e Punir*, 10ªed. Petrópolis: Vozes, 1993. ISBN 85.326.0508-7
- Lei nº21/2007 de 12 de Junho (regime da mediação em processo penal)
- LIEBMANN, Marian – *Restorative Justice in Prisons: an International Perspective*, International Congress on Mediation, Lisbon, 20-22 October 2011
- SCHMITZ, Jean - *Some Reflections Regarding Restorative Approach*, International Congress on Mediation, Lisbon, 20-22 October 2011
- SOUSA, Teresa Albuquerque - *Dois modelos de Justiça Restaurativa: a Mediação Penal (adultos) e os Family Group Conferences (menores e jovens adultos)*, International Congress on Mediation, Lisbon, 20-22 October 2011
- WALGRAVE, Lode - *Advancing Restorative Justice as the Ground for Youth Justice*, speech at the First World Congress on Restorative Justice, Peru, 4-7 November 2009, available at: www.unicef.org/tdad/index_56513.html
- WALGRAVE, Lode – *Why Restorative Justice?*, International Congress on Mediation, Lisbon, 20-22 October 2011