

# The Penal Policy of Human Rights

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This essay intends to demonstrate the contours of a deleterious configuration of human rights as backing for the punitive wish, in other words, how the discourse of human rights can be channeled into punitive demands leveraged by the will to punish, which sequesters democracy and ultimately neutralizes its political effects and blocks its very achievement.

## I. About the meaning of the proposed matter

It is well-known that the configurations of punishment, in their various strata and not only institutional ones, amount to a huge public power representation vector to be driven by various interests. Perhaps in few places the amount with which the genuine connection between desire and power can be so well represented.<sup>1</sup> Therefore, the penal discourse is the place where the most profound yearnings are quickly revealed, including those of emancipation. The language of punishment, even though it may well be associated to the best of intentions, is deeply seducing, as we know that the discourse has long been more than what the desire expresses or hides, but it is the very desire, it translates not only the struggles or domination systems, but it reveals that for which one fights – ultimately, the power we wish to take possession of.

## II. The Criminal Law/Right of the Punitive Left

Such considerations only intend to stress the need to renew the warning about a phenomenon that could be eventually be named the “punitive left”. It certainly does not specifically concern legislative practices, but it elevates the very interpretative mechanisms of the legal actors in the confrontation with matters more sensible to demands against “the ones above”. In short, it is marked by the “claim for extension of the punitive reaction to conducts traditionally immune to the intervention of the penal system”.<sup>2</sup>

Getting straight to the point, it concerns aspirations of specific groups (such as the feminist and ecological movement) which have been expanded to the preoccupation with the so called golden criminality, notably the abuses of the political and economical powers. A persecutory furor, often hysterical and irrational, usually monopolized by the right wing in the legitimization of reactionary forces, ultimately reintroduces the worst of authoritarianism in criminal law. This happens because, when encouraging a rupture with the essential liberties of the Rule of Law, in the excitement of

getting to those less affected by the penal system, they often do not realize that such offense reaches exactly the usual “clients” of the system<sup>3</sup> who routinely suffer its strong interference, because of the very selectiveness of the penal system.

The (not so) new formations of a punitive tendency on the left, which is another face of the traditional repressive belief, only brings a new weakening of the essential rights. “Equally trying to legitimize the penal system, this new tendency conceals punitive wishes under the cloak of an interpretation of the Constitution and the need to replace liberal and individualist ideas about essential rights for concepts that put the social rights in action, extracting alleged criminalizing obligations therefrom, under the illusory prospect of turning the penal system into an alleged instrument of social transformation or emancipation of the oppressed.”<sup>4</sup>

Quite close to the neoliberal heralds (who are certainly less deluded), what is achieved in this regard is at most the punishment of some member or other of some less affected stratum. In the extremely few cases in which hegemonic conflicts allow for the overthrowing of some person responsible for facts of this kind, this happens because of such person’s vulnerability located in a relation of power.<sup>5</sup> However, the price of this sacrifice is ultimately the awful legitimization of the penal system as a whole<sup>6</sup>, i.e., of that same repressive, stigmatizing and essentially unequal-selective mechanism.<sup>7</sup>

They forget that the exceptionality of the penal system’s action is inherent to its essence, and also peremptorily forget the noticeable functionality of any penal system in handling illegalities differently, i.e., not caring about overcoming criminality of any nature. It would be frightening and amazing, unless we could not see the immense willingness of certain sectors and political forces to adhere to a system willing to reproduce inequality and suffering under this study focus, seemingly for some momentary enjoyment of punitive reac-

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<sup>1</sup> *Foucault*, A Ordem do Discurso, Aula inaugural no Collège de France, pronunciada em 02 de dezembro de 1970, 1996, p. 10 et seq.

<sup>2</sup> *Karam*, Discursos Sediciosos: crime, direito e sociedade 1/1 (1996), p. 79.

<sup>3</sup> *Batista*, Punidos e Mal Pagos: violência, justiça, segurança pública e direitos humanos no Brasil de hoje, 1990, p. 39.

<sup>4</sup> *Karam*, Recuperar o Desejo da Liberdade e Conter o Poder Punitivo, Vol. 1, Escritos sobre a Liberdade, 2009, p. 4.

<sup>5</sup> The far from contingent but structural aspect of the selectivity of the penal system and especially the illusion of *lack of coverage* that such situation attempts to create cannot be overemphasized. See *Zaffaroni/Batista/Alagia/Slokar*, Direito Penal Brasileiro, Vol. 1, Teoria Geral do Direito Penal, 2003, p. 49-51.

<sup>6</sup> *Zaffaroni*, in: Cópola (comp.), Derechos Fundamentales y Derecho Penal, 2006, p. 70.

<sup>7</sup> *Batista*, Introdução Crítica ao Direito Penal Brasileiro, 8<sup>th</sup> ed. 2002, p. 24-26. The vast sources about the core point of the penal system (and its criminal law), both *unequal*, is a central issue in *Baratta*, Criminologia Crítica e Crítica do Direito penal: introdução à sociologia do direito penal, 2<sup>nd</sup> ed. 1999, p. 159-170.

tion channeled to another direction. At some time concerned with some social transformation utopia, they seem to embark on the contradiction of intending to use a tool that is part of the problem for the solution of this same confusion. A certain left-wing spectrum, under hypocritical political pragmatism, announces new enemies of social cohesion: now “the ones above” – the same batteries, with signs reversed. Although incorporating libertarian ideals and knowing how to recognize and break from any form of authoritarianism, such sectors ultimately serve as protection and revitalization of the more reactionary discourse of the repressing „penal right wing“ (obviously under a new guise of defense and achievement of the „real“ Democratic State Ruled by the Law). Hence the criminal law/right of the punitive left. By accepting the rationale of penal repression, it enlarges the State's punishing power and finally accepts the dynamics of violence and the exclusion included therein. Any desire for freedom is lost in the entanglements of the will to punish.<sup>8</sup>

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<sup>8</sup> The stamp of selectivity of the penal system is unavoidable. As demonstrated for a long time, the penal system works as an epidemic, affecting preferably those with low defenses (*Zaffaroni, Sistemas Penales y Derechos Humanos en América Latina [Primer Informe], Documentos y cuestiones elaborados para el seminario de San José [Costa Rica], 11 al 15 de Julio 1983, 1984, p. 159-165*). One does not escape this dynamics when dealing with higher social strata. It is the very police provision to govern the society. Such chosen ones, now from higher floors, will be equally summoned as new scapegoats (*Girard, A Violência e o Sagrado, 1990, p. 91-115*). *Penal pornography (Wacquant, Punir os Pobres: a nova gestão da miséria nos Estados Unidos [A onda punitiva], 3<sup>rd</sup> ed. 2007, p. 9*), under which we are sensationally submitted by means of spectacular operations (always given cool names, since a marketing product must be attractive), forced temporary and preventive incarcerations, often in violation of the laws themselves, should not fail to convey the image that the system is legitimate and less selective. The very actions that allege to reduce selectivity will operate the punishment of the usual prisoners. Selectivity or rather the inequality of the penal system does not materialize in an element to be reduced considering it very application. It is necessary to recognize when this takes new directions, choosing at certain times people who are not usually part of the penal system. In order to reject such arguments, one could say – not without a considerable amount of hypocrisy – that if we chose the „repressivist-emancipatory“ direction we would be at least reducing the inequality of the penal system and beginning to demonstrate that all social strata are eventually controlled. It is a happy illusion. Selection and punishment are indiscernible: trying to abolish the former can only lead to the unavoidable suppression of the latter. And ostentation in the fight against inequality only contributes to worsen the scenario, thus reaffirming the mechanisms of repression. The alternative to „democratic incarceration“ is accompanied by the Rule of Law violating Democracy (*Santoro, Cárcel y Sociedad Liberal, 2008, p. 162*). Otherwise, one forgets that new selective processes will internally affect these new targets, without ex-

It is extremely important to stress, in short, that such symptoms of the so called democratic left have sources in common – which perhaps could even be translated as an ordinary political platform – with parties of such different political structures in the sense of forming some similar political identity, something as if it were a new mechanism of partisan “subjectivation”. The derivation of punitive schemes and its populism of the so called conservative or neoliberal dens are quite noticeable. However, shifting the focus and getting closer to how the „emancipation“ discourse can contain penal authoritarianism inverters can be ever more precious.

This, in a different manner, criminologically speaking, is part of the inventory (not to say the remains) of the inheritance of a certain critical criminology,<sup>9</sup> inattentive to its own “fire warnings”<sup>10</sup>. The “paradigm of new criminalization”<sup>11</sup>, resulting from the criticism of criminal law as a “class instrument”, can be depicted as we have seen, at least in Brazil, through the Constitution, since the 90's. In the event we divided the directions of the results of the critical criminology criticism in two currents,<sup>12</sup> on the one hand, because of the class nature attributed to criminal law, we could easily conclude that we should reject it. On the other hand, in a manner more suitable to these left-wing punitive movements, we would have the demand for equalitarian application thereof. This sector shall remain faithful to the spirit of it and deals with reversing the use of criminal law as an additional means to protect the interest of the weak. It also supports the criminalization and utilization of criminal law properly to protect and castigate violations to human rights, again making use of its own reversal for its alleged protection. Formerly, decriminalize because criminal law attacks us, now, criminalize because criminal law protects us? Deep inside, the criticism in this regard contained repudiation not to criminal law itself, to the way it was being used. Such irony: the concept of human rights serving to expand criminalization by the very

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cluding the continuous reproduction and creation of spaces of exception inside the penal system. From a media perspective, the return may be huge, as it would show its „effective“ universality and equality – a false maneuver to bestow legitimacy upon the penal machinery. And when the emphasis on the crusade against criminals (powerful or otherwise) becomes everyone's mission, not just between Police-Department of Justice-Judiciary, but of the people as a moral subject (*Foucault, Estratégias, poder-saber, Coleção Ditos e Escritos IV, 2<sup>nd</sup> edition 2006, p. 163*), a police-oriented society is no longer fiction. If that which is solidly built disappears in the air, i.e., time goes by and the memory of spectacular scenes perish, the door of the exceptional guarantees of yore remains pried open.

<sup>9</sup> *Baratta* (fn. 7), p. 202.

<sup>10</sup> *Benjaminian* shades, paraphrasing Löwy (Walter Benjamin: aviso de incêndio, Uma leitura das teses „Sobre o conceito de história”, 2005, p. 33 et seq.).

<sup>11</sup> *Cohen*, Visions of Social Control, Crime, Punishment and Classification, 1999, p. 254-260.

<sup>12</sup> *Larrauri*, La Herencia de La Criminología Crítica, 1991, p. 223-224.

sectors of the progressivist movements that used to criticize the way the penal system works.

They can be new moral entrepreneurs<sup>13</sup> supporting the investment in the extremely questionable and previously attacked symbolic function of criminal law, now seen as positive. In a way, they disseminate the hegemonic discourse of criminal law as a defense means by associating with the control instances. *Larrauri* says: “a estos nuevos movimientos no se les escapa la (doble) paradoja de que la ampliación de la criminalización se debiese, precisamente, a las mismas fuerzas opuestas a la criminalización, y que movimientos normalmente contestatarios con el Estado acudiesen ahora a éste en busca de ayuda e intervención.”<sup>14</sup> Not only by resorting to penal help but most of all by shifting from the right focus, they ignore a re-victimization – by the re-regulation of the conflictive situation – of the same protection targets (for instance, women and environment protection), precisely through moving efforts away from more effective solution, apart from ultimately pulverizing certain suitable mobilization around these issues by seeing them already in the realm of penal answer.<sup>15</sup>

The penal system does not relieve suffering. At most, it replaces suffering with resentment, depression or another mechanism that will eventually be channeled into producing greater pain.<sup>16</sup> It handles pains, allowing for the legitimization of an even more violent exercise, encouraging the most perverse feelings of revenge. That is its scandal, which never ceases to materialize.

It is quite perceptible at this point that our argument bends to the opposing side. Naturally, there is no reason to ignore the huge advancement of, shall we say, a more original current of critical criminology: it is correct to say that criminal law may be accused of protecting essentially the interests of the powerful, that it is used disproportionately against more vulnerable social sector; it is correct to implement a radical transformation in order to avoid further suffering. However, its use in the best of cases is ineffective to resolve social conflicts and it ultimately serves to increase the caused evil and suspend the conflict rather than resolve it. It stigmatizes the subject, offers false solutions and does not satisfy the victim itself in any extent. The line of discussion must contain the full rejection of criminal law as a way to prevent punishment or offenses. And in this regard, on a preliminary basis, it does not refrain from taking the problems raised by social demands seriously.<sup>17</sup>

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<sup>13</sup> *Becker*, *Outsiders*, *Studies in the Sociology of Deviance*, 1963, p. 147-162.

<sup>14</sup> *Larrauri* (fn. 12), p. 218.

<sup>15</sup> About the „re-regulating is resolving” myth, see *Zaffaroni/Batista/Alagia/Slokar* (fn. 5), p. 54-56.

<sup>16</sup> *Myra y Lopez*, *Quatro gigantes da alma, O medo, o amor, a ira, o dever*, 1960, p. 112.

<sup>17</sup> Anticipating any counterpoint, the elision of the presence of procedural guarantees is not excluded from this vision. No other meaning is assigned to penal science but the fixation of guarantees, but this does not include the argument of the urgency to see them ultimately association with the punish-

The great enlargement of the punitive power through the inquisitive elements that are permanently present in the general system operators, further helped on the left by a touch of constitutional lawfulness, allows our democracy to be categorized, to some extent, as representing a “cool authoritarianism”<sup>18</sup>. However, the alleged criminalizing obligations, derived from an interpretation of the Constitution, may often be nothing more than a distortion. The protection of legal assets is a necessary condition, but it is not sufficient to legitimize the penal prohibition.<sup>19</sup> Assuming that the penal system only acts in a negative way, i.e., providing remedy, protection or avoidance of the conducts it criminalizes in an improper manner, the fact that it is simultaneously an instrument for positive action is a contradiction. In other words, the penal system is not an effective mechanism for the protection of essential rights except on an individual basis – this would be genuine “penal remedy”. Therefore, the ordinances contained in section 5 of the Constitution of the Federal Republic of Brazil, the source from which a large part of the penal constitution that we have will be taken, impose state intervention, but for the purpose of creating material, economical, social and political conditions for the achievement of those essential rights, and not on a criminalizing level. Once again, the so called left-wing legitimizing discourse slips towards this rationale.<sup>20</sup>

### III. Will to Punish and Penal Populism: archetypes for a penal policy of human rights

All this movement is intrinsically attached to an even greater dynamics. There is a deep constant which, notwithstanding, emerges as a basic symptom in such political environments, to some extent, named by Salas as a will to punish. Here a much more diffuse and enlarged amalgamation is naturally gathered, apart from the juridical actors involved in the criminal matter. A punitive fervor invades the democratic societies beyond the courts of justice, with their help and also with the help of a certain part of the left, on the pretext of some devo-

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ment in some legitimized form. The endorsement that is assumed is not the need for punishment, but the submission of the potestas puniendi to legal control (penal procedure is one of these avenues), not entailing the acceptance of this punitive model. See *Amaral*, *Violência e Processo Penal: Crítica Transdisciplinar sobre a Limitação do Poder Punitivo*, 2008, p. 117 et seq.

<sup>18</sup> *Zaffaroni*, *O Inimigo no Direito Penal*, 2007, p. 70-81.

<sup>19</sup> *Staechelein*, in: *Instituto de Ciencias Criminales de Frankfurt* (ed.), *La insostenible situación del Derecho Penal*, 2000, p. 289-304.

<sup>20</sup> Obviously, the repressive network would not be stopped this way in all cases. Even with this observation of unnecessary criminalization, in the context of the Brazilian constitution, several examples of expansionist thrusts in criminal law would remain. Even the constitutional level ignores the ineffectiveness of the penal system and invests in it, even when the protective provisions make no mention to criminalization, except through the punitive yearning of the legislative actors involved.

tion to the “victims”. A judge once involved by state ineptitude, with the demands for judicialization inherent to basic citizen rights, is now raised to the position of political actor par excellence in criminal terms: Judges now “are only visible in red”.<sup>21</sup> In a social enclosure surrounded by risk, where the management of dangers has become essential and the demonization of the other has a captive place, the latency of the victimizing state channels penal populism. The shaping triad of this state of things is summarized on the basis of, as described by Salas: a strong police, a disciplinarian Bench and right of exception always ready to act. Thus, the central question about penal populism must consider the figure that violently embodies the collisions of the yearnings of punishment: a role that is played by the victim

„Loin d’être l’apanage des partis extrêmes, il caractérise tout discours qui appelle à punir au nom des victimes bafouées et contre des institutions disqualifiées. Il naît de la rencontre d’une pathologie de la représentation et d’une pathologie de l’accusation: réduite à une communauté d’émotions, la société démocratique ‘sur-réagit’ aux agressions réelles ou supposées, au risque de basculer dans une escalade de la violence et de la contre-violence. Toute hésitation serait l’indice d’une faiblesse. Tout prudence, une marque de complicité.”<sup>22</sup>

In this pathology, one does not want the authorities to be weak and complacent to crime, since security has become an absolute right straightly aligned with the “public”. Moderation is not compatible with the exacerbation of social reaction, hence a profound deficit – not to say paralysis) of the

<sup>21</sup> Justice will only be of interest to the public in its acute form, where there is crime, a criminal court, a game of life and death. Maybe this could be explained by a double movement identified by *Foucault*. Justice enveloped by an „administration” comparable to the other State powers suffered double movement, according to him, forwards and backwards: it lets go of an even greater domain of businesses that are regulated behind themselves (like the struggles on an economic level) and furthermore it deviates greatly of the „social” functions of everyday care. It is certain that it should not act only as a fortress (even if access thereto can sometimes represent such a thing), but it is ironic that it is flexible, penetrable and transparent. It is in its realm that the organization of disorder produces useful effects. It is in the judiciary mechanism that cares for us that disorder produces order. In three ways, the *author* shall say: it produces „acceptable irregularities” under which we are in tolerance consented by everyone; it produces „usable asymmetry”, securing advantages to some that other ignore or cannot have; finally, most of all, it produces something of the highest value in civilizations such as ours – social order. *Foucault* says – not without huge shades of *Kafka* – after all the picture of the judiciary appliances as one of those pieces of machinery of *Jean Tinguely*, „full of impossible wheels, of blades that drag nothing and gears that feign: all the things that ‘do not work’ make ‘it move’.” (*Foucault*, *O Limão e o Leite*, 2010, p. 237-239).

<sup>22</sup> *Salas*, *La Volonté de Punir*, *Essai sur le populisme penal*, 2010, p. 12 and 14.

mediation imposed to democratic societies. It is then that the very democracy is exposed to these threats, which believes to puts its very fundamentals to the test.

It is interesting to systemize this movement in key points with some strength. We analyze that the rise of a security-oriented society invades the practices playing a certain leading role, at least in the West beginning in the 70’s. Taken as the central topic of the political discourse per se, the (in)security and its war rhetoric (which confounds internal and external security) attracts not only the right-wing discourses (that were always there: in times of prosperity, with its politically correct discourse, but which in hard times will call the shots for a channel giving access to repression – xenophobia, terrorism, sexual crimes, drugs etc.), not only political leaders but also, in its determination to fight against impunity and equality vis-à-vis the law, legal activism, which now gains public space as a crime-fighting tool. Penal populism clearly becomes a major component of democratic life. A purely repressive “right to punish” combined with an (effervescent) opinionated democracy is merely a small sample of attractive promises (to voters) of this political discourse of media-oriented emotion. Its irruption acquires three essential elements: radical punishment; the total indifference regarding any effectiveness of these policies (as it is the impact it has on public opinion that counts) and strict laws promising to reduce criminality.<sup>23</sup>

It is the time of the victims. The first combat and punishment plan is installed by a victimizing imaginary real and fertilizes the soil for the figure of the avenger, precisely of the “accusatory victim”. Could we risk saying that the victim of yore has become the persecutor of today? The demonization of the opponent is only the other side of the rhetoric of the martyr and the fight against evil. The dramatization of the penal scenario comes in handy in this radical separation between anger and pity. The fight of good against evil in a degraded democracy of individuals a role that is played by the victim exacerbates the return of the victim and especially places the moment of penal procedure in what could be described as “democracy of the complaining”<sup>24</sup>. The moral and populist crusades disrupt any balance that could be between the force and form that constitutes the Rule of Law. It is as if, once the irrational portion of power were rehabilitated, there would be a steep dive in the originating violence that properly inaugurates the state entity. In this critical point, the roles of victims and executioner become interchangeable.<sup>25</sup>

<sup>23</sup> *Salas* (Fn. 22), p. 57.

<sup>24</sup> *Salas* (Fn. 22), p. 84 and 90.

<sup>25</sup> For *Packer*, according to a classic scheme, the legal appliance may operate as an assembly line, assuming two operation levels: initially, crime control, headed by the police and by the Department of Justice, and a second one, regarding the respect to due process, under the authority of the judge. In fact, these would rather be two regulating models of criminal procedures that would lead us to perceive an antinomy in the heart of criminal justice. The *author* says: “Two models of the criminal process will let us perceive the normative antinomy at the heart of the criminal law. These models are not

The passion for punishment, fed by penal populism, is imposed most of all by affection. Any understanding look on the accused one is broken, to the extent that collective indignation relegates this look to evil personified. But how could one resist the embrittlement that affects democracies involved in this penal ostentation? How to keep away the intoxication (hallucination) of a demagogical community of emotion? Will the danger, as revealed in irrationality, properly come through the best possible democratic justification: the rights of men, i.e., the formation of a penal policy of human rights? The denaturation of its role of limiting the punitive exercise is the announced archetype of its own corrosion.

The repressive injunction, which leads to the multiplication of cases of incrimination, reinforces not only legislative and police activism but also the judicial realm, seeking the (sterile) protection of human rights, which is often equivalent to exposing an illusory protection through the reinforcement of the interdict. When the reference was lost, the fruitless reiteration of the legal (criminalizing) instance only reveals the failure of its authority. One resorts to the triumph (or consolation?) in criminal law just like the allies create in the illusory “Maginot Line”<sup>26</sup>, as a way to safeguard themselves against the Nazi approach. The offensive of a punitive moralism seems to have opted for the explicit choice of values inherent to the total indifference to the rights of offenders.

We are faced with democracy thrown against itself, where the return of the demands for control, safety and punishment march triumphantly over the very personal rights. To the

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labeled Is and Ought, nor are they to be taken in that sense. Rather, they represent an attempt to abstract two separate value systems that compete for priority in the operation of the criminal process. Neither is presented as either corresponding to reality or representing the ideal to the exclusion of the other. The two models merely afford a convenient way to talk about the operation of a process whose day-to-day functioning involves a constant series of minute adjustments between the competing demands of two values systems and whose normative future likewise involves a series of resolutions of the tensions between competing claims.” (Packer, *Limits of the Criminal Sanction*, 1968, p. 153). Thus, the first is a chain (literally) responsible, programmed and prepared to turn a suspect into a convict, while the second becomes an obstacle in this course, which makes the protection of the accused one a core value. The repressive system, increasingly impregnated by the ideology of the “just deserts”, has been appropriated and represented by penal justice to the detriment of the second, exactly to bestow credibility upon the institution. By imposing the corollary of the efficiency paradigm, on the one hand, this value acts mostly on the smaller criminality with a number of provisions that pragmatically claim the culpability of the defendant; regarding the „big” criminality, there is the penal procedure of exception, not only with special procedures, but most of all with the permanent and general possibility of breaking the rule through the very open provision of the laws.

<sup>26</sup> Metaphor used by Pires, *Revue de droit pénal et de criminologie* 2/81 (2001), 145-170.

extent that human rights become a policy, we would add the term *penal* to the expression of *Marcel Gauchet*<sup>27</sup>. A fundamentalist derivation conducted by the reversal of human rights through *excess* is perceived. A left outside the left, to paraphrase the French *author*.

The penal effects of a repressing and criminalizing policy, founded on the protection of essential rights, are experimented signs within the disconcerting faces of the new democracy, identifiable at least since the post-war period and reaching its peak at least since the 70’s/80’s. Which, it should be noted, had a deep effect in the Brazilian constitution. A triumphant democracy now returns – and the Brazilian case is also a noteworthy example – in a penal activism in the name of its very supreme values, surreptitiously imploding its own bases. The statement made in 1980 that the rights of men are not a policy and restated in 2000, once reread, may reveal precisely a threatening reversal that can be viewed in the emancipation of man from the level of his rights: the collective alienation tends to multiply. Hence the reinforcement of the role of the state which, in a matter of penal control, triggers a deepening of social anonymity and an aggravation of the disregard for the public thing. In other words, human rights cannot be a policy, except on the condition of being able to recognize and overcome the alienating dynamics of individualism that they naturally convey.<sup>28</sup>

The consolidation of human rights as an undeniably greater ideological and political factor in recent times, exactly then violations thereof are becoming so natural, should not lose sight that, when placed as the epicenter of the democracies, they may become the reason for their difficulty to become a policy. The greatest proof of this is their criminalizing penal expression. *Gauchet*’s argument helps us think about the questioning of the penal culture issue under different values. Under the focus built so far, we are led to accept the idea that such platform – the channeling of the demands for protection of human rights towards a penal bias and all the punitive and populist vision of their actors implied therein – comes as an additional variable of the collective impotence to turn these rights into a material political action measure going beyond the sterile penal proposition.

When democracy is no longer contested, it triumphs towards the idle consolidation of the rights its states, disregarding any social-historical consideration – *Gauchet*’s diagnosis – and the practical contradictions start to appear. Its internal substance and even its governing power are depleted. Furthermore, this could mean a certain loss of power, in this new conjuncture, of political and social discourses, which are absorbed by these very principles, which fail to nurture de-

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<sup>27</sup> *Gauchet*, *A Democracia contra ela mesma*, 2009, p. 360 and 38. It is known that it used to be a current problem in the seventies and had been covered by other *authors* such as *Lefort*, with *Espirit* magazine going as far as holding a meeting about the topic at the end of the decade: „Are the rights of men a policy?”. *Lefort*, *A Invenção Democrática*, Vol. 3, *Os limites da dominação totalitária*. Coleção *Invenções Democráticas*, 3<sup>rd</sup> ed. 2011, p. 59-86.

<sup>28</sup> *Gauchet* (fn. 27), p. 53-54, 62-63 and 69-71.

mocracy itself. In the penal realm, can this be clearer when the unchanging discourses of expansion of the punitive power are similar either at east or at west?<sup>29</sup>

Hence the weakening of the collective through an alleged individual affirmation, the realm of the individual in the society to the detriment of the society of the individual – if they can be separated and do not represent the basic problem of the matter. Regardless, in the field of political mechanism itself, human rights as a promise of power become dispossession under the effect of the liberation of the particularities in which they are translated. Particularities channeled towards the power to punish point to a complete depletion of its ideals under the mantle of an alleged emancipatory protection. If they can affirm the bases on which we are gathered, they offer little in terms of the effective fabrication of the being-in-a-set, and because of this deficiency the ultimately make

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<sup>29</sup> When they become a belief and amount to a sheer act of ideological faith, democracy gains a huge space in long strides. That is because these rights have the effectiveness of filling a void and may become a powerful means to transform the future in the lack of a great vision about tomorrow. But it must be noted: by doing it, „they say nothing about the reasons that make things be as they are”, frenetically surrendering to the ideas about means to modify them. What does it mean? There is serious disqualification in the search for explanations – after all, trying to learn, in this regard, means agreeing to the unacceptable. Thinking in terms of criminal politics, not thinking in terms of the defense of urgent criminalization, in the swelling of the State in penal persecution and severe punishment, means being against something that should be made immediately and being an accomplice of this crime. A new kind of Machiavellism arises on the foreground of democracies. The good one, „dedicated to the celebration of man and right, intended to preach the just causes and good feelings without failing to witness its humaneness, its compassion for the victims, its concern with the wounds of the world.” They refer to a separation between the ideal and the real that the governments now deal in, running the risk of they themselves becoming the scapegoats of the resistance of the real to the ideal. The move to consensual ideology is an escape from the age of confrontations, an agreement made around the rights leading to a „depoliticization of means” benefitting the powers that, in this new political art, are its mere enforcers. Hence the precariousness of any position of power in the core of our pacified regimes. A necessarily frustrated expectation will be the core of our policy: „consensus democracy is discontented democracy.” In this new system of the beliefs, there will be room for the appreciation of the intentions only. For the power, as the vector of the possible, a „policy of intentions” will suffice, of generous good will, indifferent to the denial of the real. Nevertheless, this makes prosecutors immune, regardless of the consequences of their provisions. In this regard, most of all, the problem will have been felt and will not be attributable to anyone in particular. A promise of power, of achievement of the rights of man, ultimately becomes an unintelligible potency, i.e., the grave of politics. (*Gauchet* [Fn. 27], p. 340-341 and 348-350).

room for impotent reproduction, which is enabled by relapsing into the excess penal power. It is up to us to know whether this is what we want: to dive into the *vertigo* of an intimate degradation of democracy attested by this self-destructive temptation.<sup>30</sup>

Thus, the militant ardor tends to disrupt any alliance between justice thinking and the thought of a person’s right, and the claims for justice start to relate to the representation of the victims. In short, the protective system of human rights is ultimately reversed and contradicts its own principles. Under the mantle of penal policy, they become excellent narcotics seeking to compensate for the diffuse social evils. More directly, an ideological reversal<sup>31</sup> of human rights is installed given the identification of its “policy” with the imposition of power and becomes the strongest support of security policies.

The justice institutions, perhaps more than any other, are faced with populist effects. When, in an initial political moment, democracy reacts voluntarily, pragmatically and immediately to the crime, moved by the partiality of emotion, the Department of Justice or the Police authorities come to the rescue of a threatened society. However, the opposite is assumed in the judicial moment, which is prudently and deliberately stopped by its procedural course. Some cult to surrender may lead the legal institutions not to resist and become vulnerable to opinion agitation. And the ineligible law of the judges as public servants implies – associated to this greater exposure to media-oriented discussions and the criticism receive, as it is obvious that it has to deal with any majorities, hence its counterpower of tutelage of minorities, hence its legitimacy<sup>32</sup> – greater responsibility still tied to the powers arising therefrom: “un juge enrôlé dans une croisade contre le crime n’est plus à sa place de tiers impartial; il prend le rôle d’un ‘saint belliqueux’ voué à une mission sacrée, au risque de briser les principes qui gouvernent sa fonction.”<sup>33</sup>

#### IV. Positions – Repressive Democracy

There is a pronounced force that owes little to any outside focus except to the dissemination of a viral strategy that corrodes the social body and democracy itself. Today we could talk about hyperterrorism or any other formation of some concept of enemy<sup>34</sup> without going through what really mat-

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<sup>30</sup> *Gauchet* (Fn. 27), p. 360-365.

<sup>31</sup> *Hinkelammert*, in: Herrera Flores (ed.), *El Vuelo de Anteo: Derechos Humanos y Crítica de la Razón Liberal*, 2000, p. 79-113; *Herrera Flores*, *Teoría Crítica dos Direitos Humanos: Os Direitos Humanos como produtos culturais*, 2009, p. 68 et seq.

<sup>32</sup> *Ferrajoli*, *Derecho y Razón: Teoría del Garantismo Penal*, 1995, p. 578-581.

<sup>33</sup> *Salas* (fn. 22), p. 234.

<sup>34</sup> The more diffuse the concept, the more it suits an opportunist appropriation, as warned by *Derrida*. The dominant power will be the one that is able to impose and legitimize, even legalize (as it is always a matter of law), in a national or worldwide stage, the terminology and interpretation that is

ters. If we want to use Derrida's denomination, there is a certain internal terror that produces "self-immunization" in democracy – as it is known that the worst and most effective form of terrorism, even if it seems foreign or international, is the one that installs an inside threat and reminds that the enemy is also lodged within the system – i.e., it destroys its immunity defenses, subverts its languages and weakens its institutions. The September 11 event<sup>35</sup> only exposed the self-destruction of the democratic defense mechanisms according to a mental impact of an evil that leads to counterviolence in its image. Both torture in the name of democracy allied to war culture and the punitive rhetoric in the name of the victim bestow a powerful élan upon the political discourse.

"A democracy that does not understand its own global disposition which constitutes half of its being, that is no longer attentive to the coexistence of its portions turned into a purpose in itself, is a democracy that no longer understands the bases on which it rests and the instruments it needs. It no longer knows how to confer a statute upon the limits of historical community thanks to which it is capable of acting upon itself, it no longer has the meaning of authority application that allows it to be applied to itself."<sup>36</sup>

There is an implacable law that regulates this entire self-immunity process, i.e., a rationale that leads democracy to work for itself in an almost suicidal manner, exactly to immunize its own protection. Initially it should be triggered by an event which, as such, carries some inappropriability as we have said, some incomprehensibility. This transgression of a new kind entails a trauma, a wound marked not only in memory. In this point it is healthy to rethink this capable temporality to be conveyed in punitive populism. The idea of 9-11 as a "major happening" (but the scheme remains strict for our analysis) allows us to clearly perceive that it is the *future* that determines this inappropriability, not the present or the past. Speaking of traumatism, it is produced by the threat that the worst is yet to come – "an unrepresentable future (to come)", the fear of what has happened will not be greater than the fear and imminence of a future aggression. That is why the "unrepresentable future" governs a rationality of a permanent state of readiness and anticipation of all kinds of repressive means in a sort of continuous state of defense that

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most suitable to it within a certain situation. *Derrida*, in: *Borradori*, *Filosofia em Tempo de Terror: diálogos com Jürgen Habermas e Jacques Derrida*, 2004, p. 112-119. Also about the troublesome concept of terrorism, see: *Zaffaroni* (fn. 18) p. 65-69.

<sup>35</sup> Towards a meaning of expropriation according to *Derrida*: „an event is what emerges, and when it emerges, it emerges to surprise me, to surprise and suspend the comprehension: an event is most of all that which I do not understand. It consists of that, that which I do not understand: that which I do not understand: my incomprehension. [...] Hence the inappropriability, the unpredictability, the absolute surprise, the incomprehension, the misunderstanding laughter, the unforeseeable news, the purse singularity, the absence of horizon.” (*Derrida* [fn. 34] p. 100 and 104.)

<sup>36</sup> *Gauchet* (Fn. 27), p. 363.

invests and feeds its own monstrosity that it alleges to exceed: "What will never be forgotten, thus, is the perverse effect of self-immunity in itself. Now we know that repression, both in the psychoanalytic and political sense – be it through the policy, the military or the economy, ultimately produces, reproduces and regenerates the very thing it intended to disarm."<sup>37</sup> The dissolution of politics through collective emotions exists in an atmosphere of universal war against crime. The acclamation that makes it all homogeneous is more viable. The appeal of power is sent to imaginary people much more suitable to an ideology that presumably categorizes the plurality of the real people as ungovernable. The empty place of power once supposed by *Lefort*<sup>38</sup> as the principle of democracy, which must represent a perpetual democratic abstaining from accepting ultimate fundamentals providing about last certainties, is easily filled today by any punitive demand.

*Agamben*<sup>39</sup> recalls that, in 1928, *Carl Schmitt* tried to establish the constituent meaning of the acclamations in public law when dealing of the relationship of the People with the Democratic Constitution in his *Theory of the Constitution*. There the German theoretician indissolubly associates acclamation to democracy and to the public sphere (the people). For him, the public opinion is a modern form of acclamation and here is where the essence of its political meaning can be found. Even not ignoring the dangers of certain social forces driving the public opinion and the will of the people, this would be a minor problem, provided the capacity that he considered decisive for the political existence of the people is assured:<sup>40</sup> the categorical refoundation of politics from the decision that distinguishes a friend from and enemy (*Freund und Feind*).<sup>41</sup>

As stated by *Agamben*, it is the acclamation that seems to belong to the tradition of authoritarianism, most of all, from the layer of glory (the *author's* core preoccupation)<sup>42</sup> which,

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<sup>37</sup> *Derrida* (fn. 34), p. 106-109.

<sup>38</sup> *Lefort* (fn. 27), p. 92-93.

<sup>39</sup> *Agamben*, *Il Regno e la Gloria, Per una genealogia teologica dell'economia e del governo, Homo sacer, II. 2.*, 2009, p. 277-279.

<sup>40</sup> *Schmitt*, *Teoría de la Constitución*, 2001, p. 238 and 241.

<sup>41</sup> *Schmitt*, *Concepto de lo político*, 2006, p. 31.

<sup>42</sup> Power as a political government of men, traces of which can be found in the researches of *Foucault*, is also the interest of *Agamben*. In this regard, about the genealogy of governability, the government should be placed in its theological *locus* in the trinity *oikonomia*. This provision, which we had the opportunity to comment on, is conceived as a privileged laboratory to observe the governmental machine. But it is on the correlation between *oikonomia* and glory that it invests, i.e., the question is asked: why does power need the glory and what is the relationship between glory and economy? Thus, between the power as government and effective management and power as ceremonial and liturgical royalty, a vast field is opened to identify Glory as the central arcane of power and ask about the indissoluble connection that ties it to government and *oikonomia*. In short, we are faced with the acclama-

in modern democracies, was shifted to the ambit of public opinion. What is in discussion, in short, is the multiplication and the dissemination of the function of glory (with all the hues of liturgy and ritual revamped) now concentrated on the media, which means the effectiveness of acclamation. What we have commented about some democracy of consensus also begins to make sense. On the one hand, stressing even more the position about the transformation of the democratic institutions, we can see, according to the *author*, that the theoreticians of the “communication-people” – such as *Habermas*<sup>43</sup>, who advocates a popular sovereignty totally emancipated from a “substantial people-subject”, but entirely resolved in private communicative processes which, according to his idea of public sphere, regulate the flow of political opinion and will formation – ultimately surrender the public power to specialists and the media. One falls into a kind of media-oriented and objective glory of social communication.<sup>44</sup>

The richness of the writing of the Italian professor lies in the demonstration that both government by consent and social communication actually refer to acclamations: “il consenso può essere definito senza difficoltà, parafrasando la tesi schmittiana sull’opinione pubblica, come ‘la forma moderna dell’acclamazione’” (poco importa che l’acclamazione sia espressa da una moltitudine fisicamente presente, come in Schmitt, o dal flusso delle procedure comunicative, come in *Habermas*)<sup>45</sup>. Thus, the “society of the spectacle” takes on a new meaning and strength. Glory ultimately becomes the substance from which the politics will take its criteria, and where the people, either real or communicational, of the contemporary consensual democracies ultimately lie. Which warns us about the dangers of consensus in democracy, notably the media-oriented acclamations for punishment via, for instance, the authoritarianism of human rights in criminal law.

The populist theme carries the disquieting progress of a democracy increasingly opposing to a disagreement of opinions. The tyranny of urgency regarding crime leads us to try to shift especially the scenario of punitive populism, apart from this own and proper will to punish, so we may obliquely question the “reason” itself of a punitive desire or populist acclamation for punishment which may somehow move these practices in a general fashion. This helps us reduce the scale and expand the field of vision so we can place, in a jointly manner, apart from the phenomena of the political-criminal

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tory and dexologic aspect of power, identifiable today in the mass media and contemporary democracies by its government by consent or consensus democracy. This somehow allows for the capturing of the central void of the governmental machine, getting closer to the thoughts of *Lefort*, the most power-laden symbol, i.e., the empty throne, which is the very symbol of *Glory* (*Agamben* [fn. 39], p. 187-284).

<sup>43</sup> *Habermas*, *Mudança Estrutural da Esfera Pública*, Investigações quanto a uma categoria da sociedade burguesa, 1984, p. 13-41.

<sup>44</sup> *Agamben* (fn. 39), p. 279-280.

<sup>45</sup> *Agamben* (fn. 39), p. 283.

actors and the juridical-penal actors, the social context even more deeply under the same register.

For this purpose, with the help of *Laclau*, we can view populism as a means to build politics, as it is a phenomenon contained in the entire community space. Even though it is a social rationale that goes through a number of phenomena, our concern includes taking it by surprise in configurations inherent to punitive demands. The rationale of populism and the very method of formation of the collective identities go through the assumption of support in the study of smaller units, not groups, but demands. That is why one bestows centrality upon affection as a constituent of any social tie. An alternate view of populism may see it as a constant of political action. And its conceptual vagueness and imprecision cannot get lost in a mere and crude political operation. On the contrary, there is a performative act<sup>46</sup> endowed with its own rationale in the indetermination of populism, as it is this very simplification that allows for the association of heterogeneous demands. Regarding these games of difference that gain a hegemonic centrality, in the illustration of several penalizing efforts in various fields, often with contradicting supporting interests, they are catapulted to empty expressions (these are the so-called juridical assets) that firmly tie up the chain of punitive discourse. If populism is vague and undetermined at this point, it is exactly to be endowed with internal cohesion in the end.<sup>47</sup>

In this current, the social demands, when not met, because of an institutional inability to solve them differentially, end up potentializing a certain equivalent, shall we say “simplifying” load among them. Which ultimately forms a chain, a unification of demands, in the case under analysis, easily around the punitive question.<sup>48</sup> Since the construction of the people is a political act par excellence, the tour court policy – in which the formation of opposing frontiers within the social realm summoning new subjects and the productions of empty expressions for the purpose of unifying equivalence chains in a set of heterogeneous demands is essential – and the defining spirit of populism, and seemingly of any political intervention, one must exercise the critical patience of following where these expressions may float to. More straightforwardly, one may ask: what if for the constitution of the people in this empty expression certain contingency leads to penal simplification? Aren’t the very provision of the Constitution, in turn, and more broadly the value Democracy, within a scenario of punitive ostentation conducted by a game of differences, the empty expressions ready to define a repressive penal policy within this context? It should be said that there is such centrality of the punitive power in the current constitutional democratic scheme that it is not risk to see the stage of the relations of force, contingent historical articulation (in the discontinuous succession of hegemonic formations) increasingly contain political identities ready to demand the hegemony of the punitive discourse. In short, this is the stress on populist trends and the answers have surfaced naturally.

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<sup>46</sup> *Laclau*, *La razón populista*, 2010, p. 32.

<sup>47</sup> *Laclau* (fn. 46), p. 95.

<sup>48</sup> *Laclau* (fn. 46), p. 99 and 102.



Recover the desire for liberty and not let it be buried by punitive demands will never be an easy task. If in modern democratic societies the greatest hazard, as described by *Christie*,<sup>49</sup> is not offense per se, but that the fight against it leads to the worst forms of totalitarianism, consequently resignation and pessimism cannot be greatly emphasized, let alone in dark times. Not yielding in the discourse of resistance, which is also inherent to criminal law, escaping from the *Zeitgeist* that was often used as an attempt to justify the worst atrocities committed in decadent times, seems to be the *test* to be taken repeatedly when facing the barriers overthrown by the State of Police.

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<sup>49</sup> *Christie*, *La Industria Del Control Del Delito, ¿La Nueva Forma de Holocausto?*, 1993, p. 24.