

# THE PROBLEM OF THE ACCEPTANCE OF THE NON-PUNITIVE VICTIM IN THE CRIMINAL JUSTICE SYSTEM

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The social category “victims of criminal actions” has gained a lot of visibility in the last two decades. The emergence of victims’ movements, the exploitation of victims’ dramas in the media, the quests for legal changes to “protect” or “in consideration of” the victims, these are all scenarios that have become more frequent in many different countries from different legal traditions. But this visibility brings some challenges and inconveniences for the traditional actors of the criminal justice system. For judges and prosecutors, it seems that more often than not the victims are perceived as a problematic new actor that should remain estranged from the process of imposing a criminal punishment. It is a new actor in the scene, and an actor who does not have an established legitimacy when it comes to determining a criminal punishment. The process of sentencing is not – theoretically speaking – concerned with the desire of the victim to make the criminal suffer. In short, the inconvenience that the victim poses to the criminal justice system would come from its novelty and also from its (perceived) strong punitive feelings. But, and here is the theme of this article, what happens with the criminal justice system when it faces a victim that does not want punishment, a victim that demands a different solution? How do judges react to a victim that is ready to settle, to forgive or to do not seek a punishment in any sense? To answer or, more accurately speaking, to develop these questions, we use the data from some qualitative interviews with judges and prosecutors in a Civil Law tradition country (Brazil) that were collected in during our doctoral research. We intend to raise questions about how the criminal justice system, specifically in matters of sentencing, deals with non-punitive victims and, more importantly, how it perceives solutions that depart from the frame of the modern theories of punishment and its traditional punishments. Can the criminal justice system accept a victim’s pardon, resolution or lack of interest in pursuing a criminal punishment as a solution to the conflict? Can it conceive that the “interest of society” sometimes may worsen a conflict more than bring any form of solution? And can we conceive that, despite all the mediatized punitive portray of the victims, some of them are looking for a solution of a conflict that differs from the traditional infliction of punishment, the only option that criminal justice system seems to offer?

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## INTRODUCTION

The emergence of victims as a new voice in the context of the criminal justice system seems to be a characteristic of the turning of the century. This new “social category” (Erner, 2006) seems to have become a common place for movements interested in making legal changes or influencing judicial procedures. The “victims”, as real actors or as an invoked category, have clearly acquired a new status in society, which seems to present new challenges to the actors of the criminal justice system.

In a context of increasing penal populism, opposing the demands of the victims seems to be an inglorious task. This “sanctified category” seems to have legitimacy in itself and carry a new idea of “justice”. Responding to the victims’ needs seems to have become a necessity, a fundamental (for its supporters) task of a “humanist” and “just” criminal justice system. As Garland puts, “[i]f the centre-piece of penal-welfarism was the (expert projection of the) individual offender and his or her needs, the centre of contemporary penal discourse is (a political projection of) the individual victim and his or her feelings.” (Garland, 2001: 144)

However, if the victims may have arrived to the centre of the penal discourse, it does not mean that they have arrived to be the centre of concern for the criminal justice system actors. Especially when it comes to determine a sentence, the inputs of the victims seem to be very problematic stimuli. Traditionally, the task of determining a criminal punishment is, regardless of the legal tradition, based on legal criteria and theories of punishment that do not seem to give great importance to the victims.

*Taking the victims in consideration* does not seem to be in itself a discourse that brings a problem. Many judges and prosecutors will say that they are very aware of the victims’ sufferings and ordeals and they are sympathetic towards them. The problem appears when *taking the victims in consideration* means *taking the victims’ opinion for the penal solution in consideration*. If, in one hand, to be “sympathetic” and “compassionate” to the victims does not bring much concern to judges and prosecutors and it is even perceived as a “humanistic” attitude, accepting a victim’s will as a penal sanction is perceived as inappropriate, as an usurpation of the criminal justice system powers.

One of the main arguments for keeping the victims out of the “construction” of the criminal response is that, besides the lack of legitimacy, they would bring a disproportional answer. Victims, as they are perceived, act out of strong emotions and feelings of revenge and for that reason they would unbalance the system, they would make it irrational and extremely severe.

However, we do know that conciliatory victims do exist. Our interviewees, when asked about them, will always remember one or two cases where they had

faced a victim that did not seem interested in inflicting suffering upon the offender or at least seemed more interested in conciliation or compensation. So by having noticed the existence of non-punitive victims, our point here is: if one of the main arguments to not take victims in consideration in the criminal response is that they are perceived as overly severe and irrational, why can't we take in consideration victims that are not interested in the infliction of punishment? Why can't we take in consideration victims that believe their conflict is solved with a simple mediation? Or those who are ready to forgive? Or even those for whom compensation with damages is enough?

With these questions in mind, we carried out interviews which had, among other purposes, the goal of evaluating the openness of the criminal justice system for solutions which depart from the traditional sentencing. Considering that the imposition of the traditional criminal sentences – especially imprisonment – very often brings more problems to the people involved in the case than solutions (not to speak of the social consequences of the mass imprisonment), the openness to different forms of conflict resolution seems to us a key element to a less socially harmful criminal justice system.

### **A SHORT NOTE ABOUT THE EMPIRICAL DATA**

The following excerpts of interviews are part of a database of 42 interviews with judges and prosecutors in different parts and of different courts in Brazil. We performed semi-directive interviews (with a list of subjects, but no specific questions) of about 1h15 each to capture their representations on many different subjects: mandatory punishment, the role of public opinion and alternatives to punishment were some of these topics. The part concerning victims was focused on identifying the roles that victims can or cannot play in the criminal justice system according to these actors, as well as the acceptance of agreements between victims and offenders.

### **CJS ACTORS' PERCEPTIONS OF THE VICTIMS AND REASONS TO KEEP THEM AWAY**

On the reasons why the non-punitive victims should not play any role in the criminal justice system, we were particularly interested on those which reinforce the “system of ideas” (infra 4) of the referred system. As we will explain in the following section, we work with a theoretical framework which is concerned with how the theories of punishment make it extremely difficult for alternative solutions to become mainstream. This is justified by the fact that these alternative solutions foresee the criminal justice system as a conflict solving instance more than a punishment delivery institution. These theories, despite their differences and incompatibilities, they all work with the idea that a penal “solution” is the

infliction of punishment/suffering, excluding conciliatory solutions, forgiveness and other solutions alike.

Therefore, our main goal was to find arguments excluding the participation of non-punitive victims based mainly on the theories of punishment. However, the range of reasons we found in our interviews were broader than we thought. In the following lines, we expose the main reasons (that appeared in the discourse of our interviewees) why non-punitive victims cannot be accepted in the process of determining a criminal response to a given criminal act.

#### a) The precedence of society over the individual victim

First of all, some interviewees were clear in their rejection of the non-punitive victims, but their reasoning was very poor. Here is one example:

I'm gonna tell you something: I really don't care about what the victim wants. The victim's right, the victim's right of an opinion... that's an individual thing. I'm worried with what's collective. You can forgive whoever you want, it's your right. Depending on the circumstances, I think it could be good for you to forgive. You are gonna grow as a person, you're gonna reach the nirvana, whatever... (...) But I myself have learnt that if one doesn't reprove, one doesn't amend. If I kill you in a traffic accident; an accident in which I was at fault. I never meant to kill you. I was going fast, but I never intended to kill you. I'm a good person, I'm a family man, I raise my kids... Maybe even your parents will forgive me. (...) But I've committed a crime. It's there in the law that this is a crime. Why wouldn't I be held responsible?<sup>1</sup> (prosecutor 9)

In this excerpt, we see a very crystallized rejection of the non-punitive victim even though the reason to do so is far from clear. In his sarcastic terms, this prosecutor let us know that he despises completely the role of giving an answer to the individual conflict. What he is worried about is the “community group”:

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<sup>1</sup> Free-translation from the original transcript of the interview: “Eu vou dizer para o senhor o seguinte: tô pouco interessado no que a vítima quer. Porque o direito da vítima, o direito de opinião da vítima, é uma coisa individual. Eu fico preocupado é com o coletivo. Você pode perdoar quem você quiser, é um direito seu. [...] Acho até melhor para você, porque você vai crescer como pessoa, você vai atingir o nirvana, você vai o que você quiser. Só que eu aprendi [...] [que] se você não repreende você não se acerta. Não basta você dizer pra mim: “não eu estou, olha eu estou arrependido”. Sim e daí? E aquela coisa que a gente aprende desde que o mundo é mundo que todo ato gera uma consequência. Eu mato você num acidente de trânsito, um acidente de trânsito em que eu tive culpa. Eu nunca quis matar você, eu estava em velocidade excessiva, mas eu jamais pensei em matar você. Eu sou uma boa pessoa, eu sou pai de família, crio os meus filhos, de repente os seus pais vão até me perdoar, eu não tive vontade de matar você... Mas eu cometi um crime, está ali na lei que aquilo é crime. Por que eu não vou ser responsabilizado?”

the individual conflict should not in any sense precede the criminal justice role (as he sees it) of punishing on behalf of the group. An obligation of punishment and the non consideration of the victims here are clear, but the reasons for that are far from explicit in his talks.

A little more eloquent in his argument is our next interviewee:

Well, I myself believe (...), by principle and philosophy that the characteristic of criminal law is the maximum social defence, and because of that the possibility that the victim may interfere in the process is minimal and must continue to be like that. Therefore, the use of the [penal] machine and the imposition of a punishment is a characteristic of the State. This largely exceeds the personal interests of the victim and his relatives. So [the discourse that says] “listen, for me it’s fine, it’s over, it was a tragedy, it was unfortunate...” I’m sorry, but no! It’s still a non relevant position. The position here [that counts] is the society’s one. If we leave to the will [of the victim] this creates distortions and corruptions, and this will make the criminal law ineffective.<sup>2</sup> (judge 8)

This judge is very clear on the fact that the conflict “belongs” to society: the wishes of the victim cannot counter the fact that the State has the monopoly of the distribution of justice. Holding on a traditional argument of the theories of punishment (the State is the only legitimate source of answer for a criminal offense) which was essential in the foundation of the modern criminal law, a displacement of the conflict from the victim’s hands is operated here. Their presence would be the source of “inequalities”, “corruptions”, “ineffectiveness”. It’s worth noting that the argument of “inequality” here is used in an odd way to contribute to the severity of criminal justice system: since others are punished for similar cases, as a matter of equality, we should not listen to the non-punitive victim and punish the offender in this case as well.

Finally, it is worth noting too that this argument on the lack of legitimacy of the victim is not exclusive to the non-punitive victim. I would say that this seems to be the most important argument – or at least the most prominent one – to keep victims out of the system, no matter if they are punitive or not.

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<sup>2</sup> Free-translation from the original transcript of the interview: “Bom, eu entendo, eu continuo dizendo por princípio e filosofia que a característica do direito penal é a de defesa máxima social e, assim sendo, a condição de que a vítima possa interferir no processo é e deverá permanecer sendo mínima. Então a movimentação da máquina e a imposição da pena é uma característica do Estado, transcende em muito os interesses pessoais da vítima e de seus familiares. [...] Então, [o discurso que diz] “olha pra mim na verdade tá tudo bem, pra mim acabou, foi uma tragédia, uma infelicidade”... Me desculpe, mas não. Continua não havendo uma relevância na sua posição. A posição aí é uma posição da sociedade. Se isso ficar ao bel prazer isso cria distorções e corrupções, e aí sim vai mostrar um direito penal ineficiente.”

## b) Individual deterrence and incapacitation

Another good reason to do not take in consideration non-punitive victims' opinion is the argument of the "social relevance" of the segregation of the offender. The importance of inflicting a punishment is because of the dangerousness of the offender and the need of either incapacitating or deterring him. Our judge 22 gives one good example of this kind of argument:

It depends on the case. For instance, there are situations, let's say some crimes against property... The person was a victim of a non-violent theft (...) and when you'll hear the victim he says: "what a poor guy, I didn't even want to do anything... but I went to the police station etc." It's that after sometime at the police station, when he was angry that someone robbed him, things cooled down, he calms down, he realises that what was stolen wasn't that valuable, he goes to see the offender... "what an unfortunate person". He feels bad for what's happening... In these cases you can't consider the will of the victim. The crime really took place and the person is only acting out of emotion. But [in these cases] who is a really a victim is society. (...) You have to think of society, not only the person who was robbed. Why? Because if this person [the offender] is set free (...) he's gonna do that again and any other person in society can be a victim. So you've gotta think about society, you can't just say "no, it's fine". We understand what the victim says and that he feels sorry for the offender, and we don't blame him for that. You can't give much importance to that. (judge 22)<sup>3</sup>

In this excerpt, the judge brings back an old argument of social defence, an argument very popular in the end of nineteenth and beginning of the twentieth century, with the positivist criminology: the problem of the dangerousness of the criminal. This idea, that has increasingly regained strength with a new the-

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<sup>3</sup> Free-translation from the original transcript of the interview: "Depende da situação do caso, por exemplo, há situações vamos dizer crime contra o patrimônio um furto, se a pessoa foi vítima num furto e tal e foi instaurado um inquérito a ação penal você vai ouvir a vítima e a vítima "não ele é um coitadinho não nem queria sabe, por mim não teria nem... mas eu fui na delegacia e tal" é que depois que ele foi lá que ele tava no calor da revolta alguém lhe tinha retirado os bens né é foi lá e acusou e a pessoa foi encontrada, mas depois aquilo esfria os ânimos de acalmam, saiu de lá até não tinha tanto valor, aí vai ver a pessoa "ah um coitadinho", fica com pena da pessoa com pena do acusado e pensa "puxa, mas por que isso está acontecendo?" aí nesse caso você não pode considerar a vontade da vítima, o crime você vê que o crime realmente ocorreu e que pra pessoa não há importância ela só tá agindo emocionalmente né, agora ali quem é vítima realmente é a sociedade também né, não é só a pessoa se você condenar ou não você tem que pensar na sociedade não só na vítima que sofreu o furto. Por quê? Porque se essa pessoa for liberada se é que não houve a consequência a pessoa vai praticar novamente e qualquer outra pessoa da sociedade pode sofrer por aquilo. Então você tem que pensar também na sociedade, então nesses casos tem casos que você não pode considerar "não, tudo bem" você entende o que a vítima disse você entende que ela sentiu pena e não pode reprová-la por isso, mas você tem que dar um peso menor." (judge 22)

ory of incapacitation<sup>4</sup>, upholds that some people present a danger to society and the only reason to stop them is with a criminal sanction (meaning prison). For that reason, some people may even be forgiven by their victims, but still they present a threat to society, and for that reason society has to ignore whatever the actual victim thinks. We should notice that the argument of the precedence of society over the individual is always present here, but with an incapacitation reasoning underneath it this time.

In the next passage we have a similar argument:

In this case [a homicide], the victim is not only the deceased person or his relatives, it's society itself (...). Therefore in this case it's not about a settlement or a solution to that conflict created to the family of the victim. In a certain way, the conflict is much broader. The person who committed that crime is potentially dangerous to the point of being segregated from the others, to be arrested, to be convicted and kept in prison. And this is so that even if the families of the victims think otherwise... The judge, the State, has to be aware of this need, if this is necessary in the case... (judge 22)<sup>5</sup>

The example we were discussing was that of a homicide which was perpetrated by a very young offender, with no previous criminal history, who showed a clear regret. For that reason, the family of the victim was able to forgive the offender after some mediation (the case was based on a true case, but was presented in a hypothetical manner to the judge). Again here the fact that it seems to be an unlikely recidivist, an offender with no previous criminal history and clearly suffering the moral consequences of his act, does not seem enough to counter the argument that we are dealing with a potential threat to society – a threat that should be neutralized – and because of that the opinion of the family against a prison sentence should not be considered.

### c) General deterrence

To our interviewees, Another good reason to keep non-punitive victims away from the sentencing process is the argument that of one of the main theories of punishment, the theory of general deterrence.

<sup>4</sup> About the emergence of incapacitation in late twentieth century, see Zimring and Hawkins, 1995.

<sup>5</sup> Free-translation from the original transcript of the interview: “nesse caso a vítima não é apenas a pessoa que foi morta ou os parentes da vítima, nesse caso é a própria sociedade [...]. Então nesse caso não é só os parentes você não vai estar tentando solucionar ou compor apenas aquele conflito, o conflito criado na família da vítima. De forma alguma, o conflito é bem maior é se essa pessoa que cometeu esse crime ela é potencialmente perigosa a ponto de ter que ser separada dos demais, ou seja, ser presa, ser condenada e ser mantida presa. Então isso mesmo que os familiares da vítima acham que não, o juiz, o Estado deve verificar se há essa necessidade, se houver essa necessidade no caso, entende...”

(interviewer) If it's about reinstating the legal order, why the offender cannot settle directly with the victim?

Because there's the interest of the State. The crime is not something that only interests the victim; it also concerns the State. (...) [B]ecause when A steals from B, the victim is the one who has the interest in being repaid etc., but the State has the predominant interest in not seeing that behaviour happening again. (prosecutor 5)<sup>6</sup>

In this passage we see the classical argument of the deterrence theory: not punishing means not sending a message to others potential offenders that that behaviour is unacceptable and whoever engages in similar acts will be punished. As if reading Beccaria, the prosecutor makes it very clear that an agreement is unacceptable because it undermines the deterrence effect of criminal punishment. In other terms, the punishment is necessary because without it nothing would prevent others from transgressing the norm.

Here, once again, we see society taking precedence over the individual conflict, but now through a general deterrence argument.

#### d) Retribution

The traditional argument of the theory of retribution – the infliction of a punishment is the only way of making justice – seems to be another good reason to not give voice to the non-punitive victims.

(interviewer) “You can't leave it unpunished because this crime deserves a punishment so justice can be served in a retributivist conception? Is it so or I am...”

“Yes, it's also that. (...) He committed a very serious crime (...) and has to be punished, there has to be a consequence for that. As I always say, (...) I see sometimes my peers – and they don't like my opinion on this matter – when they have to sentence... (...) I tell them: “But your sentences are too lenient”. (...) It's like if we were being generous with someone else's life on the line. But how can I be generous at the expense of other people's lives? Because the family forgave... the family said “no, I'm ok. I have accepted the mistake and I forgive him”. It's a crime with intention, not an unintentional one. If it wasn't intentional, that would be another story, I could give a judicial pardon. But in an intentional

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<sup>6</sup> Free-translation from the original transcript of the interview: “se isso se trata de recompor a ordem jurídica por que o autor do delito não pode transacionar diretamente com a vítima? Porque aí você tem o interesse do Estado. O crime não é só um interesse da vítima, ele é um interesse do Estado, [...] porque quando um fulano A pratica um roubo contra o fulano B, a vítima o fulano B é quem tem um interesse maior em se ver ressarcido e etc, mas o Estado tem o interesse predominante de não ver aquela conduta se repetir.”



crime... “no, it’s fine, we have accepted what happened and understood the circumstances which led him to do it”... In other words, it’s as if I was being clement to look well to the Creator’ gaze... But nobody asked the victim if she would herself give the offender this pardon. (judge 21)<sup>7</sup>

This excerpt is a little trickier because since it is a homicide case, the direct victim could not give an answer, and the pardon of the family’s victim seems insufficient to the judge. But what is really important to us is the conception underneath his belief in criminal punishment. Even if the interviewer seems to have gone a little too far here in suggesting the retribution, it seems clear that the interviewee holds a belief that severe punishment in homicide cases is the only way to do justice. His concerns are not utilitarian ones: a punishment, and not a lenient one, is deserved; the offender *has* to suffer a consequence. And his sense of moral righteousness about the retributive punishment is even stronger when he condemns his peers for not being severe enough: being lenient means “being generous” at someone else life’s expense; in his conception, the judge does not have the right to not punish severely because that would be, in a certain way, despising the value of someone’s else life.

#### e) Seriousness of the offence

If the general perception supports sidelining victims, there is however one factor – the seriousness of the crime – that seems to mitigate this attitude. The less serious is the crime, the more willing judges and prosecutors are to consider the victims’ opinions. Let’s take a look at another excerpt:

If there’s something that really disgusts me in any situation is the creation of exceptions, states of exceptions for more or less. There should be a rule for the participation of the victim in the more serious crimes and in the

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<sup>7</sup> Free-translation from the original transcript of the interview: “Não pode deixar impune porque esse crime merece um castigo pra se fazer justiça com a concepção retributiva? É isso ou eu estou...”

Sim, também. [...] ele cometeu uma conduta gravíssima [...] e tudo ele tem que ser punido, tem que receber uma consequência por isso. Porque eu sempre inclusive às vezes eu digo isso e eu já me acabei me indispondo com muitos colegas em relação à isso, eu vejo os juízes às vezes na hora de quantificação das penas eu sempre fui de um juiz de uma linha assim mais rigorosa na dosimetria da pena e às vezes eu digo com os colegas “mas vocês estão fixando pena baixa”, [...] é como se a gente fosse fazer cortesia com a vida dos outros. Como é que eu vou fazer cortesia com a vida dos outros? Aí porque a família perdoou, a família falou “não eu estou bem já aceitei o erro que ele fez ele tá perdoado”? O crime é doloso, nós não estamos falando de crime culposos. Culposos é outra história, vale até o perdão judicial. Mas num crime doloso “não já está tudo bem nós já aceitamos já entendemos as circunstâncias que ele cometeu o delito”... Ou seja, eu estaria fazendo cortesia pra ficar de bem talvez perante o Criador com a vida da outra pessoa. Ninguém perguntou pra vítima se ela daria a ele delinquente ele infrator esse perdão.”

less serious ones... Of course, if it's considered a criminal event there's always some seriousness. In the less serious ones, it could even be accepted the abolition of the punishment, the judicial pardon or the substitution of the punishment for something else. But in the more serious ones, we keep the punishment (...) but diminishing it's duration. (judge 10)<sup>8</sup>

It's clear here that the less serious crimes are perceived very often by the actors of the criminal justice system as something that should not even be dealt by the criminal law. Some crimes of damage, of personal offense, small thefts etc. do not seem to present a challenge. It is easy to consider them as forgivable, as not deserving a punishment, as something that criminal law should not worry much about. In this sense, it is easy for the actors of the criminal justice system to consider not a problem taking non-punitive victims in consideration here. The bottom line is that these crimes are very frequently not perceived as "real crimes", or "what counts". Because of that, a greater tolerance for the participation of victims is seen here.

It should be noted that even though the interviewee was talking about less serious crimes, such representation of the criminal response theoretically opens a very interesting possibility to the participation of the non-punitive victims in the criminal justice system. The simple fact that this judge sees as acceptable diminishing a punishment due to a victim's pardon to the offender is a form of escaping what we define in the following section as the *modern penal rationality*.

## THE VICTIM AND THE MODERN PENAL RATIONALITY

To conclude our argument in this article, we need to make explicit our theoretical framework which guides our observation of the lack of acceptance of the non-punitive victims.

The main concept that we have in mind throughout the text is the idea of a *modern penal rationality* developed by Pires (1998, 1999, 2001, 2002a, 2002b, 2004a, 2004b, 2006, 2007, 2008; Pires and Acosta, 1994; Pires and Cauchie, 2007; Pires and Garcia, 2007). According to this author, modern criminal law is trapped in a system of ideas that makes it very difficult for any form of alternative resolution to be stabilized in the criminal justice system. Criminal law has very limited creativity in solving conflicts due to the cognitive obstacles of its own system of thought.

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<sup>8</sup> Free-translation from the original transcript of the interview: "Uma coisa que me repugna em qualquer situação é a criação de exceções, estados de exceção pra mais ou pra menos, quer dizer me parece que deveria ser uma regra que a participação da vítima em graves ou em não graves, menos graves, certo que se teve a tutela penal teve alguma gravidade. No menos grave que até implicasse na abolição da pena, no perdão judicial, na substituição da pena; mas que nos mais graves mantivesse a pena se houvesse arrependimento, mas com a redução da sua extensão."

This idea of a system of thought comes from the observation of the modern theories of punishment – we are thinking here specifically about deterrence, retribution, rehabilitation and denunciation – from a different angle. They all present themselves in opposition to the other theories in a way that they exclude each other as a justification to punishment. However, what if – as a theoretical exercise – we try to see what they have in common instead of focusing on their differences?<sup>9</sup> Can they be that much different if we, empirically observing, see these theories in many cases being used together? In fact, as a simple jurisprudential research can show, many legal operators (judges, prosecutors) do not really see a problem in determining a punishment invoking at the same time denunciation and retribution, or retribution and rehabilitation, or even retribution and deterrence.

So the question that lies beneath this idea of a system of thought is: despite all their differences, what are the elements that bring these theories of punishment closer together? What are the elements of the criminal law that they support in spite of the fact they often claim to have nothing in common? In answering these questions, we come to a set of characteristics of the modern criminal law which are so ontologized that they make it very difficult for those who work with them to come up with stable alternative solutions. Here are these characteristics:

a) Obligation of responding: these four theories of punishment support the idea that the right to punish is more than a simple right/authorization of punishment; it is a right/obligation to punish. We can use Luhmann's concept of *medium* and *form*<sup>10</sup> (1998 [2007]: 149 e ss.) to make this idea a little more clear. Using this author theoretical framework, we can say that the expression "right to punish" is a *medium*, what means that it can take many different *forms* in a communication, and that the expression itself is nothing else but an empty envelope. It does not have a preconceived and invariable content, it is not "ontologized": the *form* it assumes depends on the content we associate with it. We can conceive the right to punish as a simple *authorisation for a sanction*, or as an *obligation to react to a crime in a very broad sense* or as an *obligation to inflict a punishment*. Therefore, the "right to punish" depends on the *form* we create. And here is the place where the theories of the punishment meet: the *form* they create is always the same, an *obligation to punish 'stricto sensu'* (not an authorisation and not an obligation to sanction in broad terms).<sup>11</sup>

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<sup>9</sup> This "intuition" was first explicated by Van de Kerchove (1981).

<sup>10</sup> For a similar use of this concept, see Garcia, 2009 and Possas, 2009.

<sup>11</sup> Taking a different path than ours here, Foucault (1975) offers a very interesting argument for the emergence and a consolidation of an obligation to punish in the modern criminal law. In demonstrating the decline of the ordeals and the emergence of the modern punishment of the disciplinary society, Foucault shows how important it was for the reformers to limit the absolute power of the sovereign at the time to inflict a punishment. If in one hand that meant "ra-

b) Besides this obligation to punish, the system formed by the theories of punishment (the modern penal rationality) will contend that the meaning of punishing is the *infliction of a suffering*. For the actors of the criminal justice system, a punishment that intends to be positive, to bring a reconciliation (and this instead of punishing, not as a complement), may even be a good alternative, but is very often not considered a *criminal sanction*. The criminal punishment *must* inflict a suffering to do not be seen as an “inappropriate sanction”, as a “civil sanction”, it must cause a suffering. In luhmannian terms, the *medium* “punishment” is invested by the content of inflicting suffering: to “truly” punish is to impose an afflictive sanction.<sup>12</sup>

c) The over appreciation of prison and the exclusion of alternatives punishments come as a consequence and as an element to reinforce “a” and “b”. A good explanation for the lack of imagination for penal alternatives may be found in the support that prison gets from this system of ideas derived from the theories of punishment. Since they all support an obligation of punishment *stricto sensu*, prison is an ideal place: it inflicts suffering at the same time that it prevents the punishment from being perceived as inhumane as the pre-modern forms of the criminal law. Besides, prison is the ideal place for a project of individual reform, as it is supported by the rehabilitation theory. Therefore, with this obligation to inflict pain and an institution so socially solid<sup>13</sup>, there’s no space for the alternatives to really become mainstream in the criminal justice system. There’s a lack of theoretical support for them; they never get to be perceived as “real” responses of the criminal law.

d) The conception of the protection of society is another important characteristic of this modern penal rationality. According to this idea, the criminal law, through its modern penal rationality, conceives its role

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tionalize” and “humanize” the punishment by putting an end in deeply violent practices, on the other hand – and this is the less known part of Foucault that interests us here – it was also a matter of limiting the sovereign’s power to forgive and to set people free. To reach an “effective” criminal justice system, as intended by the reformers, punishment should be “moderate” but “absolutely certain”. That means keeping out all possibilities of pardon and composition between the parties.

<sup>12</sup> Christie (1981: 46, 47) has also noticed this over appreciation of the suffering in the criminal justice system: “Worse than the importance given to crime and individual blame is the legitimacy given to pain. Pain, intended to be pain, is elevated to being the legitimate answer to crime. But I learned in school, through the non-hidden curriculum, that the best answer was to turn the other cheek to him who struck me. Highly regarded solutions such as non-reaction, forgiveness and kindness are pushed into obscurity in the neo-classical simplicities. [...] Neo-classicism presents punishment as the inevitable solution, as a matter of course, by making it the only, invariable, alternative.”

<sup>13</sup> And nobody has demonstrated this strength of the prison better than Foucault (1975) with his argument that all the criticism of the prison is contemporary to the institution itself, and since the beginning it only has served to call for more prison.

as fundamental to the existence of society. This conception leads to two things: the importance of the *ultima ratio* argument and the notion of the necessity of a present and concrete evil for an immaterial (and sometimes in the future) good. Concerning the latter, we are talking about a way of thinking, present in all theories of punishment, according to which we have to do a tangible evil in the present to achieve an immaterial good to society: e.g., by inflicting pain now, we re-establish justice (retribution) or we deter potential criminals (deterrence) (Pires 2004b: 43, 44). About the idea of *ultima ratio*, this modern penal rationality encloses the idea that criminal law, differently from other branches of law, must bring the strongest possible answer since it is the last resort as society's answer to a certain problem. It is actually a two folded idea: criminal law must be society's last alternative to a problem and, for that reason, it must hold the toughest responses. However, it seems that the side of the "last alternative" has become far less important than the "toughest answers" side (which seems evident with the amount of many criminalized behaviors in different countries, of different legal traditions, that are hardly justifiable as a threat to society that ask for its last resort solution).

After this detour about the modern penal rationality, what this has to do with the problem of the non-acceptance of the non-punitive victims? Our point here is that – and this is a hypothesis for now – the non-punitive victim, due to the fact that it collides with the system of ideas of the criminal justice system (the modern penal rationality), is even more problematic than the punitive victim. If the latter is very problematic because it is perceived as demanding, as trying to play a role that is not his, as trying to interfere in the sphere of action of judges and prosecutors, the former is even more problematic because not only does it present all these characteristics, but also because of the *form* of his demand. In other words, this *form* – a non-punitive request – goes against a system configured to be punitive, to inflict pain and to refuse conciliation and forgiveness. Besides, the non-punitive victim, in a way, deconstructs the "pacifier" role (the idea that without the criminal justice system conflicts in society would always certainly degenerate in perpetual revenges) of the criminal justice system as perceived by many of its actors. How can some actors still support the idea that the referred system exists to pacify conflicts when we come across these victims that do not want any vengeful solution to their conflicts?

To conclude, and to make explicit our point of view here, despite all the criticism to the non-acceptance of the non-punitive victim in this article, we believe that a lot of precautions should be exercised when considering the integration of victims in the criminal justice decision process. If listening and paying attention to the victims' needs seem to be a very positive way to helping this category in coping with an unfair offense and consequently helping cooling down

social conflicts, we understand that a great deal of victims do not want only to be listened, but to have an impact in the outcome of the sentencing process in a punitive sense. We are aware that the non-punitive victims portrayed here are not a fair sample of all the victims of the criminal acts.

So, defending taking victims in consideration in the sentencing process may be a risky business. It is certain that we believe that the non-punitive ones bring a much needed fresh air in terms of alternatives to solving conflicts and avoiding the infliction of socially harmful punishments. However, it is impossible not to notice that in our “society of victims” (Erner, 2006) those who are more punitive are more vocal and more present (at least for the criminal justice system actors). Moreover, the punitive victims, despite their apparent inconvenience to the referred system, may certainly seem more “palatable” on a closer look. Their demands, even if sometimes are perceived as too punitive, go in the same direction of this system of ideas of the theories of punishment: the obligation to punish, the exclusion of alternatives and the intolerance with forgiveness.

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