

## **Prison and inhumanity in Brazil. A critical based on the history of the present**

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**Summary:** 1. Introduction. 2. Inhuman images of the vulnerable. 3. The history of the present and the genealogy of punishment. 4. Veiled violence: the Brazilian trajectory between sovereignty and past heritage. 5. For a critique beyond the rhetoric of punishment and humanity. 6. Considerations. References

**Abstract:** The paper presents, through hypothetical-deductive and historical methods, a contribution of the history of the present to the critical study about the violation of the fundamental rights of persons deprived of their liberty. It points out data and information of violation of fundamental rights in the prisons. It exposes the characters about the history of the present. It analyzes the Brazilian trajectory of violence, violations and inequalities. Finally, it indicates the need for criticism beyond the rhetoric of punishment and humanity. The article concludes that obedience to human dignity is a constant element in penitentiary constitutionality, in defense of democracy and respect for fundamental rights. The persistent violations of the prison reality indicate that the intervention must be directed to the spaces that produce and naturalize the violence of the violation, with the objective of reaching the base that sustains authoritarian, segregationist and exclusionary dynamics.

**Keywords:** Prison, Inhumanity, Fundamental rights, History of the presente, Brazil

### **1. Introduction**

The present study aimed at understanding to what extent the history of the present may contribute to a critical and current view of the violations of fundamental rights of those individuals deprived of liberty. The approaches proposed were the hypothetical-deductive method and the historical research.

The prison environment has notorious and complex characteristics with recognized discrepancies between criminal enforcement law and prison reality. Yearly, the national prison records reveal an ineffective and abusive state that commits human and social rights violations. The prison space is a scenario of systematic and daily victimization where incarcerated people have become one of the most vulnerable populations in the country.

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Punishment by way of imprisonment often demonstrates the impact of authoritarian and repressive inheritances on today's prison dynamics. When punitive practices played a key role in modern states, punishment was veiled through inhuman dynamics. The positivization of fundamental rights in major constitutions led to the protection of rights of persons in vulnerable situations. However, it was not strong enough to break the cruel structure of the punitive power.

In Brazil, the systematic use of punishment and all the atrocities have been an essential part of a long term repression. Sentence enforcement in Brazil has been established by the structures that became the foundation of the prison practice. These structures embody authoritarianism, violence, repression, bureaucracy, clientelism, violation of fundamental rights, selectivity, and particularly social inequality. Thus, the history of the present seeks to question a past that may seem distant, but which constitutes the exact moment the conditions and contingencies first appeared. The critical perspective enables the criticism of the present itself.

Thus, the article analyzes violence and violations of rights in Brazil's prison system under the critical perspective of the history of the present, transcending the rhetoric of punishment and humanity. First, it uncovers the punitive sentencing, which led to higher incarceration rates, according to the data provided on the violation of fundamental rights in prisons. Second, it shows the importance of the history of the present for the investigation of a past that constitutes the moment when the conditions and contingencies first arose. Third, it examines the Brazilian trajectory of violations and segregations, with the prison being the core of the state punitive power and social exclusion, as well as the target of the public policies in the country. Finally, it shows the need for a critical perspective beyond the rhetoric of punishment and humanity, in order to optimize the discussion on the realities and the political and social impacts inherent to the historical process of the punitive system

## **2. Inhuman images of the vulnerable**

The prison settings, with all the burden of the penal system, constitute a scenario of systematic and daily victimization<sup>2</sup>. The deliberative exercise of victimization of such degrading environment started with the organization of rules and discipline and the use of domination and order in the name of security. In turn, it is not difficult to observe the level of criminal selectivity in prisons, a place where the population fits into patterns with obvious markers: poverty, ethnicity, skin color, forms of exteriorization, family status, gender, crimes committed, among others<sup>3</sup>.

The use of incisive and highly repressive criminal control draws attention to the negative effects of authoritarian and repressive inheritances on current prison dynamics. For Hugo Leonardo Rodrigues Santos, it is possible to identify a certain *cynical reason*, which is demonstrated by the persistent use of prison as a false solution to the violence of crime, even though it is known that this instrument is absolutely ineffective in the pursuing purposes officially established by the criminal system<sup>4</sup>.

In the first half of 2016, the number of people deprived of liberty in Brazil exceeded 700,000, 8 times higher than in 1990. Between 2000 and 2016, the rate of imprisonment increased by 157%. In June 2016, there were 352, 6 inmates per 100,000 inhabitants. Regarding the number of vacancies, there is a total deficit of 358,663 vacancies and an average occupancy rate of 197.4% nationwide.

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<sup>2</sup> NEUMAN, E. *Victimologia y control social. Las víctimas del sistema penal*, Editorial Universidad, Buenos Aires, 1994, p. 64.

<sup>3</sup> NEUMAN, E. *Victimologia y control social. Las víctimas del sistema penal*, Editorial Universidad, Buenos Aires, 1994, p. 249.

<sup>4</sup> RODRIGUES SANTOS, H. L. "Futuro pretérito da prisão e a razão cínica do grande encarceramento: três momentos de emergência de discursos, expectativas e experiências acumuladas em torno do conceito de prisão". *Revista Brasileira de Ciências Criminais*, 131 2017.

Approximately 40% of those arrested had not yet been tried and convicted. Crimes related to drug trafficking represent 28% of criminal offenses. Crimes of theft and robbery total 37% and homicides 11%<sup>5</sup>.

In 2022, there are 661,915 people arrested. Between 2000 and 2022, the number of prisoners grew significantly, around 184.4%. The Brazilian incarceration rate is 310 people for every 100,000 inhabitants. In 2000, the rate was 137 people. Between 2000 and 2022, there was a 126.2% increase in the imprisonment rate. The mass incarceration demonstrates social consequences allied to several amplifiers: overcrowding, degradation of structural conditions, shortage of vacancies, etc. Regarding the number of vacancies in the year 2022, there is a total deficit of more than 190 thousand vacancies and an average occupancy rate of almost 140.8% in the country<sup>6</sup>. However, this does not remove the persistent incidence of overcrowding in several penal units, according to reports of visits by the National Mechanism for the Prevention and Combat of Torture.

At the end of 2016 and the first months of 2017, deaths and massacres occurred inside prisons in different Brazilian states. In 2014, the death rate from homicides in Brazilian prisons was 9.52 per 10,000 inmates. Another cruel image refers to the high incidence of diseases: for every 100 people arrested in December 2014, 1.3 were diagnosed with HIV, 0.5% had syphilis, 0.6% hepatitis, 0.9% tuberculosis, and 0.5% had other health conditions<sup>7</sup>. Between 2014 and 2019, there was a 94% increase in deaths in prisons in the country. In that same period, the annual average of deaths in Brazilian prisons was 1,647, without considering the second half of 2017. The prison population grew by just over 20% during this period. Diseases account for the vast majority of cases registered in the country: natural deaths accounted for 59% of deaths that occurred in the period from 2014 to 2019; criminal deaths, 22%; suicides, 8%; deaths from unknown causes, 7.5%; and accidental deaths, 2%. In 2020, there were a total of 2,137 deaths in physical cells, and 304 under house arrest. The report recorded the persistence of the increase in deaths from natural causes and the expressive growth in deaths from unknown causes. Data on deaths under house arrest are important for understanding the expansion of prison degradation even in situations where sentences are served at home. There is an outstanding number of deaths due to criminal causes and even due to unknown causes. In 2021, 2,005 deaths were recorded in Brazilian prisons, and 423 deaths under house arrest. Of all deaths in prisons, 70% correspond to natural causes, 13% to criminal causes, 8% to suicides, 7% to unknown causes, and 2% to accidental deaths<sup>8</sup>.

Punishment against those who commit an act considered by the criminal law as an offense significantly reflects on the contemporary society. To have the illusion that making a certain vulnerable class suffers so that society can live is a myth that fosters the whole justifying and legitimizing idea of public punishment and which is strictly defended by the criminal system.<sup>9</sup> Thus, there is an inversion of roles in which those who were once defined as active subjects of any criminal act are now victims of the prison system. This comes at a time when an attempt to facilitate reintegration

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<sup>5</sup> National Survey of Penitentiary Information Infopen - June 2016. Available in: [http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio\\_2016\\_junho.pdf](http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf)

<sup>6</sup> System for monitoring the execution of sentences, provisional arrest and security measure, <https://www.gov.br/depen/pt-br/servicos/sisdepen>

<sup>7</sup> National Survey of Penitentiary Information Infopen - December 2014. Available in: <https://www.conjur.com.br/dl/infopen-dez14.pdf>

<sup>8</sup> System for monitoring the execution of sentences, provisional arrest and security measure. Available in: <https://www.gov.br/depen/pt-br/servicos/sisdepen>

<sup>9</sup> ALAGIA, A. *Hacer sufrir*, Ediar, Buenos Aires, 2013, p. 304.

encounters substantial barriers in the objectification and suffering imposed by the state measures and sanctions on persons deprived of liberty<sup>10</sup>.

Prison overcrowding provides information regarding the profile of the population deprived of liberty. The number of people deprived of liberty in June 2016 showed that 55% of the prison population aged 29 and represented 18% of the total Brazilian population in 2016. Schooling is extremely low: in 2016, approximately eight out of ten people in prison studied up to elementary school, while the national average of those who did not attend elementary school or had incomplete education is 61%<sup>11</sup>.

The distribution of the population deprived of liberty by color or ethnicity shows the proportion of black people arrested: two out of three prisoners are black. While the percentage of black people in the prison system is 67.8%, in the general Brazilian population, the proportion is significantly lower (56.1%). A relevant part of the prison population (42.4%) is formed by young people (up to 29 years old), and the same population represents 18.9% of the total population in 2022<sup>12</sup>.

In 2016, the female prison population reached the mark of 42,000 women deprived of liberty, which represented an increase of 656% compared to the total recorded in the early 2000s, when less than 6,000 women were in the prison system. In the same period, the male prison population grew by 293%. There are currently 28,699 women in prison. Between 2000 and 2022, the number of women detained in penal units grew by almost 380%, twice as much as the general prison population (Brasil, 2022)<sup>13</sup>.

Evidence that reinforces the female overcrowding in prisons is the nature of the prison settings. Most prison grounds were designed for males: 74% of prisons are for men, 7% for female. The remaining 16% are characterized as mixed, which means that some specific wards or cells are being used for female inmates within an originally male setting<sup>14</sup>. In general, prisons are unable to observe the specificities of facilities and services for women, given the recognized influence of patriarchal culture and the dimensions expressed in incarceration<sup>15</sup>.

Regarding the imprisonment of indigenous peoples, the Infopen census of June 2014 showed a percentage of 0.2% in the country's prison. In December of the same year, it reached 0.13%<sup>16</sup>.

Indigenous peoples deprived of liberty are overrepresented in many Brazilian penitentiaries: Alagoas (0.37% in prisons; 0.23% in the general population); Ceará (0.68% in prisons; 0.21% in the general population); Mato Grosso do Sul (1.28% in prisons; 0.82% in the general population); Pernambuco (0.94% in prisons; 0.62% in the general population); Piauí (0.40% in prisons; 0.14% in the general population); Rondônia (0.40% in prisons; 0.29% in the general population); and Roraima (5.65% in prisons; 4.80% in the general population).

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<sup>10</sup> NEUMAN, E. *El estado penal y la prisión-muerte*, Editorial Universidad, Buenos Aires, 2001, p. 75.

<sup>11</sup> National Survey of Penitentiary Information Infopen - June 2016. Available in: [http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio\\_2016\\_junho.pdf](http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf)

<sup>12</sup> System for monitoring the execution of sentences, provisional arrest and security measure. Available in: <https://www.gov.br/depen/pt-br/servicos/sisdepen>

<sup>13</sup> System for monitoring the execution of sentences, provisional arrest and security measure. Available in: <https://www.gov.br/depen/pt-br/servicos/sisdepen>

<sup>14</sup> National Survey of Penitentiary Information Infopen - June 2016. Available in: [http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio\\_2016\\_junho.pdf](http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf)

<sup>15</sup> PIMENTEL, E. "As marcas do patriarcado nas prisões femininas brasileiras". *Revista Eletrônica da Faculdade de Direito da Universidade Federal de Pelotas (UFPEL)*, Dossiê Punição e Controle Social: degradações carcerárias em América Latina e Europa, v. 02, n. 2, Jul.-Dez., 2016.

<sup>16</sup> National Survey of Penitentiary Information Infopen - June 2016. Available in: [http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio\\_2016\\_junho.pdf](http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf).

Institutional violence regarding vulnerabilities in the prison system can be revealed by the availability of adequate places for social groups<sup>17</sup>. The distribution of units for lesbian, gay, bisexual and transgender (LGBT) persons in detention facilities was as follows: 10 (1%) units with a specific ward; 73 (5%) units had a specific cell; 1.217 (86%) did not have a specific ward or cell; and 120 (8%) units did not provide information. These figures were not so different from those provided for the elderly: 22 (2%) detention facilities claimed to have a specific unit; 70 (5%) had a specific cell; in 1,208 (85%) detention facilities had no specific cell; and 120 (8%) did not provide information. For foreigners, the following was observed: 1 (0%) detention facility reported having a specific cell; 11 (1%) detention facilities had a specific cell; 1.289 (91%) reported not having a specific cell; and 119 (8%) did not provide information.

For persons with disabilities, there were only 87 (6%) correctional facilities with accessible cells that could accommodate them in accordance with the legislation in force. In 49 (4%) facilities there were some adapted cells but with total disregard for the technical and legal standards. More than 82% (1,164) of detention facilities did not have any adapted cells for disabled persons. A total of 120 (8%) detention facilities did not provide data to the census. For indigenous peoples, 1 (0%) detention facility claimed to have a specific cell; 7 (1%) reported having a specific cell; 1,293 (91%) detention facilities had no specific ward or cell; and 119 (9%) did not provide information.

Violations affect human dignity and also the fairly distribution of health, legal, social, educational, and labor policies. The contribution on such inhumanities requires an understanding of the conditions that made our present reality possible. The conditions of Brazilian prisons resulted, in 2015, in the declaration of unconstitutionality of the prison system by the Federal Supreme Court, within the scope of *Arguição de Descumprimento de Preceito Fundamental* nº 347, due to acts violating fundamental rights perpetrated by the State and public agents.

### 3. The history of the present and the genealogy of punishment

The history of the present seeks to question a past that may seem merely remote, but constitutes the exact moment the conditions and contingencies first appeared<sup>18</sup>.

The inhumanity of prisons in Brazil can be observed in the selection and exclusion of people who are part of some vulnerable social groups. It is materialized in constant violations of the fundamental rights of the population deprived of liberty. The state's omission to dignify the prison structure presents inhumanity as something normal. Violations of human dignity are common, even with the signatures of international treaties, agreements and conventions on human rights, in addition to constitutional and infra-constitutional legislative acts aiming at protecting and guaranteeing the rights and dignity of prisoners<sup>19</sup>.

Maximo Sozzo verified the context around the psychiatric field, notably the security measure, and identified people declared irresponsible criminally and at the same time dangerous ("criminally insane"), imprisoned indefinitely in institutional spaces (psychiatric hospitals and penitentiary units), having investigated the birth of the intersection between madness and crime, between the psychiatric device and the penal device during the 19th century, in Buenos Aires. For the author, to evaluate

<sup>17</sup> National Survey of Penitentiary Information Infopen - June 2016. Available in: [http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio\\_2016\\_junho.pdf](http://www.justica.gov.br/news/ha-726-712-pessoas-presas-no-brasil/relatorio_2016_junho.pdf)

<sup>18</sup> SOZZO, M. *Locura y crimen: nacimiento de la intersección entre los dispositivos penal y psiquiátrico*, Didot, Buenos Aires, 2015, p. 12.

<sup>19</sup> ROTTA ALMEIDA, B., CAMARGO MASSAÚ, G. "A normalidade do desumano: a banalidade do mal no sistema penitenciário brasileiro". *Derecho y Cambio Social*, a. 12, n. 41, 2015.

contemporary practices means to consider their historical background; it also means to root the understanding of their current structure in a series of previous changes. The past does not repeat itself in the present, but the present plays and innovates while using the legacy of the past. The history of the present, in the work of Maximo Sozzo, is based on the investigation of two devices (criminal and psychiatric) with specific aspects derived from the problematization of the present, with its dynamics and contemporary effects. The identification of this problematization makes it possible to explore not only its origin in the past, but also its resurgence<sup>20</sup>.

In the punishment context, the multidisciplinary scenarios contemplate a multitude of faces the problem of punishment and penalty brings out. However, some approaches (perhaps less known and more relevant) are those that intend to interpret them as forms or elements used to understand the social group of each moment. In fact, to study the forms, procedures, and languages, the grammar of punishment and the penal system may be a way to know and better understand the society that supports it. For Iñaki Rivera Beiras, it is initially described as a retrospective reflection, and then descriptive and analytical, which modestly aimed at realizing where we are after crossing a long distance in history. For the author, it is necessary to claim, more than ever, the need to make the history of the present in order to deeply contemplate the current relationship between discourse traditions, and procedures<sup>21</sup>, as well as the history of authors, schools, and thoughts that may point out possible and interesting panorama of a mediate present-future in the reality of punishment<sup>22</sup>. According to David Garland, "today, more than ever, it is easy to live in the immediacy of the present and lose all sense of the historical processes out of which our current arrangements emerged"<sup>23</sup>. The author listed the relevance of historical processes for the challenges for a better understanding of current crime control and criminal justice, using historical research to discover how certain phenomena have acquired their present characteristics. Another purpose was to indicate the forces that generated the current practices and to identify the historical and social conditionings on which they still depend.

The perspective of the history of the present is related to the studies of Michel Foucault. The French author developed criteria for traditional questioning and critique. Based on the work of Georg Rusche and Otto Kirchheimer<sup>24</sup>, Michel Foucault presented a history of the changes in criminal codes and punishments from the perspective of the political technologies that act upon bodies. At the beginning of the 19th century, the great spectacle of physical punishment had disappeared. Under the expanded gentleness of punishments, the author observed a shift in its application. Through this displacement, the criminal justice presented a whole field of recent objects, a new regime of truth, knowledge, techniques, discourses and a number of unprecedented roles. Michel Foucault's goal in *Discipline and Punishment* meant to be a history of the modern soul and a new power to judge; a genealogy of the current scientific-legal complex from which the punitive power derives its bases<sup>25</sup>.

Today, prison can be explicitly conceived as a tool of exclusion and control. The walls are seen as the most important and valuable component of the penal institution<sup>26</sup>. Prison is used as a kind of reservoir for the segregated/isolated. Most incarcerated individuals come from vulnerable social classes, according to the

<sup>20</sup> SOZZO, M. *Locura y crimen: nacimiento de la intersección entre los dispositivos penal y psiquiátrico*, Didot, Buenos Aires, 2015, p. 11.

<sup>21</sup> RIVERA BEIRAS, I. *Recorridos y posibles formas de la penalidad*, Rubí, Anthropos Editorial, OSPDH, Universitat de Barcelona, Barcelona, 2005, pp. 9-10.

<sup>22</sup> RIVERA BEIRAS, I. *Mitologías y discursos sobre el castigo. Historias del presente y posibles escenarios*, Rubí, Anthropos Editorial, OSPDH, Universitat de Barcelona, Barcelona, 2004.

<sup>23</sup> GARLAND, D. *A cultura do controle: crime e ordem social na sociedade contemporânea*, Revan, Rio de Janeiro, 2008, pp. 42 ss

<sup>24</sup> RUSCHE, G.; KIRCHHEIMER, O. *Punição e estrutura social*, Revan, Rio de Janeiro, 2004.

<sup>25</sup> FOUCAULT, M. *Vigiar e punir: nascimento da prisão*, Vozes, Petrópolis/RJ, 2009, pp. 19.

<sup>26</sup> GARLAND, D. *A cultura do controle: crime e ordem social na sociedade contemporânea*, Revan, Rio de Janeiro, 2008, p. 380.

penitentiary data mentioned above. Crimes and offenders are determined and pointed out by society through the public safety management, which invades neighborhoods looking for young and unfortunate *game losers*<sup>27</sup>.

Genealogy is to reveal what is behind things, and it may be done through critique. Michel Foucault and Friedrich Nietzsche showed what is (or was) veiled through a radical critique. According to Martin Saar<sup>28</sup>, genealogy should be understood in terms of three aspects: (a) as history or historical method; (b) as a critique or evaluation; (c) and as a type of writing or a textual practice. Genealogy as history or historical method investigates methods; it demonstrates its relation with reflexivity. Some histories become critical when they expose the historical conditions of our own being, for example in Friedrich Nietzsche's radical criticism of morality in *Genealogy of Morality*<sup>29</sup>. It shows a specific way of writing about the history of certain objects, processes, mentalities, considering their discontinuity, functional transformations and contingencies. It is a distinct and radicalized historicism of its own. Genealogy as critique or evaluation deals with values. The conditions of contingency and denaturalization provide insight of a critical and evaluative dimension. Friedrich Nietzsche introduced the term genealogy into the philosophical discourse. The geology of morals is a historical heritage version of a radical criticism of the genealogical morality. Genealogical criticism, therefore, is always self-critical. Genealogy as a type of writing or a textual practice refers to questions of style or gender. All attempts made to explain how genealogy functions as a critical method should consider this formal dimension. Genealogy is an irreducible criticism of gender. However, it also means that genealogical criticism can only be exercised in a certain way. The narrative or rhetorical tone of genealogies is generally tragic or (stylistically) catastrophic, and in some cases, even nostalgic. The real Nietzsche's or Foucault's genealogy is a gain and loss calculation. Genealogies are the histories of the present for the inhabitants of our present, for "us".

The study of genealogy, which traces the curve of evolution, should be set aside; it should gather different scenes related to different roles that the events played as well as gaps and discontinuities<sup>30</sup>. Genealogy is not opposed to history. In contrast, it confronts the meta-historical unfolding of ideal meanings and indefinite teleologies. It opposes the search for the origin. For Foucault<sup>31</sup>, the way to make genealogy involves meticulousness and the possibilities of beginnings and a scrupulous attention to its derisive evil, using history as a tool. To do so, it is necessary to know how to recognize the history events, its disturbances, its surprises, the faltering victories, the poorly digested defeats, which account for atavism and

<sup>27</sup> BAUMAN, Z. *Globalização: as consequências humanas*, Jorge Zahar, Rio de Janeiro, 1999, p. 134.

<sup>28</sup> SAAR, M. "Genealogy and subjectivity". *European Journal of Philosophy*, v. 10, n. 2, 2002, pp. 231.

<sup>29</sup> In his book, Friedrich Nietzsche examines the origins and meanings of our different moral concepts. For him, it was more about the value of morals. In Friedrich Nietzsche, there was a distrust of these instincts. His goal was to go through morals with new questions, new vision, a history of morals. The author sought judgments of values which have established and defined hierarchies. He also referred to the noble in contrast with the poor, where the good and the bad originated, with the instinct of the herd as something that led to the adoption of these concepts (NIETZSCHE, F. *Genealogia da moral*. Companhia das Letras, São Paulo, 2008, p. 7)

<sup>30</sup> Most historians adopt the doctrine of historical continuity and deny the existence of a great divider, due to the vague concept of contemporary. Geoffrey Barraclough, in contrast, claims that continuity is not the most relevant feature of history. For him, the universe is made of discontinuous leaps, and decisive points and contemporary history should be considered as a distinct period of time, with characteristics of its own which mark it off from the preceding period (BARRACLOUGH, G. *Introdução à história contemporânea*, Zahar, Rio de Janeiro, 1983, pp. 13-14). However, this will not succumb to the persistence – and even continuities – through which certain discourses, rationalities, practices, mentalities, procedures and methods, particularly those involving punishment and penalty operate

<sup>31</sup> FOUCAULT, M. *Microfísica do poder*, Graal, Rio de Janeiro, 2008, p. 19.

hereditary. History accompanied by its intensities, collapses, secret rages, great and febrile agitations, are the very body of *devir* (a concept that signifies the changes through which things pass).

For Michel Foucault<sup>32</sup>, the *devir* of humanity is a series of interpretations, and genealogy should be its history: the history of morals, ideals, metaphysical concepts, and the history of the concept of freedom or the ascetic life, emerging from various interpretations that will make them appear as events in the theater of procedures. History must be the differential knowledge between energies and demises, heights and depths, poisons and antidotes. For the author, the historical meaning should only represent a sharp look that distinguishes, divides, and scatters. It looks from a certain angle, with the deliberate purpose of enjoying, saying 'yes' or 'no', following all traces of the poison to find the best antidote. This is a look that knows where it looks, as well as what it looks at. The historical meaning gives knowledge the possibility to make its own genealogy.

The principle that guides the four-volume study of Michel Foucault, *The History of Sexuality*, is the history of thought as a critical activity. A warning to criticism does not mark insurmountable limits or describe closed systems, but brings to light the transforming singularities, which are established through the work of thought on its own.

Here, it is not a question of studying the theory of criminal law itself, or the evolution of the institution of different punitive systems, but to analyze the formation of a certain punitive rationality, whose appearance may be much more revealing. Instead of trying to seek an explanation in the general conception of law, or in the evolution of industrial production, Michel Foucault observed the functioning of his own power<sup>33</sup>.

According to Maximo Sozzo<sup>34</sup>, the history of the present involves the assumption that there is no teleological background crossing time and there is no inevitability in the present. It is a gesture that destabilizes and questions the actual situation, highlights the current limits of what is necessary and ultimately states that things could have been – or still can be – otherwise. In this sense, the history of the present is introduced from a critical perspective, a historical analysis that allows a critique of the present. It is a critique of what we say, think and do within the framework of a historical ontology of ourselves to try to interfere between our reality and things we know from our own past history. The success of such interference lies in the creation of real effects on our present history. For Sozzo, the history of the present has to be compatible with a form of criticism.

Criticism raises judgment and also means recomposition, invention. Reconstruction and recomposition do not convey a return to an origin that must be re-produced, but rather, perhaps, a more appropriate one, and the result may be reinvention. Therefore, criticism is and should be understood as an interaction between the capacity to judge and the talent to create a series of (meanings) components. Criticism should also be seen as a search for alternative forms of life, away from the civil, administrative and patriarchal dominance, and as a struggle over language for the production of broader knowledge. The place of criticism is where social resistance machines merge into text machines<sup>35</sup>.

The history of the world is the court of the world, according to Fernando Catroga<sup>36</sup>. This author discusses that the emergence of the new is like a flare derived from the tension between inheritance and expectation. It is an individual (and therefore collective) impulse that destabilizes the timeless present and denies the

<sup>32</sup> FOUCAULT, M. *Microfísica do poder*, Graal, Rio de Janeiro, 2008, p. 26.

<sup>33</sup> RABINOW, P. *The Foucault reader*, Pantheon Books, New York, 1984, pp. 336-337.

<sup>34</sup> SOZZO, M. *Locura y crimen: nacimiento de la intersección entre los dispositivos penal y psiquiátrico*, Didot, Buenos Aires, 2015, pp. 17-18.

<sup>35</sup> RAUNIG, M. *What is critique? Suspension and recomposition in textual and social machines*, 2008.

<sup>36</sup> CATROGA, F. *Os passos do homem como restolho do tempo: memória e fim do fim da história*, Almedina, Coimbra, 2009, p. 262.

prophecies. And it is this (and in this) scale that, summoning the memory and practice of the history of the world as the court of the world, judges its relevance, not only in the light of the winners, but also of the future that was given to the past, so that the defeated can also be heard. Therefore, history does not die as well as the need to question it. Its concrete and socially conditioned representations are the ones that begin to wither.

The approach to the prison system, in the light of social history, should consider the structure of the prison institution within the state punitive power, revealing the apparatus of social exclusion and the actual purposes of the public policies in Brazil<sup>37</sup>. These are trajectories that indicate a certain perpetuation of what goes through the entire history of the country's penitentiary system<sup>38</sup>. We have observed that the continuity of methods and practices that, in view of the omission of the State in relation to its citizens, have not solved but rather legitimized suffering through punishment. The contribution requires an understanding of the conditions that made the reality of our present possible.

#### **4. Veiled violence: the Brazilian trajectory between sovereignty and past heritage**

The sovereignty of the past is the thesis established by Jessé Souza<sup>39</sup> on the social disturbances of peripheral countries, such as Brazil (social inequality and naturalization of mass marginalization of important sectors of the population). The author intends to demonstrate how the naturalization of unevenness and the social construction of the so-called sub-citizenship may be more adequately perceived as the effective consequences of the modernization process (effectiveness of modern values and institutions) based on a successful "outside-in" import, and not a supposed pre-modern and personalist heritage. This interpretation allows us to understand the construction of an obscure context of the causes of inequality, whether for the privileged, or for the victims of this process, which is defined by the author as, "the key point in the discussion of the naturalization of unevenness, abyssal as it is, among us"<sup>40</sup>.

Jessé Souza dismisses heritage as a comprehensive phenomenon of current reality and sociability. Slavery, however, is placed at the center of this element. For Jaime Ginzburg, we have inherited the submission to aggression, the lack of collective sense and the absolute lack of concern by the elite regarding most of the inhabitants. According to the author, the Brazilian society has experienced two fundamental traumas throughout its history. The first is associated with the historical impact of centuries of colonial exploitation, violently forged, from the early years to independence. The second is related to cruelty during slavery, which was part of the country's formation during the imperial era. The effects are still felt today, considering that the suffering caused has never been overcome. Violence has been institutionalized in the execution of sentences in Brazil<sup>41</sup>.

The work of Gilberto Freyre<sup>42</sup> has revealed the Brazilian historical culture and social formation. The attenuation/substitution of slave labor by free labor had a

<sup>37</sup> PEDROSO, C. R. *Os signos da opressão: história e violência nas prisões brasileiras*, Arquivo do Estado, São Paulo, 2002, p. 44.

<sup>38</sup> BOGO CHIES, L. A. "Questão penitenciária: obstáculos epistemológicos e complexidade". *Revista Paranaense de Desenvolvimento*, v. 35, n. 126, jan./jun. 2014, p. 35.

<sup>39</sup> SOUZA, J. "A gramática social da desigualdade brasileira". *Revista Brasileira de Ciências Sociais*, n. 54, fevereiro 2004, p. 89.

<sup>40</sup> SOUZA, J. "A gramática social da desigualdade brasileira". *Revista Brasileira de Ciências Sociais*, n. 54, fevereiro 2004, p. 94.

<sup>41</sup> GINZBURG, J. "Escritas da Tortura". In TELES, Edson Teles & Vladimir Safatle (Coord.). *O que resta da ditadura? - a exceção brasileira*, Boitempo, São Paulo, 2010, p. 133.

<sup>42</sup> FREYRE, G. *Sobrados e mucambos: decadência do patriarcado e desenvolvimento do urbano*, Global, São Paulo, 2006, p. 623.

strong effect on the large property. For the author, the use of machinery, the abolition of slavery and servitude, as well as the utilization of cattle and horses brought great benefits particularly to the farm work. However, there is a certain sublimation in this approach. At the end of slavery, sublimation made us realize that thinking was more associated with images of the industrial and technological progress, improvement of financial institutions, markets, civil and political rights. However, such consideration suppresses the fact that the slave structure of social organizations has been remade and strengthened since the beginning of the 19<sup>th</sup> century, which made the century old experience of black people more dramatic, inhuman and violent<sup>43</sup>.

The historical narrative mentioned above did not approach the violence of the slave system. To some extent, it conceals the racial segregation reproduced by colonial and imperial families and the State. According to Jessé Souza, "this interpretation is linked to the need to create and sustain a Brazilian identity. For a long time, the myth of the *Brazilian way* has obstructed the existence of racism among us"<sup>44</sup>. These descriptions are quite similar to those exercised by the police when they frequently approach black people: "if in the era of slavery, black individuals were wandering in the streets and arrested 'on suspicion of being slaves', today they are detained for other allegations, which make them go back to the same past and origin"<sup>45</sup>.

The order of punishment has gone through the Brazilian history for centuries. It displays the subjections of the bodies, having slavery as the source of domination rules and strategies. Thus, the investigation of political practices of training and domination, which were developed during the Brazilian slave regime, between the 16<sup>th</sup> and 19<sup>th</sup> centuries, made it possible to "map their origin which, regardless of the political regime, underlie our authoritarian sociability"<sup>46</sup>.

In addition, no one should forget the racial whitening ideology which was accepted as the solution to the so-called mixed race and developed a presupposition of white supremacy<sup>47</sup> and theories that studied the degeneration and tendency of blacks and *mestizo* towards crime<sup>48</sup>. The mixing of races was understood as a key issue for understanding the destinies of the Brazilian nation and its citizens<sup>49</sup>.

The division remains veiled, silent, and conditioned to a vocabulary that turns color into a social marker of difference. Such language is often used and ratified through the actions of the repressive system. This allows us to analyze the positive attitude of political justice and the historical formation of practices (maneuvers, training, experiences, experiments, routines, confrontations and resistance) of kidnapping, subjection and formation of social groups which were targeted by the repression of the economic, political and criminal systems, even if the legitimate discourse of punishment and control practices have undergone historical changes. Although these practices encompassed different techniques of domination, the effects, knowledge, techniques and strategies regarding the domestication of slavery that perpetuated while the population was being controlled, regardless of the political regime and the government administration, supporting the permanence and possible

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<sup>43</sup> CHALHOUB, S. *A força da escravidão: ilegalidade e costume no Brasil oitocentista*, Companhia das Letras, São Paulo, 2012, p. 34.

<sup>44</sup> SOUZA, J. *Ralé brasileira: quem é e como vive*, Editora UFMG, Belo Horizonte, 2009, p. 381.

<sup>45</sup> MORITZ SCHWARCZ, L.; MURGEL STARLING, H. *Brasil: uma biografia*, Companhia das Letras, Brasil, 2015, p. 92.

<sup>46</sup> SOLAZZI, J. L. *A ordem do castigo no Brasil*, Imaginário/Editora da Universidade Federal do Amazonas, São Paulo, 2007, p. 23.

<sup>47</sup> SKIDMORE, T. E. *Preto no branco: raça e nacionalidade no pensamento brasileiro (1870-1930)*, Companhia das Letras, São Paulo, 2012, p. 110.

<sup>48</sup> CORRÊA, M. "Raimundo Corrêa Nina Rodrigues e a 'garantia da ordem social'". *Revista USP*, n. 68 2005-2006.

<sup>49</sup> MORITZ SCHWARCZ, L. *O espetáculo das raças: cientistas, instituições e questão racial no Brasil - 1870-1930*, Companhia das Letras, São Paulo, 1993, p. 11.

diagnosis of a punishment, proper to slavery and to the selection of those subjected to criminal-political justice<sup>50</sup>.

### 5. For a critique beyond the rhetoric of punishment and humanity

The debate on the humanization of prison took hold by the end of the 18<sup>th</sup> and early 19<sup>th</sup> centuries in Western Europe, particularly due to the precarious prison conditions. The so-called *reformers* wanted to establish a common punitive standard, which would ensure not only a fair treatment to those arrested, but also the benefits and the functional outcomes. The theorists have justified the structure of the punitive power using the same premises. Here, the intrinsic contradiction between punitive power and its limitation is revealed; to perpetuate the public persecution of offensive actions and punishment as the state obligation meant to maintain an intrinsic inequality and selectivity over which rests any punitive power<sup>51</sup>.

The fight for prisoners' rights started in the 20<sup>th</sup> century with the establishment of international normative instruments for the guarantee and protection of human rights. However, violence against humanity and punishment has always been accepted as pedagogical and strategic practices of social restraint. When the punitive practices started to play a crucial role in modern states, punishment began to be veiled through inhuman dynamics. The constitutionalization of fundamental rights was not able to disrupt the cruel structure of the punitive power system. In Brazil, the systematic use of punishment and atrocity has been an essential part of repression for a long time. The current death rate in prisons and the constant recommendations of the Organization of the American States (OAS) received by the Brazilian state for torture, murder, abuse and other human rights violations represent the punitive practices of the past.

According to Luigi Ferrajoli<sup>52</sup>, every conquest of rights, equality and guarantees by individuals has been determined by the manifestation of something evil. Discrimination or oppression of the weak or different individuals becomes unbearable. At a certain moment, the veil of normality that concealed the oppression of the weak individuals has been removed by their struggles and claims. Today, the great challenge of democracy is to deal with an increasing and unacceptable inequality, exarcebated by a racist disqualification of the excluded, who are considered insignificant, and therefore, destined to be rejected.

The legal discourse on the devaluation of the fundamental rights of prisoners and the making of a second-class citizen<sup>53</sup>, discloses the outcome of a historical process so-called *no-right zones*<sup>54</sup>. The prison sentence falls then within the scope of *no-rights*, a suffering intentionally caused by the end of degradation<sup>55</sup>. Prison information demonstrates the need to persevere on resistance and fight against institutional violence.

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<sup>50</sup> SOLAZZI, J. L. *A ordem do castigo no Brasil*, Imaginário/Editora da Universidade Federal do Amazonas, São Paulo, 2007, p. 24.

<sup>51</sup> ANITUA, G. I. *Castigo, cárceles y controles*, Didot, Buenos Aires, 2013, pp. 53-54.

<sup>52</sup> FERRAJOLI, L. "Filosofía del mal y garantismo". In Alejandro Forero Cuéllar; Iñaki Rivera Beiras & Hector C. Silveira Gorski. *Filosofía del mal y memoria*, Anthropos Editorial; Observatori del Sistema Penal i els Drets Humans; Universitat de Barcelon, Barcelona, 2012, p. 107.

<sup>53</sup> RIVERA BEIRAS, I. *La devaluación de los derechos fundamentales de los reclusos. La construcción jurídica de un ciudadano de segunda categoría*, Bosch, Barcelona, 1997.

<sup>54</sup> COSTA, P. *Il progetto giuridico. Ricerche sulla giurisprudenza del liberalismo classico*, Vol I., Guffrè, Milano, 1974, p. 357.

<sup>55</sup> PAVARINI, M. "Estrategias de lucha. Los derechos de los detenidos y el abolicionismo". *Delito y Sociedad, Revista de Ciencias Sociales*. Año 17, n. 26, 2008.

In the context of punishment, which is defined as a social institution that involves a complex structure and a bulk of both historical and social meanings<sup>56</sup>, violence that conceals exclusion and prison realities is nothing more than a naturalization of the violence itself. In other words, it is a process of prison victimization and intensified inequality and discrimination. Moreover, punishment and torture are established as structural elements of the criminal system<sup>57</sup>. According to Maria Rita Kehl<sup>58</sup>, when torture is forgotten, it produces the naturalization of violence as a serious social symptom in Brazil, which is manifested through practices and discourses that are automated, independent of the singular psychic structures of each of its agents.

The critical analysis of prisons should not forget the questioning of the past to optimize the discussion on the configuration of realities and the impact of political and social elements, which are part of the historical process of the punitive system, including selectivity, vulnerability, sociability, stigmatization and segregation<sup>59</sup>. Therefore, the heavy hand of punishment must turn against it. This is because, in societies characterized by strong inequality, there is the constant risk (use) of the state coercive apparatus in order to maintain an unjustified state of things, which systematically benefits some and harms others. The answers should be directed to a counter exclusion to reduce suffering and social exclusion<sup>60</sup>.

## 6. Considerations

The truly critical analysis of prisons should not forget to question the past, which is understood as the exact moment the initial conditions and contingencies first appeared. It is only through the history of the present that we will be able to see the permanence/persistence visualized by the political-historical-social structures of inhumanities in the criminal-penitentiary system.

The execution of sentences in Brazil is established by structures that are the bases of the prison practice. Thus, from the Brazilian historical discontinuities arise the continuities of a society based on slavery embodied in the inhumanities of authoritarianism, violence, repression, bureaucracy, clientelism, violation of fundamental rights, selectivity and, above all, in social inequality.

The present study has demonstrated that people deprived of liberty within the prison system are vulnerable. The inhumanity of prisons consists of systematic and daily violations, in which vulnerability becomes more intensely when they reach the singularities of each social group. The violence experienced by the prison population offends human dignity and the distribution of policies regarding rights and assistance. Violence can be observed in the selectivity of the criminal and prison systems, as well as in the poor and degrading conditions of prisons, which do not meet the minimum requirements.

The penitentiary censuses cited in the present article have shown increased rates of incarceration, which cause high deficit of vacancies and overcrowding. According to the information collected, the punitive charge reaches a significant number of people arrested without definitive conviction. In addition, the crimes imputed may be abbreviated to crimes related to drug trafficking and offenses against

<sup>56</sup> GARLAND, D. *Castigo y sociedad moderna: un estudio de teoría social*, Siglo XXI, Ciudad de México, 2006, pp. 326.

<sup>57</sup> ANITUA, G. I.; ZYSMAN QUIRÓS, D. "Presentación". In Gabriel Ignacio Anitua & Diego Zysman Quirós. *La tortura: una práctica estructural del sistema penal, el delito más grave*, Didot, Buenos Aires, 2013, p. 9.

<sup>58</sup> KEHL, M. R. "Tortura e sintoma social". In TELES, Edson Teles & Vladimir Safatle (Coord.). *O que resta da ditadura? – a exceção brasileira*, Boitempo, São Paulo, 2010, p. 124.

<sup>59</sup> BOGO CHIES, L. A. "A questão penitenciária". *Tempo social, Revista de sociologia da USP*, v. 25, n. 1, 2013, p. 30; BOGO CHIES, L. A. "Questão penitenciária: obstáculos epistemológicos e complexidade". *Revista Paranaense de Desenvolvimento*, Curitiba, v. 35, n. 126, jan./jun. 2014, p. 38.

<sup>60</sup> GARGARELLA, R. *De la injusticia penal a la justicia social*, Siglo del Hombre, Bogotá, 2008.

property. The deaths, massacres and high rates of diseases demonstrate the mortifying character of inhumanity in prisons. From the analysis of the sample, selectivity – intrinsically racial – was conceived by the profile of the prison population (young black people with extremely low educational level). In addition, women's incarceration rates have grown dramatically, which reinforces the humiliating treatment suffered by women prisoners. The female prison overcrowding still comprises the patriarchal culture of the prisons settings (created especially for men). The unavailability of adequate space for different social groups (women, indigenous people, LGBT, the elderly, foreigners, and people with disabilities) is a degrading aspect in our prisons.

In sum, the penitentiary information cited in the article showed the grammar of inhumanity in prisons, which strongly affects vulnerable social groups. The contradictory genesis of prisons in Brazil and the continuity of methods and practices, often reinforced by authoritarian and discriminatory convergences, have legitimized suffering and attack the particularities of persons deprived of liberty.

Obedience to human dignity is a constant element in prison constitutionality. However, persistent violations hinder the advancement of democratic ideals and respect for rights in the prison system. The culture of resistance to inhumanity in prisons should seek strategies of struggle to confront the prison reality that may reevaluate and optimize the fundamental rights of people arrested and help them overcome imprisonment.

The human-dignifying discourse distances itself from the illusion as it approaches the true value of realities, and the (re)evaluation of the past based on the critical perspective of the history of the present. Moreover, the intervention has to be directed to the places that violate the fundamental rights, and reproduce the naturalization of the fundamental rights, challenging the foundation that sustains corporations and authoritarian, segregationist and exclusionary sociabilities. It is a matter of thinking about institutional ruptures that may tear down the solid foundations of the state sustained by social exclusion and inhumanities.

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