



**HOW TO TALK ABOUT LEGAL HISTORY WITHOUT BEING A
HISTORIAN? HISTORIOGRAPHICAL CONSIDERATIONS ON PENALTY
AND PUNISHMENT¹**

**COMO FALAR SOBRE HISTÓRIA JURÍDICA SEM SER HISTORIADOR/A?
CONSIDERAÇÕES HISTORIOGRÁFICAS SOBRE PENA E CASTIGO**

**¿CÓMO HABLAR DE HISTORIA DEL DERECHO SIN SER
HISTORIADOR/A? CONSIDERACIONES HISTORIOGRÁFICAS SOBRE LA
PENA Y EL CASTIGO**

<i>Recebido em</i>	30/11/2023
<i>Aprovado em:</i>	01/01/2024

Otávio Augusto Ganzert Weinhardt²

Raul Ferreira Belúcio Nogueira³

ABSTRACT

It is not rare at all to find criminal law handbooks, courses, and even academic texts discrediting criminal legal history achievements on shared issues. This article is an effort to facilitate this dialogue by offering some criminal legal history references to Brazilian

¹ Este artigo é a versão ampliada e revisada do primeiro capítulo do livro Weinhardt, Otávio Augusto Ganzert e Nogueira, Raul Ferreira Belúcio. Diálogos transdisciplinares sobre a pena. Curitiba: Intersaberes, 2021, pgs. 23-40.

² Doutorando na Universidade de São Paulo, com estágio de pesquisa no Maria Sybilla Merian Center for Conviviality/Inequality in Latin America. otavioweinhardt@usp.br

³ Doutorando na Università degli Studi della Tuscia, com estágio de pesquisa na Humboldt Universität de Berlim. raulbelucio@gmail.com



criminalists willing to address the several pasts criminal law has for itself. Based solely on literature and consolidated historiography, the results differ drastically from the “historical introductions” manuals and other similar literature have presented in the past century. What we offer is an invitation to legal history to the detriment of legal modern mythologies.

Key-words: Criminal Legal History; History of Crime and punishment; Critical review to mainstream legal culture.

RESUMO

Não é raro encontrar manuais de direito penal, cursos e até mesmo textos acadêmicos descreditando as conquistas da história jurídica penal em questões comuns a ambas as áreas. Este artigo é um esforço para facilitar esse diálogo, oferecendo referências de história jurídica criminal para criminalistas brasileiros/as dispostos/as a abordar os diversos passados do direito penal. Com base apenas na literatura e na historiografia consolidadas, os resultados diferem drasticamente das “introduções históricas” que manuais e outras literaturas similares apresentaram desde o século passado. O que oferecemos é um convite à história jurídica em detrimento das mitologias jurídicas (penais) da modernidade.

Palavras-chave: História do Penal; História do Crime e da Pena; Revisão crítica da cultura jurídica dominante.

RESUMEN

No es raro encontrar manuales de derecho penal, cursos e incluso textos académicos que desacreditan los logros de la historia jurídica penal en cuestiones compartidas. Este artículo es un esfuerzo para facilitar este diálogo, ofreciendo algunas referencias de la historia jurídica penal a los penalistas brasileños dispuestos a abordar los varios pasados que el derecho penal tiene para sí. Con base en la literatura y en la historiografía



consolidada, los resultados difieren drásticamente de las "introducciones históricas" que los manuales y otra literatura similar han presentado desde el siglo pasado. Lo que ofrecemos es una invitación a la historia jurídica en detrimento de las mitologías jurídicas modernas.

Palabras clave: Historia jurídico-penal; Historia del delito y de la pena; Revisión crítica a la cultura jurídica dominante.

INTRODUCTION

The *long term* consists in an extremely difficult task to be addressed in historiography. Few authors have dedicated themselves to such an endeavour and, generally, when they have done so, they dedicate large works and many years, decades, of research to cover history in a totality. That can be done from its geographical aspects, for example (FONSECA, 2009), or by addressing one specific object in the *longue durée*. And even in these cases, it is indispensable to be quite clear about how to interpret and discuss the alterity of time (and times), along with the meaning of whatever truth can mean for historians (COSTA, 2020).

This ethical and methodological prophylactic measures should be made not only in history and historiography, but also in law. There are important ethical implications when legal authors condense a thousand years of history into a paragraph (usually referencing another law textbook that does exactly the same thing). By doing so, would s/he be enquiring into the past or would s/he be simply reaffirming a current legal assumption with the (un)known distant past? One simple, but rather eloquent example we like to give is: who are jurists supporting when they reaffirm a fallacy that assumes the "since Roman times", "since the Greeks" families have been equally formed by man and woman, headed by the former, etc, when that could not be more far away from what the sources tell us? A simple glimpse on some familiar arrangements of the most pop characters in the classic period would attest otherwise. Or should we ignore even Hercules had his heart broken by the death of his *male* young lover?



A similar phenomenon happens on criminal law. After all, believing prison has always existed, and has always been crueller than it is today, serves to legitimise the system we currently share. And all of those “medieval torture instruments”, spread across questionable “museums” around the world, also mislead us to forgetting the amount of torture we inflict in our prisoners today. Moreover, another common feature in handbooks and textbooks suggests some kind of invisible thread between Mesopotamia, Greece, Rome, the European Middle Ages, European Modernity and then, suddenly, us contemporaries. What links the history of these peoples to ours? In what sense would we be heirs to these traditions? And why? Contemporary historians answer these questions when addressing 19th century historiography, of course. But the fact that jurists do not even bother to ask these questions is enough of a diagnosis.

Instrumentalising the past serves the present. And in spite of what may be written in some textbooks one could find in golden star positions in jurisprudence libraries, that is not what history is (or should be) about. It still serves the present time, but rather to offer perspectives and solutions. It serves to understanding the present, rather than favouring it and confirming its myths and beliefs (GROSSI, 2007).

This text aims to present some general lines that could be taken into consideration when addressing the criminal law past(s). On the first point, we present Mario Sbriccoli’s view on the change of paradigms from medievality to modern and contemporary legal phenomenology. The second point addresses the centrality of imprisonment: a common idea on textbooks, but absent in any serious enquiry of the past. The third point asserts peculiarities in the Brazilian case. On the results, we indicate that attention to the past as an everlasting foreign place could offer interesting instruments to criminal sciences in thinking the criminal system as it exists today.

As a conclusion, we suggest that criminalists, criminal jurists, and jurists in general could have a deeper dialogue with legal history. We do not defend they should become historians and dig into primary sources, but rather read contemporary colleagues from other areas – as we did it on this article. And on purpose.



1. NEGOTIATED JUSTICE AND HEGEMONIC APPARATUS JUSTICE

If our goal is to draw an interpretative key to the history of the penalty and, consequently, to a criminal legal history, we must do so carefully, choosing well the limits of our delicate operation, avoiding risks and accidents along the way. Being criminal law as we know it today, a recent and modern phenomena, a twin to the nation state, enquiring any further means entering swampy terrains.

And for this we will turn to an author who, having devoted his life to researching criminal law (or something close to it) from the medieval to contemporary times, suggests possibilities for reading it in the long duration. Mario Sbriccoli manages to trace the long past of the European common law tradition and to see some of its influences in the post-National State period. His observations, especially in the long term, can, to some extent, be extended to our past, since our law, especially in the theoretical-formal field, was greatly influenced by Portuguese-European law, by the *ius communi*. After all, the colonial enterprise imposed its own legal reasoning on the other side of the Atlantic, whose peculiarities also confirmed the disparities towards other groups inhabiting the same space (HESPANHA, 2006).

On criminal law specifically, an interesting interpretative key to digging deeper than the nation state period itself is to address its relations with other more private form of legality. For Mario Sbriccoli,



The history of the 'penal' can be thought of as the history of a long exit from vengeance. An interpretation key that is only apparently simplifying, if used as a prudent indication of method, the perspective of the exit from vengeance (vengeance of individuals, of societies, of states) is the one that best reveals the tortuous process of civilisation of penal systems, giving meaning to their historical reconstruction and enhancing, in those systems, the function of legal defence of persons, goods, and societies.⁴ (SBRICCOLI, 2009).

Sbriccoli then turns to the possibility of recognising how this substitution took place over time and suggests two explanatory categories that, for us, are quite useful for understanding this long process of transformation: negotiated justice, and hegemonic apparatus justice. Here, we will deal with these categories with a certain simplification and didacticism, only to the extent that they serve our purposes.

The idea of negotiated justice is drawn from the medieval communal experience between the 11th and 13th centuries, in which revenge is a right, an ordinary means of justice that is imposed on others and enjoys social legitimacy. The imposition of justice, in this case, appears as an accepted result of a community rite, such as duelling or ordeals. Negotiated justice rests on consensus, rather than certainty, on agreed links between what would be reprehensible and what would not: “Belonging, protection, consensus and - I would add - orality refer to the community character of negotiated justice⁵” (SBRICCOLI, 2009, p. 6-7). Medieval literature provides plenty of examples of the usage of vendetta, vengeance, or killing as a rightful and regulated tools on dealing with conflicts.

The Njáls saga, part of the Icelandic Sagas, for instance, portrays several situations in which the killing of someone for what we now would name as “vengeance”

⁴ Translated from Italian. In the original: *La storia del 'penale' può essere pensata come la storia di una lunga fuoruscita dalla vendetta. Chiave di lettura solo all'apparenza semplificatrice, se usata come prudente indicazione di metodo, la prospettiva della fuoruscita dalla vendetta (vendetta degli individui, delle società, degli Stati) è quella che meglio svela il tortuoso processo di incivilimento dei sistemi penali, dando senso alla loro ricostruzione storica e valorizzando, di quei sistemi, la funzione di difesa giuridica delle persone, dei beni, delle società.*

⁵ Translated from Italian. In the original: *Appartenenza, protezione, consenso e — aggiungo — oralità rimandano al carattere comunitario della giustizia negoziata*



was a well regulated affair. When Hallgerd gets another man to kill her husband, for her consent was not asked when signing the marriage, her father, Hauskuld, pays for the killing, restoring peace and honour to both the families. The most interesting part, though, is his brother, Hrut, juridical counselling: "Thou hast undertaken this suit, which belongs to thy daughter, rather for the greed of gain and love of strife than in kindness and manliness." (ANONYMOUS, [1861], undated). Such piece of advice states the rightful aspects of revenge and its possible (rather, desirable) substitution for a fair price (BARBERO, 2006).

Similarly, if the killing was not vindicated nor reparations were made, the right to vindicate would protract indefinitely. Dante himself, in the 29th of his *inferno*, talks to Virgilio about how his uncle is rightfully angry about not having his own death vindicated. On the other hand, Shakespeare's *Titus Andronicus*, around two centuries later, reveals a similar spiral of violence and revenge when Aaron revenges his family's captivities by raping and mutilating Lavinia, Titus Andronicus' daughter. In retaliation, the Andronicci also take revenge on the killing (SHAKESPEARE, 1588/93). In spite of its Roman ambience, it is an early modern tale, reflecting early modern relations.

The transition from this form of justice to one of apparatus justice did not happen overnight, nor did it occur in a way that did not maintain in society various negotiated forms of establishing criminal justice. However, a strong character of publicisation of the law can be perceived at the end of the 13th century and the beginning of the 14th century, and it is decided that the criminal initiative can no longer concern only the victim: "*si impone un principio per cui chi commette un reato offende la sua vittima, ma anche il pubblico, che ha il diritto di soddisfarsi infliggendo una pena*" (SBRICCOLI, 2009, p. 8). It is worth remembering that at that historical moment, penalty and prison were not yet intertwined, being a much broader concept than what we have today.

The hegemonic justice that begins to take shape here has four technical presuppositions: the law, the action, the proof, and the penalty, which can be perceived to some extent, with drastic changes of course, even today. The apparatus of this hegemonic



justice will form very slowly over the following centuries until it culminates in a justice apparatus that is only possible with the establishment and consolidation of the European nation state, which is intended to be more comprehensive and powerful than the monarchs who preceded it could ever have imagined. Most importantly, it is interesting to observe how the State takes for itself the role (and along with it, the importance) of the victim.

It is perfectly comprehensible that in contemporary logics, the state would take part in the conflict as both an adjudicator and as a way to defend and act in favour of the victim. In addition, at least in theory, the state should also confirm that all mechanisms that composed and granted truthfulness are respected. Having an arbitration mechanism would, hence, guarantee the victim's defence and access to justice. All of that, rhetorically (or, at least, theoretically).

The victim's subtraction away from the process has many collateral effects. An appealing case to analyse in Brazilian recent changes in criminal legal action. Since 2018, in crimes against sexual dignity, the victim can no longer choose whether to prosecute the aggressor or not. It is what is called "unconditional public action". In this case, the public ministry (prosecution) is the one taking all decisions in the process.

This is particularly appealing from a historiographical point of view, for the 1940 Penal Code, in its original provisions, states that, in case of crimes "against customs", the correct legal proceedings should be private law. It all changed in 2009, when a legal reform changed it to "conditional public action", meaning the public ministry (prosecution) could only act if the victim represented. Along with the aforementioned alteration in 2018, this particular crime is a synecdoche for the long process of substituting a negotiated and private paradigm for dealing with conflicts for a centred and absolute one: how to impose on the victim the trauma of going through all justice proceedings, trials, testimonies, exams? Or, on the other hand, force her or him to not registering it in order to avoid going through all of that? Recent cases in the Brazilian media denounce the absolute incapacity justice authorities have to deal with such issues



in Brazil. As in other crimes, but in a less sensible way, the same thing happens. The victim suffers twice for the reaffirmation of the state's power over all decisions regarding conflicts. And history has a potential to denounce: it has not always been the case.

2 THE CENTRALITY OF THE PRISON IN HISTORY

The institution of imprisonment as punishment belongs to a particular historical moment. It is often claimed that its origins are deeply rooted in the formation of early human societies. People may refer to gods, rituals, sacred scriptures, tribes from Southeast Asia and South American forests, not to mention the Roman Republic and its institutions, as if they were all closely tied to our reality. However, we can set aside these considerations. As the legal anthropologist Fernand Pirie asserts, scholars are interested in the rules that determine how people act, but those rules are not explicit and “the task of understanding social life is not straightforward” (PIRIE, 2013, p. 3).

As mentioned, historiographical reflection presented merely as a curiosity or as a way to explain the present, without considering historical studies, methods, and theoretical concerns, does not help those seeking to understand the past. For this reason, we insist on starting our discussion from the Modern era. Undoubtedly, the history of punishment goes back much further, but attempting to exhaust it within a few pages does not bring us any benefits; on the contrary, it risks distorting the past with anachronistic and simplistic interpretations that only serve to reinforce certain myths and provide a false air of erudition to jurists. To introduce the development of imprisonment in Modernity, we present two well-known cases in Cultural History.

In the 16th century, a man named Arnaud du Tihl was imprisoned in France, accused of impersonating another person, a peasant named Martin Guerre. What's remarkable is that if he really wasn't Martin Guerre, he had managed to deceive an entire community for a considerable amount of time. Martin had disappeared from the midst of his village in southern France, near the current border with Spain. Some time later, he returned, capable of remembering everyone in the neighbourhood. He was also



recognized by the entire community, including relatives and his own wife. However, at some point, Arnaud (or Martin) was accused of being an imposter and was arrested for that. This astonishing story was narrated by Jean de Coras, one of the judges of the case at the time, and later transformed into a book by historian Natalie Zemon Davis titled "The Return of Martin Guerre" (DAVIS, 1987), which also had a version in French cinema and an American remake that transported the story to the 19th-century United States.

We won't spoil the ending of this true – although almost unbelievable – story. Still, we bring it up as an example of an individual who lived at the transition between a pre-modern and a modern world and was imprisoned, but not as a way of punishment. As Davis shows, he was detained only to wait for his trial. This previous time in prison did not count as a punishment; the real sanction would only come after the trial. The same can be said for prisoners during the Inquisition, political dissidents, or any other detainees from medieval and ancient times. People were imprisoned, but it does not imply that the modern concept of imprisonment extended far back in time.

A similar case is that of the miller Domenico Scandella, born in a small Alpine village in 1532, who was twice prosecuted by the Inquisition for a series of heretical ideas. His story is narrated by the Italian historian Carlo Ginzburg, based on extensive documentation gathered about the case (GINZBURG, 2006). In 1583, Menocchio (as he was better known) was denounced and prosecuted by the Holy Office, remaining imprisoned until 1586 when he was released with several restrictions. While in freedom, the miller continued to practise the same heresies, leading to a new trial and his re-imprisonment in 1599, awaiting a definitive sentence.

On the first occasion, a jailer informed the bishop and inquisitor that "the prison where Menocchio was held was 'strong and secure', locked with three 'strong and secure' locks, and there was no prison stronger or more rudimentary than that in the city" (GINZBURG, 2006, p. 149). The prisoner described the jail as "rough, earthy, dark, and damp", which completely ruined his health: "I remained bedridden for four months, and during this year, my legs swelled, and my face is still swollen, as you can see, and I almost



lost my hearing; I became weak and almost beside myself"⁶ (GINZBURG, 2006, p. 150-1). Unlike the modern prison, where the poor conditions are considered (at least in theory) a problem to be solved and an obstacle to the rehabilitation of inmates, in that period, the sufferings caused by the prison environment were important to its purposes. Lack of light, humidity, rats, diseases, unhealthy diets, and so on, were welcomed as part of the sanction.

Historiography presents pre-modern imprisonment as “merely a means to ensure that the prisoner remained available to justice to receive the prescribed punishment, which could include death, deportation, torture, slavery, or forced labour on galleys, among others”⁷ (BRETAS; MAIA; COSTA; SÁ NETO, 2007, p. 8). Both the modern concepts of penalty and imprisonment are historical phenomena that should not be confused with other forms of punishment in the past.

Considering these “methodological reservations”, we can understand the “modern penalty” experience better, as the one conceived around the 18th century, but most significantly developed in the 19th century. Its appearance coincided with industrialised Europe, and one cannot dissociate Criminal Law from this context. It is in this setting that the European map gradually became more urbanised, with the rural population transforming into the urban working class.

In this context, the modern concept of imprisonment began to take shape. The penal system evolved to address the changing dynamics of society, urbanisation, and industrialisation. Imprisonment became a prominent form of punishment, replacing or supplementing other traditional methods. The emphasis slowly shifted from retribution to rehabilitation, with the aim of reforming offenders and reintegrating them into society after their sentence.

⁶ Translated from the Portuguese version of the book. In the original text: “Fiquei quatro meses sem levantar da cama e durante este ano as pernas incharam, e ainda tenho o rosto inchado também, como podem ver, e quase perdi a audição, me tomei fraco e quase fora de mim”.

⁷ Translated from the Portuguese. In the original text: “apenas um meio de assegurar que o preso ficasse à disposição da justiça para receber o castigo prescrito, o qual poderia ser a morte, a deportação, a tortura, a venda como escravo ou a pena de galés, entre outras”.



Industrialisation generates wealth, of course, and cities experienced a profound process of urbanisation throughout the 19th century, which brought wide avenues, squares, plazas, monuments, public lighting, trains, trams, cinemas, cafés, and all the comforts that modern life in that period could offer. However, all this progress came at a high cost: the expulsion of working-class families from central regions, the proliferation of unhealthy and overcrowded tenements, with minimal sanitation conditions, promoting the spread of diseases and more (PERROT, 2006, p. 110-111). Let's see how historian Clóvis Gruner completes this panorama:

The same pages that publish discourses expressing enchantment caused by development and urban reforms, by a more dynamic metropolitan life, especially in the central region, also print writings that seem to diverge and even destabilize those readings, emphasizing the melancholy and sadness of life in large cities or accusing the dangers and risks of modern culture. Especially the new urban characters – impoverished minors, drunkards, gamblers, beggars, pickpockets, prostitutes, their clients, and the criminals who exploit them – capture the attention of those who know that, alongside progress, a horde of enemies, against whom one must be constantly vigilant and cautious, enters the city's borders as part and product of that progress (GRUNER, 2012, p. 18)⁸.

The emergence of modern punishment, therefore, emerged in the context of industrialised and urbanised Europe, marked by deep social inequalities and the appearance of new “types of delinquents” such as vagrants, drunkards, pickpockets, and others, in addition to the traditional criminals like robbers and murderers who had “always” existed. This ushered in a new relationship with criminality previously unknown. Simultaneously, it became evident that existing punitive mechanisms were

⁸ Translated from the Portuguese. In the original text: “As mesmas páginas que publicam os discursos que traduzem o encantamento provocado pelo desenvolvimento e pelas reformas urbanas, por uma vida cidadina mais dinâmica, notadamente na região central, imprimem as escritas que parecem destoar e mesmo desestabilizar aquelas leituras, ressaltando a melancolia e a tristeza da vida nas grandes cidades ou acusando os perigos e riscos da cultura moderna. São principalmente para os novos personagens urbanos - menores carentes, bêbados, jogadores, mendigos, punguistas, prostitutas, seus clientes e os cáftens que as exploram - que se voltam os olhares daqueles que sabem que, junto com o progresso, e como parte e produto dele, adentram as fronteiras da cidade toda uma horda de inimigos contra os quais é preciso estar incessantemente vigilante e precavido”.



ineffective and that there was a need to extract some benefit from the punishment. As the philosopher Michel Foucault provocatively questioned: “Why should society suppress a life and a body that it could appropriate?”⁹ (FOUCAULT, 2014, p. 107).

The shift in rationale prompted the development of the penitentiary concept, giving rise to several proposals for the ideal establishment across Europe and the United States. One such proposal was Jeremy Bentham's renowned panopticon, an architectural design intended to create a prison where constant surveillance was possible from a central point, fostering a sense of constant visibility and potential control over inmates. Similarly, the Philadelphia and Auburn systems emerged around the same period, becoming notable references in the history of prisons. The Philadelphia system emphasised solitary confinement at night, with inmates working individually during the day in silence, while the Auburn system introduced group labour during the day with separate cells for individual confinement at night (BRETAS; MAIA; COSTA; SÁ NETO, 2017, p. 09). These different approaches aimed to reform offenders and reintegrate them into society as productive and law-abiding citizens. The era was marked by an array of ideas and philosophies, driven by the belief in the transformative power of these institutions and the pursuit of the most effective techniques for achieving social cohesion and rehabilitation.

However, it did not take long for the utopian vision of incarceration to be challenged. As Amanda Tortato emphasises, “the desire for discipline does not align with the conditions of prisons, which are imagined as secretive and mysterious places where the general population remains largely unaware of what happens behind their walls, except when a prisoner rebels”¹⁰ (TORTATO, 2020, p. 69). Throughout the 20th century, criticism against prisons grew globally, and discussions on alternatives to imprisonment

⁹ Translated from the Portuguese version of the book. In the original text: “por que haveria a sociedade de suprimir uma vida e um corpo de que ela poderia se apropriar?”.

¹⁰ Translated from the Portuguese. In the original text: “a vontade de disciplina não condiz com as condições dos presídios, lugar imaginário, secreto e misterioso, onde a população em geral desconhece o que ocorre entre seus muros, exceto quando o preso se rebela”.



gained space in a century marked by transformations in legal thinking, the delegitimization of certain discourses, and the emergence of human rights in public debate. Criminology, in particular, embraced a more critical vein (ANITUA, 548-551), distancing itself from its infamous origins.

As societies grappled with the inadequacies of the prison system, ideas surrounding restorative justice gained prominence. This approach sought to shift the focus from punitive measures to repairing harm, both to victims and communities, while fostering rehabilitation and reintegration for offenders. As previously mentioned, the realisation that imprisonment often exacerbated social inequalities and perpetuated a cycle of recidivism encouraged a reevaluation of penal practices.

Furthermore, during the latter half of the 20th century and into the 21st century, the concept of transformative justice gained traction, emphasising the need to address the root causes of crime, such as poverty, inequality, and lack of access to education and opportunities. Advocates of transformative justice argued that true rehabilitation could only occur by addressing the underlying social issues that contributed to criminal behaviour.

We certainly do not consider the present time as a “point of arrival”. The debate and, above all, penal practice are “light-years” away from the ideal, especially because, even while discrediting imprisonment, we still believe in the principles that gave rise to it. In this sense, Michelle Perrot's criticism of the prison system holds true, regardless of the type of punishment:

The penitentiary system seems to have deviated profoundly from its initial intentions. Far from reintegrating, it expels, evacuates, and suppresses those considered irredeemable. Yet, at the same time, it perhaps reveals its hidden and true purpose: to defend the industrial bourgeois society built upon property and labour. The prison becomes the illusory safety valve of this society (PERROT, 2006, p. 265-266).

3 ON THE HISTORY OF CRIME AND PUNISHMENT IN BRAZIL



When discussing the Brazilian scenario, we must be even more cautious. Importing ideas and authors without proper “translation” does not serve us well. While it's intriguing to explore concepts from figures like Cesare Beccaria, Jeremy Bentham, or the renowned names in the field of “positivist criminology”, as the Lombroso-Garofalo-Ferri trio, we must be mindful that these ideas may not directly apply to the Brazilian reality and could even prove misleading. The same goes for foreign scholars like Michel Foucault.

Similarly, attempting to comprehend the history of punishment in Brazil by scrutinising legal statutes, such as the often [mis]quoted 5th Book of the *Ordenações Filipinas* or the Criminal Code of 1830, yields limited value. Most of the time, what we encounter is a crude transcription of certain past provisions, naively believing that they fully reflected the national reality.

Nonetheless, this does not imply that we should dismiss foreign ideas and authors or the national law altogether. On the contrary, it is essential to emphasise the necessity of examining the past with due care, observing the techniques of historiography, and engaging in meaningful dialogue with it. Certainly, studying past legal frameworks is useful, and reading authors like Cesare Lombroso is equally valuable for contemplating the Brazilian reality, given the popularity and influence of their ideas in this context. Moreover, the analytical framework proposed by authors such as Michel Foucault is indispensable for understanding the national reality – not necessarily to explain the Brazilian penitentiary system as it is and as it functions, but certainly as it was supposed to work.

Expanding upon this notion, understanding the history of penalties in Brazil requires a multi-layered approach that encompasses diverse cultural, socioeconomic, and political dimensions. We must recognize the complexities of the country's colonial past, the legacy of slavery, and the intricate interplay between crime and social stratification. While foreign theoretical perspectives offer valuable insights, they must be skilfully woven into the intricate fabric of Brazil's unique historical trajectory.



It is paramount to understand that the historical development of penalties in Brazil is not a linear trajectory but rather an amalgamation of intersecting narratives that deserve careful scrutiny. By embracing a critical and culturally sensitive approach, we can construct a comprehensive understanding of Brazil's penal history, untangling the intricacies of its past while recognizing the complexities of its present realities.

In Brazil, the application of penalties also underwent a period of modernisation, and to some extent, the discussions that were fervent mainly in Europe quickly made their way to the national territory. If we were to read the pronouncements of jurists and public authorities in Brazil throughout the 19th century, we would find a discourse closely aligned with the ideas circulating in Europe (WEINHARDT, 2019b, p. 86ss). The same thing happens in parliamentary debates (BELÚCIO, 2018). As Marilene Sant'Anna points out:

The construction of civilization necessarily involved penal modernity, the establishment of prisons aimed at rehabilitating the individual, guiding them through discipline, work, and repentance, making them useful members of society. The intensity with which debates and disagreements arose over the prison's varying degrees of regenerative capacity, as well as the harshness or severity of conditions for convicts, merely reflected the clear acceptance, among various groups, of the significance of the prison issue within the context of Brazilian social organisation throughout the 19th century and part of the 20th century (SANT'ANNA, 2007, p. 302)¹¹.

Ideas swiftly crossed the Atlantic, but their implementation was not as fast. Reflections of the so-called Penal Enlightenment reached the newly born Brazil, and our first Constitution determined the abolition of whipping, torture, hot iron branding, and other cruel punishments, while also mandating that prisons should be secure, clean, well-

¹¹ Translated from the Portuguese. In the original text: "A construção da civilização passava necessariamente pela modernidade penal, pela construção de prisões que recuperassem o indivíduo, que o conduzissem, pela disciplina, pelo trabalho, pelo arrependimento, como ser útil, para a sociedade. A intensidade com que foram formulados os debates e as divergências sobre o maior ou menor papel regenerador da prisão, sobre as suas condições mais duras ou penosas de atingir os condenados, nada mais representou do que a clara aceitação, junto a diversos grupos, da relevância da questão prisional no próprio contexto de organização da sociedade (brasileira), ao longo de todo o século XIX e parte do XX".



ventilated, and equipped with various facilities to separate different inmates (art. 179, XIX and XXI, Federal Constitution, 1824). In the imperial legal framework, imprisonment also became the standard punishment.

If we delve into the historical documentation of that period, we encounter the recurring concern of public authorities with the issue of punishment. In 1850, the House of Correction was inaugurated in Rio de Janeiro, the capital of the Empire back then. This facility was organised into different sections, each with its own specialised regimen and a well-defined routine for meals, rest, work, and other activities (SANT'ANNA, 2017, p. 302-303). As Brazil sought to define its identity and establish itself as a civilised nation, it grappled with the complexities of implementing penal reforms inspired by European Enlightenment ideals. While the ideas of the time emphasised the importance of humane treatment and the reformation of offenders, translating these lofty principles into practical and effective policies proved to be a challenging endeavour.

The House of Correction in Rio de Janeiro stands as a testament to the attempts to implement a modern and progressive penitentiary system in Brazil. Its design and organisational structure were intended to foster a more rehabilitative approach to punishment, with different sections tailored to address the diverse needs of the incarcerated population. While such efforts demonstrated a commitment to penal reform, the reality of prison life often fell short of the envisioned ideals.

Throughout the country, the goal was to have prison establishments in these terms, although the reality in much of the national territory was the use of improvised facilities that served as prisons. Even in the provinces capitals where there were specific buildings, the conditions could be terrible (WEINHARDT, 2017, p. 341). Once again, let's see what Marilene Sant'Anna has to say:



Prisons were supposed to become laboratories for observing criminal individuals, in order to study their criminal personalities, motives for crimes, family and psychological backgrounds, among other aspects. As we have seen so far, nothing could be further from the reality of prisons at the turn of the 19th to 20th century (SANT'ANNA, 2007, p. 296)¹².

An interesting example of that reality comes from the city of Curitiba. In 1909, the Ahú Penitentiary was inaugurated, a model institution based on Auburnian principles. However, the prison had some "beginning flaws", such as the surreal lack of a wall surrounding its entire perimeter. Ascânio de Abreu, the young and enthusiastic Ahú's warden, maintained an optimistic tone in his reports despite the accumulating problems. Historian Amanda Tortato analysed Ascânio's reports during the two decades he worked as the prison's director, noting the changing discourse over time:

As the years passed, the optimistic tone of the early reports transformed, and due to financial difficulties or political ambitions, the situation deteriorated, making the original project increasingly challenging to implement. The paternal and lenient approach to the most basic and inherent requirements of the prison in the beginning gave way to a tone of concern caused by the accumulation of unsolved problems. These complaints, far beyond the director's whim, represented the danger of unraveling a project that defended the civilizing nature of punishment. With this scenario, the necessary regenerative aspect believed to eliminate barbarism and violence became impossible (TORTATO, 2020, p. 88)¹³.

In a way, Ascânio's disappointment reflects the disappointment of an entire society that once believed in the prison system. Over time, the prison has evolved into a

¹² Translated from the Portuguese. In the original text: "A prisão deveria converter-se em laboratórios de observação dos indivíduos criminosos, a fim de ser possível estudar sua personalidade criminosa, os motivos dos crimes, os antecedentes familiares e psíquicos, entre outros aspectos. Como vimos até aqui, nada mais distante da realidade das prisões da virada do século XIX para o XX".

¹³ Translated from the Portuguese. In the original text: "Com o passar dos anos, o discurso otimista dos primeiros relatórios se transforma e, seja pelas dificuldades financeiras, ou por anseios políticos, a situação se deteriora, tornando o projeto original cada vez mais difícil de ser executado. O jeito paternal e ameno com que as exigências mais básicas e inerentes a um presídio eram tratadas no início, deram lugar a um tom de preocupação que o acúmulo de deficiências nunca supridas ocasionou. Tais queixas, muito além de um capricho do diretor, representavam o perigo do desfazimento de um projeto que levava em



problem as severe and unsolvable as the crimes it aims to address. Despite global advancements in alternative forms of sanction, Brazil has maintained (and continues to maintain) its focus on incarceration.

While the world embraced discussions on alternative punitive measures, we remained largely detached from this debate. It was only towards the final years of the 1964 Military Dictatorship that the need to reform the Brazilian punitive system gained strength, leading to an important reform, currently embodied in Laws 7.209/84 and 7.210/84, respectively, the “new” *Parte Geral*, and the *Lei de Execuções Penais*.

Despite the initial optimism surrounding the reforms, the challenges and complexities of the criminal justice system persisted, leaving society to grapple with the ongoing dilemma of effectively addressing crime and rehabilitating offenders. Alongside this, the quest for a balanced approach to punishment and rehabilitation remained elusive, leaving policymakers and scholars to confront the constant tension between public safety, social reintegration, and human rights. While some progress has been made, many questions remain unanswered. Can we genuinely reform a system that has become deeply entrenched? Should we continue down the path of incarceration, or embrace innovative approaches that prioritise prevention, rehabilitation, and social support? As we navigate the complex terrain of criminal justice reform, it becomes evident that a holistic and multifaceted approach is essential to create a more just and effective system – one that values the dignity and potential for change in every individual, while safeguarding the well-being of the broader community.

CONCLUSION

When historians address the legal pasts, we necessarily reach out to jurists. Doctrinal reasoning can tell a lot about a society, if we are in social history, or about

conta o caráter civilizatório da pena. A partir dessa perda, o caráter regenerativo necessário à ameaça da barbárie e da violência do crime era impossibilitado”.



intellectual and conceptual history. They create realities, build reasoning, and mediate knowledge exchanges. So should criminalists (and jurists in general) reach for historians when addressing the past. This article was written based solely on historiography and literature. And our main goal was to demonstrate it is possible to do so by simply reading our contemporary colleagues.

This brief penal system history exploration reveals a complex tapestry of ideals, intentions, and challenges. From its ancient roots to the emergence of the modern penitentiary, societies have grappled with the task of balancing punishment with the aspirations of rehabilitation and societal protection, alienating and disregarding the role of the victims. While the modern prison system initially emerged declaring the ambitious goal of reforming offenders and safeguarding the public, it soon encountered harsh realities and complexities that proved difficult to navigate effectively.

Throughout the ages, the prison system has encountered criticism and scepticism, prompting calls for reform and innovative approaches to criminal justice. From the early debates on the efficacy and on the justifications of punishment to the emergence of alternative sanctions and restorative justice practices, societies have sought ways to address crime more holistically. However, it is evident that significant challenges persist, and the need for continuous adaptation remains pressing.

In the context of Brazil, the journey of the penal system reflects broader global trends. The enthusiasm that once surrounded the prison's transformative potential has given way to a sense of disillusionment as it grapples with issues of overcrowding, recidivism, and human rights concerns. The pursuit of more balanced, humane, and effective methods of addressing crime continues to be a work in progress. This journey necessitates ongoing dialogue, comprehensive and transdisciplinary research, and collective efforts from policymakers, scholars, jurists, and the public.

REFERENCES

REVISTA DIREITOS SOCIAIS E POLÍTICAS PÚBLICAS (UNIFAFIBE)

DISPONÍVEL EM: WWW.UNIFAFIBE.COM.BR/REVISTA/INDEX.PHP/DIREITOS-SOCIAIS-POLITICAS-PUB/INDEX

ISSN 2318-5732 – VOL. 12, N. 1, 2024



ANITUA, G. I. **Histórias dos pensamentos criminológicos**. Rio de Janeiro: Revan, 2008.

ANONYMOUS, "The Story of Burnt Njal", George W. DaSent, *Icelandic Saga Database*, Sveinbjorn Thordarson (ed.), URL = <http://www.sagadb.org/brennu-njals_saga.en>. Chapter 8.

BARBERO, A. Dante. Bari-Roma: Laterza editori, 2020.

BARBERO, A. Vendetta e risarcimento nelle saghe islandesi, in *La Vengeance*, 400-1200, a cura di D. Barthélemy, F. Bougard e R. Le Jan, Rome 2006, pp. 281-297.

BELÚCIO, R. *Sciencia requeitada e debates parlamentares: a cultura jurídica penal brasileira e os debates sobre a pena de morte no Congresso Constituinte de 1890*. 2018. Dissertação (Mestrado em Direito) – Universidade Federal do Paraná. Curitiba, 2018.

BRETAS, M.; MAIA, C.; COSTA, M.; SÁ NETO, F. **História das Prisões no Brasil** (v. 1). Rio de Janeiro: Anfiteatro, 2017.

DAVIS, N. Z. **O Retorno de Martin Guerre**. Rio de Janeiro: Paz e Terra, 1987.

FONSECA, R. M. **Introdução teórica à história do direito**. Curitiba: Juruá, 2009.

FOUCAULT, M. **Vigiar e punir: nascimento da prisão**. Rio de Janeiro: Vozes, 2014.

GINZBURG, C. **O Queijo e os Vermes: o cotidiano e as ideias de um moleiro perseguido pela Inquisição**. São Paulo: Companhia das Letras, 2006.

GROSSI, P. **Mitologias jurídicas da modernidade**. Florianópolis: Fundação Boiteaux, 2007.

GRUNER, C. **Paixões torpes, ambições sórdidas: transgressão, controle social, cultura e sensibilidade moderna em Curitiba, fins do século XIX e início do XX**. 2012. Tese (Doutorado em História) – Universidade Federal do Paraná: Curitiba, 2012. Disponível em: <<https://acervodigital.ufpr.br/bitstream/handle/1884/28114/R%20-%20T%20-%20CLOVIS%20GRUNER.pdf?sequence=1See%20More>>. Acesso em: 24 mar. 2021.

HESPANHA, A. M. Da "iustitia" à "disciplina": textos, poder e política penal no antigo regime. In: HESPANHA, A. M. (Org.). **Justiça e litigiosidade: história e prospectiva**. Lisboa: Fundação Calouste Gulbenkian, 1993. p. 287-379.

HESPANHA, A. M. Porque é que existe e em que é que consiste um direito colonial brasileiro. In: GROSSI, P. (Ed.). **Quaderni fiorentini per la storia del pensiero**



giuridico moderno, v. 35, tomo I, p. 59-81, 2006. Disponível em:
<<http://www.centropgm.unifi.it/cache/quaderni/35/0060.pdf>>. Acesso em: 24 mar. 2021.

PERROT, M. **Os excluídos da história**. Rio de Janeiro: Paz e Terra, 2006.

PIRIE, F. **The Anthropology of Law**. Oxford: Oxford University Press, 2013.

SANT'ANNA, M. Trabalho e conflitos na casa de correção do Rio de Janeiro. In: BRETAS, M. et al. (Orgs.). **História das prisões no Brasil**. Rio de Janeiro: Anfiteatro, 2017. v. 1.

SBRICCOLI, M. Beccaria ou l'avènement de l'ordre: Le philosophe, les juristes et l'émergence de la question pénale. In: SBRICCOLI, M. *Storia del diritto penale e della giustizia*. Milano: Giuffrè, 2009. p. 393-406. (Scritti editi e inediti (1972-2007), tomo I).

SBRICCOLI, M. Giustizia Criminale. In: SBRICCOLI, M. *Storia del diritto penale e della giustizia*. Milano: Giuffrè, 2009. p. 3-46. (Scritti editi e inediti (1972-2007), tomo I).

TORTATO, A. **Um crime de duas cidades**: as façanhas de Papst e Kindermann entre Curitiba e Porto Alegre. 2020. Dissertação (Mestrado em História) - Universidade Federal do Paraná, Curitiba, 2020. Disponível em:
<<https://acervodigital.ufpr.br/bitstream/handle/1884/69739/R%20-%20D%20-%20AMANDA%20CORREA%20TORTATO.pdf?sequence=1&isAllowed=y>>. Acesso em: 24 mar. 2021.

WEINHARDT, O. A. G. **Delitos étlicos**: embriaguez, criminalidade e justiça (Curitiba, 1890-1920). 2019. Dissertação (Mestrado em Direito) - Universidade Federal do Paraná. Curitiba, 2019a. Disponível em:
<<https://www.prppg.ufpr.br/siga/visitante/trabalhoConclusaoWS?idpessoal=57376&idprograma=40001016017P3&anobase=2019&idtc=104>>. Acesso em: 24 mar. 2021.

WEINHARDT, O. A. G. **Menores problemas, menores soluções**: discursos e práticas em torno da infância marginalizada nas décadas finais do Império do Brasil (Curitiba, 1871-1890). 2019. Dissertação (Mestrado em História) - Universidade Federal do Paraná. Curitiba, 2019b. Disponível em:
<<https://acervodigital.ufpr.br/bitstream/handle/1884/64135/R%20-%20D%20-%20TAVIO%20AUGUSTO%20GANZERT%20WEINHARDT.pdf?sequence=1&isAllowed=y>>. Acesso em: 24 mar. 2021.

WEINHARDT, O. A. G.. **O Aipim e a Espingarda**: juventude, criminalidade e pensamento criminológico no século XIX. *Aedos*, v. 9, n. 21, p. 330-347, dez. 2017.



WEINHARDT, O. A. G.; NOGUEIRA, R. F. B. Diálogos transdisciplinares sobre a pena. Curitiba: Intersaberes, 2021.

WELLS, STANLEY; TAYLOR, GARY; JOWETT, JOHN AND MONTGOMERY, WILLIAM (eds.) The Oxford Shakespeare: The Complete Works (Oxford: Oxford University Press, 1986; 2nd edn., 2005)