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## RIGHT TO RESIST THE INSTITUTIONAL VIOLENCE IN BRAZILLIAN'S PRISONS

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### Abstract

The paper briefly discusses the possibility of inmates to exercise the right of resistance to oppose institutional violence. The right of resistance was spread in the contemporary democracies for the protection of rights and to control the legitimacy of the state acts. In this sense, it addressed the changes that culminated in the unfavorable scenario to the expansion of speeches that claim for protection of fundamental rights of convicts. Nevertheless, based on the doctrine that claims the universalization of human rights, it is defended the lawfulness of conducts that seek to defeat the institutional violence and deconstruct the manichean political game built on fear instilled in society ..

**Key-words:** Violence. Fundamental rights. Resistance.

## DIREITO DE RESISTIR À VIOLÊNCIA INSTITUCIONAL NO SISTEMA CARCERÁRIO BRASILEIRO

### Resumo

Discute-se em breves linhas a possibilidade de a população carcerária exercer o direito de resistência para fazer contraposição à violência institucional. O direito de resistência difundiu-se pelas democracias contemporâneas para a defesa de direitos e controle de legitimidade dos atos estatais. Nesse corte, trata-se das mudanças que culminaram num cenário desfavorável à expansão dos discursos de proteção dos direitos fundamentais dos apenados. Apesar disso, com base na dogmática jurídica de universalização dos direitos humanos e nos alicerces democráticos, defende-se a licitude de condutas que buscam derrotar a violência institucional e desconstruir o jogo político maniqueísta edificado sobre o medo inculcado na sociedade.

**Palavras-chave:** Violência. Direitos fundamentais. Resistência.

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## Introduction

The material dimension of the recognized constitutional rights substantiates the spheres of effectiveness of those before the State and before the individuals. The Law that wants to be fair, in its state/state-owned manifestation (production and application of law by the public officials), it's conditioned to its legitimation before its recipients in pursuit of effectiveness intra-systemic.

The discussion about the opportunity of positivization of the resistance right is quite olden, however slightly necessary<sup>2</sup>. The complexity of social life challenges any abstraction intentioned in establishing limits to society in the way we expose our disapproval the effects caused the conduct of the public officials.

Thus, it's possible to think that the right of resistance congregates the faculty to explicit the decisions and the acts emanated by the public officials needy of legitimation in the democratic regime, which concentrates in its core the right of freedom.

The acts of the State, in the legal dogmatic, possess the presumption of legitimation and validity. By positivism influence, it wasn't a faculty of the citizen to judge the fairness of the law; the external and "supreme" will should be respected by a criterion of power ("the Power comes from the Law, and the Law comes from Power<sup>3</sup>). In case there were disobedience, the State could exercise its coercion power, and would have the obligation to inflict a (negative) sanction to the individual who affronted the State's will, even though the "violator" had disobeyed a unfair law.

The institutional violence is a result from the (legal) monopoly of the use of the force in the hands of the State (Max Weber)<sup>4</sup>. However, the use of force shows intrinsic limits in the vital guarantees (vital cores) of the citizen's fundamental rights. Therefore,

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<sup>2</sup> Modern authors agree that the right of resistance is implicit in democracy but are divided if is appropriate or not positivize the right of resistance. Hannah Arendt argues that constitutional provision as an instrument of citizenship; Jean Cohen and Andrew Arato disagree, they argue that it would be a contradiction itself (COHEN, Jean C.; ARATO, Andrew. *Civil society and political theory*. EUA: Massachusetts Institute of Technology, 1992). It is thought that it may even be contradictory the institutionalization of the right of resistance: it is as if the law predicts the right to be broken –if it is not a right, it would not be breaking the law, but the exercise of a right already provided. Anyway, the discussion seems pointless.

<sup>3</sup> KRIELE, Martin. *Introdução à Teoria do Estado*. Urbano Carvelli (trad.). Porto Alegre: Sergio Antonio Fabris Ed., 2009, p. 35.

<sup>4</sup> BOBBIO, Norberto. *Teoria do ordenamento jurídico*. Tradução de Maria Celeste Cordeiro Leite dos Santos. Brasília: Editora Universidade de Brasília, 1995, p. 25.



the legitimation of the violence act does not comes from its subjective element solely (who practices it), but also from its teleological aspect (what's its aim).

It's also known that the violence acts in the prison sphere are frequent<sup>5</sup>; the prisoner's fundamentals rights are ignored (disregarded) without a wide commotion of the society. The speech in favor of the protection of the dignity (a fundamental Republic value) of the arrested community faces an adverse degree of defensibility and consensus in the society.

The prisons prosecute with mastery the function which is attributed to them, by their own definition: impose penances pithily. Hence, the prisoners are brought into a subordinated institutional position (inside the structures of power) in their handling with society, which fears those individuals and claims growing for punity and recrudescence of the penal system.

Accordingly, it is questioned the possibility of the exercise of the right of resistance by the arrested community to fight the institutional violence (consented by the elites) and make efforts with the aim of combat the denial of their fundamental rights. This research adopts the hypothetical-deductive method, using as procedure the pursuit of data and the documental and biographical analysis.

The prison system is vile in this sense: denies to the convicted the usufruct of their fundamentals rights and “[...] sanctions (administratively or criminally) any manifestation in contrary to this state of things”<sup>6</sup>; this observation about the prisoner's right of resistance seems to be necessary. Therefore, it is required to approach briefly the right of resistance outlines in a theoretical view in the first part of this work. In the second topic, we will examine the institutional violence and its relation with crime control policies adopted nowadays. Lastly, we'll focus on the possibility to exercise the right of resistance in the prison sphere as a instrument of contraposition to the institutional violence.

The right of resistance.

John Locke used to talk about the (natural) right of revolution in a frame of political degeneration. As he used to believe that the legitimation of the governments comes from the agreement, no absolute governor would be possible. Hence, the tyrant (the governor who does not obey the law) should be deposed, once the organization of

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<sup>5</sup> The acts of institutional violence against prisoners are reiterated, known and reported by the mídia Cf.: <[http://www.vermelho.org.br/sc/noticia.php?id\\_noticia=216493&id\\_secao=116](http://www.vermelho.org.br/sc/noticia.php?id_noticia=216493&id_secao=116)>. Acesso em 21 jun. 2013.

<sup>6</sup> CARVALHO, Salo de. Pena e garantias. Rio de Janeiro: Lumen Iuris, 2008, p. xxviii (Introdução).



society (the overcoming of the natural state) would serve to preserve the individual (and protect people's inalienable rights).<sup>7</sup>

Locke's thought differs from Kant's and Hobbes's thought. Kant denied people's right of resistance because he considered the sovereign as a guarantee of the civil society preservation and the ethic progress which comes with the overcoming of the state of nature. For Kant, by means of an imperative of reason, the people is the legislator (author and addressee of the law) and, therefore, for the corrections of the vices (injustices), reforms should be made and not revolutions.<sup>8</sup>

Hobbes, in the *Leviathan*, chapter XXI, conceives freedom as a field of actions limited by the sovereign. In the same chapter, Hobbes denominates civil liberties, widely than the simple absence of obstructions, as the "true subordinate's civil liberty, in other words, the things that, although ordered by the sovereign, notwithstanding they can deny to do it without being unjust"<sup>9</sup>. Because of this second conceptualization, it's known that Hobbes referred to the subordinate's right of disobeying the law in a way that this disobedience does not constitute a form of injustice. This hypothesis of disobedience grounds itself in the noncompliance (by the sovereign) of the social contract, which grounds the civil obedience.<sup>10</sup>

In current analyses, it appears that the exercise of the right of resistance it's only possible (legally<sup>11</sup>) in the Democratic Constitutional State, which presents an expansive logic in relation to the reach of people who recognize the legitimacy of the government by the material rationality. In dictatorship, the effectiveness of Law "only rests in the fear before the coercer power and not in the internal recognition of its mandatory"<sup>12,13</sup>. In this view, the right of resistance is part of the rights of citizenship.<sup>14</sup>

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<sup>7</sup> LOCKE, John. **Dois tratados sobre o governo**. Tradução de Júlio Fischer. São Paulo: Martins Fontes, 2001.

<sup>8</sup> KANT, Immanuel. *A metafísica dos costumes*. 2ª ed. Trad. Edson Bini. Bauru, SP: Edipro, 2008, p. 163-165.

<sup>9</sup> HOBBS, Thomas. *Leviatã*. Tradução de J. P. Monteiro e M.B. N. da Silva. São Paulo: Abril Cultural, 1997. Col. Os pensadores, p. 175.

<sup>10</sup> BRONDANI, Clóvis. *Direito à resistência na filosofia de Thomas Hobbes*. 2007. 138 f. Dissertação (mestrado) – Universidade Federal do Paraná, Curitiba, 2007, fl. 8.

<sup>11</sup> Of course, a revolution would change everything. It is emphasized that in democracy, the person who breaks the law can no longer be sanctioned (having removed the wrongfulness of his conduct) without a change in the political structure.

<sup>12</sup> KRIELE, Martin. *Introdução à Teoria do Estado*. Urbano Carvelli (trad.). Porto Alegre: Sergio Antonio Fabris Ed., 2009, p. 37-38.

<sup>13</sup> No democratic government takes one hundred percent of their decisions rationally and worried about the legitimacy of the measure; and no authoritarian government is so oblivious to what people think and want, it would be very difficult for a constraints system sustain in long term. Just remember the "A Marcha da Família com Deus pela Liberdade" in March 19th, 1964, which brought together five hundred thousand persons against basic reforms proposed by President João Goulart. The "Marcha da Vitória",



Although it's normally agreed that the possibility to offer a good abstract response which could embrace the multiple forms of the right of resistance is not clear<sup>15</sup>, some theorists intend to conform it by sealing the chance of violence utilization.<sup>1617</sup>

The right of resistance opposes the structuralism in which the positivists currents immersed<sup>18</sup>. Hans Kelsen, formulator of the pure theory of law<sup>19</sup> (quintessence of legal formalism in Norberto Bobbio's view<sup>20</sup>), considered dangerous the possibility that the individual suspends the term of the Law for himself by the excuse that the legal obligation imposed to him is amoral. Martin Kriele, when discoursing about this Kelsen's argument, says that he (Kelsen) just confirmed the thesis he assaulted<sup>21</sup>, therefore, acted morally: he affirmed that it was better to respect the term of the Law because there could be consequences as the driving to anarchy, civil war. Kriele, counteracting Kelsen, sustains that mandatory features of the Law is a moral issue.<sup>22</sup>

The North American origins (under John Locke's influence<sup>23</sup>) of the civil disobedience (one of the right of resistance's expressions<sup>24</sup>), would be a way for society's claim for political participation in order to change a law or a government policy which lacks legitimacy<sup>25</sup>. In this context, for instance, it's is widely discussed

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dated 2 April 1964, legitimized the military government in 1964 with a million people on the streets, welcoming the newly established regime (dictatorship).

<sup>14</sup> COSTA, Nelson Nery. Teoria e realidade da desobediência civil. Rio de Janeiro: Forense, 1990, p. 21.

<sup>15</sup> OLSEN, Frances. Legitimidad, pobreza e resistência. In: GARGARELLA, Roberto. El derecho a resistir el derecho. Buenos Aires: Mino y Dávila, 2005, p. 147.

<sup>16</sup> BOBBIO, Norberto. A era dos direitos. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Elsevier, 2004, p. 143.

<sup>17</sup> ARENDT, Hannah. Crises da república. Tradução de José Wolkman. São Paulo: Perspectiva, 2006, p. 55.

<sup>18</sup> Bobbio assumes that the interest in the function of law is related to the expansion of sociology. But a sociological theory of law cannot be fully reduced to the study of the function of law. Although it has been said that structuralism is as conceptual feature of positivist theories (at least those that are affiliated to the existence of a hypothetical basic norm, Kelsen defended as taking inspiration from Kant), Bobbio realize that the struggle was not between formalism and structuralism, but between monism and pluralism. (BOBBIO, Norberto. Da estrutura à função. Barueri: Manole, 2007, 82-83).

<sup>19</sup> KELSEN, Hans. Teoria pura do Direito. São Paulo: Martins Fontes, 1995, p. 86-113.

<sup>20</sup> BOBBIO, Norberto. Da estrutura à função. Barueri: Manole, 2007, p. 82.

<sup>21</sup> As it is known, a characteristic trait of positivism is precisely the insistence on the thesis of separation between law and moral.

<sup>22</sup> KRIELE, Martin. Introdução à Teoria do Estado. Urbano Carvelli (trad.). Porto Alegre: Sergio Antonio Fabris Ed., 2009, p. 40.

<sup>23</sup> ARENDT, Hannah. Crises da República. São Paulo: Ed. Perspectiva, 2006, p. 75.

<sup>24</sup> Besides civil disobedience, are also included in the list of manifestations (species) of the right of resistance: conscientious objection, the political strike, the right to revolution and the principle of people's self-determination.

<sup>25</sup> RAWLS, John. Uma teoria da justiça. São Paulo: Martins Fontes, 2002, p. 364



those wrongful imprisonment of all man who refused to fight in Vietnam, when drafted to the army.<sup>26</sup>

Roberto Gargarella argues that the members of a democratic community who suffers from extreme poverty could violate the law, since: i) they obey the basic moral duty of respect and reciprocity; ii) there is a link between the actions which they accomplish and the disadvantages they suffer; iii) those actions minimally affect others, in a way that society suffers minimal sacrifices<sup>27</sup>. Roberto Bobbio describes the right of resistance as a secondary right, which is exercised in favor of primary rights, as life, freedom and dignity. Thus, the right of resistance is only justifiable in case of violation of the law which protects some primary right.<sup>28</sup>

The resistance, in those conceptions, therefore, must be justified by a situation in which the fundamental rights are violated. The finding of an unfair situation is the means of assess the violation of a right. In Roberto Gargarella's conception, those who disobey the law must be living a situation of legal alienation.<sup>29</sup>

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<sup>26</sup> Ronald Dworkin, who was Hart's successor in the chair of the University of Oxford, explains this episode clash between moral and legal issues, and has projected that the moral objections that context (60s of XX century) were as follows: "A) the United States are employing immoral weapons and tactics in Vietnam; b) war has never been endorsed through deliberate, reflective and open vote of the representatives of the people; c) the United States has no interests to defend in Vietnam, whose strength, not even remotely, is sufficient to justify requiring that a segment of its citizens to risk dying in that country; d) if no army should be recruited to fight in this war, is immoral to do so through a recruitment which postpones the presentation or the provision which exempts the provision of university students, thus discriminating the economically disadvantaged; e) The recruiting exempts those who are opposed to any wars for religious reasons, but not those who are contrary to certain particular wars on moral issues; but there is no relevant difference between these positions, and thereby recruitment, to make this distinction, suggests that the second group is less worthy of respect than the former one; f) the law that makes it a crime to advise the resistance to recruitment silences those who oppose the war, since it is morally impossible to maintain that war is profoundly immoral without encouraging those who refuse to fight" (DWORKIN, Ronald. *Levando os direitos a serio. Tradução e notas de Nelson Boeira*. São Paulo: Martins Fontes, 2002, p. 318-319).

<sup>27</sup> GARGARELLA, Roberto. El derecho de resistència ensituaciones de carencia extrema. In: GARGARELLA, Roberto. *El derecho a resistir el derecho*. Buenos Aires: Mino y Dávila, 2005, p. 13-48.

<sup>28</sup> BOBBIO, Norberto. *A era dos direitos*. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campus, 1992, p. 95.

<sup>29</sup> Roberto Gargarella does an extensive theoretical immersion to understand what would be "legal alienation." He uses previous authors to Locke (Buchanan, Francisco Suárez, Thomas Aquinas, and others) and concludes that these theorists have contributed to the construction of John Locke, whose lessons in the legal disposition appear more clearly linked to a betrayal of the people's will/general will. At present, the decentralization of power does not necessarily prevent the emergence of situations of oppression; actually hinders resistance in practical terms (sources of domination are scattered and do not know whom to complain). The social fragmentation also contributes making resistance less conceivable (in the case of the theme addressed here - oppression is often sectorized). The legal disposition to Gargarella, is the situation of extreme poverty, which causes the state (Gargarella speaks in legal, but in context, it seems that he is referring to the public entity) is responsible for the deprivations suffered by these groups. (GARGARELLA, Roberto. *El derecho de resistència ensituaciones*



## 2. INSTITUCIONAL VIOLENCE

The Brazilian democratization process, in 1988, apparently, didn't affect several sector of society. As Teresa Pires do Rio Caldeira says: "[...] the issue of human rights ends up being the symbol of the several paradoxes of overlapping criminality and affirmation of rights of violence in democracy"<sup>30</sup>. The notion that rights are exercised as privileges substantiate the resistant rhetoric to the expansive logic of human rights, attacking the recognition of the right of the convicted. Even though there has been some progress on this issue, for those public policies of universalization of rights and contending the institutional violence, Teresa Caldeira shows the irony in the violent police forces (which kills) and attend to the requests of the citizens discredited in the effectiveness of the legal system.<sup>31</sup>

### 2.1 Crime, poverty and disbelief in the prison system

In the view of Gizlene Neder: "Prisons (nationwide) exhibit the rot which highlights the arrogance and indifference of elites and rulers to the human rights of the poorest classes"<sup>32</sup>. In fact, it remains in the collective consciousness (mainly in the elite's consciousness, reproduced in the mass media) the (disgusting) idea of correlation between poverty and crime (taboo). But, somehow, this notion is useful to reinforce the ideology of social oppression, because the poor are the "favorite customers" of the prisons.<sup>33</sup>

Taking poverty as a cause of crime and reduce the explanation of violence to social inequality is, in reality, assume that money is the only desire of all human beings. As Alba Zaluar explains, the utilitarian assumption (that man would act to survive) of those type of assertions (in an apparent defense of the poor), eventually reduces the complexity of the issue to the commercial logic of material need. The poor are the most frequent victims of crimes; and the thesis that justifies violence in social inequality (invoking envy as ideological background of violent acts) closes the investigation of the

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de carencia extrema. In: GARGARELLA, Roberto. *El derecho a resistir el derecho*. Buenos Aires: Mino y Dávila, 2005, p. 13-48).

<sup>30</sup> CALDEIRA, Teresa Pires do Rio. *Violência, Direitos e Cidadania: relações paradoxais*. *Ciência e Cultura* vol. 54 n. 1 São Paulo Jun./Set. 2002, p. 44.

<sup>31</sup> CALDEIRA, Teresa Pires do Rio. *Violência, Direitos e Cidadania: relações paradoxais*. *Ciência e Cultura* vol. 54 n. 1 São Paulo Jun./Set. 2002, p. 45.

<sup>32</sup> NEDER, Gizlene. *Em Nome de Tãnatos: Aspectos da História do Sistema Penitenciário no Brasil*. In: NEDER, Gizlene. *Violência e Cidadania*. Porto Alegre: Fabris, 1994, p. 12.

<sup>33</sup> Violence is inherent to human nature, but access to justice is, in common sense, the privilege of those who can afford good lawyers (paradox).



institutional violence and widespread violence in society, not realizing that inequality remains also within the gangs.<sup>34</sup>

In this perspective, Paulo Sérgio Pinheiro says that, although many victims of crime are derived from the lower classes, the middle and upper classes see the crime as a problem that only affects them. The wealth classes identify crime as a phenomenon from the lower classes and "the police tends to act as border guards of the rich against the poor's violence and police violence remains unpunished because it is exercised against these dangerous classes and rarely affects the wealthy ones".<sup>35</sup>

The legacy of the authoritarian past left to the police the task of protecting the rich against the poor, because "democratization does not attack the roots of social forms of authoritarianism or 'authoritarianism socially deployed'".<sup>36</sup>

Débora Regina Pastana approach the culture of fear that settled in Brazil as the sum of the values, behavior and common sense associated with crime, reproducing the "[...] hegemonic idea of insecurity". The changes in social behaviors and habits, such as frequenting shopping malls (fortified enclaves) for safety reasons, the abandonment of public spaces and the stimulating consumption related to insecurity are aspects of this culture of fear fed incessantly by the news. It is noteworthy that the idea of risk, moreover, is manipulated "[...] to influence public opinion and legitimize authoritarian postures [...]".<sup>37</sup>

Zygmunt Bauman says that "we live in a new era of fear."<sup>38</sup> The sense of danger makes people avoid leaving home because of the distress that comes from the constant sense of insecurity and vulnerability. What frightens the most, as Bauman says, is the ubiquity of fears: the threats may come from anywhere and any persons. The volatility (for Bauman, liquidity or fluidity)<sup>39</sup> of the situations (job, life, youth, heritage, food,

<sup>34</sup> ZALUAR, Alba. Oito temas para debate: Violência e segurança pública. In: Sociologia. Maio 2002, n. 38, p. 19-21.

<sup>35</sup> PINHEIRO, Paulo Sérgio. Violência, crime e sistemas policiais de novas democracias. Tempo Social; Ver. Sociol. USP, São Paulo, mai. 1997, p. 46.

<sup>36</sup> PINHEIRO, Paulo Sérgio. Violência, crime e sistemas policiais de novas democracias. Tempo Social; Ver. Sociol. USP, São Paulo, mai. 1997, p. 47.

<sup>37</sup> PASTANA, Débora Regina. Medo e opinião pública no Brasil contemporâneo. Estudos de Sociologia Araraquara, v. 12, n. 22, p. 91-116, 2007.

<sup>38</sup> It is a return to structuralism. With the decline of the welfare state, the neoliberal state resurrects the characteristics of the perfect liberal state in the nineteenth century: focus on negative sanctions (ie, discredits the award); retrospective strategy, ex post control; idea of social stability (no more than social transformation), and the idea of fear (coercion rather than stimulus).

<sup>39</sup> In similar sense, Erik Jayme lists three characteristics of modern times: speed, ubiquity and freedom. Among the most challenging problems listed by Erik Jayme's what puts the internet in relation to jurisdiction over crimes committed in this environment. (JAYME, Erik. Le droit international privé du nouveau millénaire: la protection de la personne humaine face à la globalisation. Recueil des Cours. Hague/Boston/London: MartinusNijhoff Publishers, v. 202, p. 26).





weather) makes people seek ways to feel (deceive) safe (eg, paying for insurance, alarms, diets against aging, food stocks, pocket knives). "After all, living in a liquid-modernity which admits only one certainty - that tomorrow cannot be, should not be, will not be like today - means a rehearsal diary disappearance, disappearance, extinction and death.<sup>40</sup>" In this scenario, occurs the commodification of fear:

The consumption economy depends on the production of consumers, and the consumers who need to be produced for products destined to face the fear are fearful, hopeful that the dangers they fear might be forced to retreat due to themselves (with paid help, obviously).<sup>41</sup>

As Bauman says, "we live on credit". The uncertainty of the future and the fear of threats produce the immediacy (what's the reason for delaying gratification? Carpe diem!)<sup>42</sup>. "Today, more than ever, it is easy to live in the immediacy of the present and lose all sense of historical process that led to the current state of things".<sup>43</sup> The ways of thinking and acting in relation to the crime suffered sensitive changes in the last thirty years, which has led us to skepticism (the destruction of dogmas), anxiety (permanent state of crisis) and the absence of directions, factors that characterize the daily lives of professionals of law in dealing with crime. David Garland explains that "[...] contemporary responses to crime have taken the form they have today, with new and contradictory aspects."<sup>44</sup>

The panorama of crime control "[...] is the result of politic choices and administrative decisions, both settled on a new structure of social relations and informed by a new pattern of cultural sensibilities."<sup>45</sup> It's not obscure anymore that there were the decline of the ideal of rehabilitation (gradual disappearance of the correctional penal system *ratio*), therefore, Garland asserts that the "[...] criminal justice measures are

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<sup>40</sup> BAUMAN, Zygmunt. Medo líquido. Tradução de Alberto Medeiros. Rio de Janeiro: Jorge Zahar Ed., 2008, p. 9-13.

<sup>41</sup> BAUMAN, Zygmunt. Medo líquido. Tradução de Alberto Medeiros. Rio de Janeiro: Jorge Zahar Ed., 2008, p. 15.

<sup>42</sup> BAUMAN, Zygmunt. Medo líquido. Tradução de Alberto Medeiros. Rio de Janeiro: Jorge Zahar Ed., 2008, p. 16.

<sup>43</sup> GARLAND, David. **A cultura do controle: crime e ordem social na sociedade contemporânea**. Rio de Janeiro: Ed. Revan, 2008, p. 41.

GARLAND, David. A cultura do controle: crime e ordem social na sociedade contemporânea. Rio de Janeiro: Ed. Revan, 2008, p. 41.

<sup>44</sup> GARLAND, David. A cultura do controle: crime e ordem social na sociedade contemporânea. Rio de Janeiro: Ed. Revan, 2008, p. 42.

<sup>45</sup> GARLAND, David. A cultura do controle: crime e ordem social na sociedade contemporânea. Rio de Janeiro: Ed. Revan, 2008, p. 48.



routinely subordinated to other penal goals, especially retribution, neutralization and risk management."<sup>46</sup>

About Brazilian reality, Débora Pastana emphasizes the diffuse feeling of dissatisfaction with the judiciary and criminal law. Democratization is still ongoing in Brazil. Thus, the legacy of authoritarianism left a fertile ground for the propagation of the neoliberal bourgeois project, addicted in spreading fear (insecurity) in the population and legitimizing the increased repression, even in an authoritarian manner. Given these (and other) characteristics, Deborah Pastana concludes that there is a model of punitive state in Brazil, i.e., primarily focused on punishing.<sup>47</sup>

The current discourse focuses on penalty function, assured by austere prison conditions. The emotional tone of the criminal policy discourse also stands out<sup>48</sup>; it is directed to the public sensibility in favor of fair claim for compensation, to the detriment of the "[...] commitment of building fair social solutions".<sup>49</sup> Also, there is the return of the victim to endorse the Manichean political game aimed at intensification of feathers (in Brazil, not only in relation to the duration of them)<sup>50</sup>. Also, there is the return of the victim to endorse the Manichean political game aimed at intensification of punishments (in Brazil, not only in relation to the duration of them). As Garland points out, the new political imperative is to protect, honor and assist victims, and this logic's Manichaeism is to consider the gain of the aggressor as the victim's loss.<sup>51</sup>

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<sup>46</sup> GARLAND, David. *A cultura do controle: crime e ordem social na sociedade contemporânea*. Rio de Janeiro: Ed. Revan, 2008, p. 50-51.

<sup>47</sup> PASTANA, Débora Regina. *Justiça Penal autoritária e consolidação do Estado punitivo*. *Revista Sociologia Política*, v. 17, n. 32, p. 121-138, fev. 2009.

<sup>48</sup> Exemplifying the question concerning the emotional tone of public policy, check out the video at: <<http://terratv.terra.com.br/videos/Noticias/Brasil/4194-465510/Mae-de-estudante-morto-em-SP-defende-reducao-da-maioridade-penal.htm>>. Access on 21 June 2013. This news is not hard to see the "appealing" tone of the article for the reduction of legal age in Brazil. The arguments posted are multiple (comparative law, statistics), but the focus is directed to the web surfer in the feeling of indignation mother whose son (student of nineteen) assassinated by a young man of seventeen. The report is nonetheless subtle; while showing the burial of the victim's family and the sadness, crying out for discussion in the Legislative criminal capacity of less than eighteen years.

<sup>49</sup> GARLAND, David. *A cultura do controle: crime e ordem social na sociedade contemporânea*. Rio de Janeiro: Ed. Revan, 2008, p. 48.

<sup>50</sup> Check out the following video: <[http://www.youtube.com/watch?feature=player\\_embedded&v=NxT3nSWo0Eg](http://www.youtube.com/watch?feature=player_embedded&v=NxT3nSWo0Eg)>. Access on 21 June 2013. In it, Jair Bolsonaro sharply criticizes a bill proposed by Rep. Rodrigo Dutra. The GO WITH GOD, famous for homophobic and anti-pluralist discourses (confusing constitutional democracy with political democracy) inflamed, reveals the general feeling transfused in the social environment that the convict should not only have curtailed their freedom of locomotion, but the prison you must be painful (ie, must reciprocate, perhaps disproportionately, the harm caused).

<sup>51</sup> David Garland talks about the baptisms of the laws adopted with names of victims. (GARLAND, David. *A cultura do controle: crime e ordem social na sociedade contemporânea*. Rio de Janeiro: Ed. Revan, 2008, p. 55). In Brazil, it also happened: the Law n. 11.340/2006 was named 'Maria da Penha Law'



In contrast to this setting (manipulation) of the victim in evidence to justify the hardening of the penal system, fortunately, this year, there was the application of the right to be forgotten in favor of the convict, so he is not punished (not being remembered in society) eternally by the media and public opinion because of the conduct that has incurred in the distant past.<sup>52</sup>

Based on these lessons, we try to construct a response to the problems highlighted in this paper: The prisoner has the right to resist institutional violence?

## 2.2 Convict's right to resist state violence: possibility, implications and legitimate forms of exercise

As seen, the right of resistance should have some factual assumption justifying the need and the occurrence of exercise. Breaking the law cannot be viewed as something normal and not exhaustively planned regarding its justification in the abstract plane (Frances Olsen demonstrates how to illustrate the story of thieves Kardemomme - "Gente e ladrones de la ciudad de Kadermomme").<sup>53</sup>

The material content of fundamental rights implies the adoption of negative attitudes (omissions) and positive (benefits) by the State in relation to individuals (and also between individuals). The (ideal)<sup>54</sup> Dignity "inherent" to all human beings triggers a distant roll of rights impassive of being broken: the existential minimum, as Ricardo Lobo Torres believes, can be embedded in the category of legal-dogmatic rule, impassive of sopesamento and flexibilities, ie applicable for subsumption, and judicially enforceable.<sup>55</sup> It is also important to visualize the absence of innocence and the crisis of

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(victims of domestic violence), and the recent Law n. 12.737/2013 was nicknamed 'Law Carolina Dieckmann' (actress victim of cyber-crime).

<sup>52</sup> The decision is the Superior Court of Justice and recognizes the application of Statement no. 531 of the CJF, adopted at the Sixth Day of Civil Law ("the protection of human dignity in the information society includes the right to oblivion"). The jurisdictional provision of the STJ is relative to n Resp. 1.335.153/RJ. Procedural progress available at: Access

<<http://www.stj.jus.br/webstj/processo/justica/detalhe.asp?numreg=201100574280>> 21 June 2013.

<sup>53</sup> OLSEN, Frances. Legitimidad, pobreza e resistência. In: GARGARELLA, Roberto. El derecho a resistir el derecho. Buenos Aires: Mino y Dávila, 2005, p. 121-148.

<sup>54</sup> Ingo Sarlet summarizes the various dimensions presented in the teaching about the dignity of the human person, meaning by this "[...] the intrinsic and distinctive quality recognized in every human being that is worthy of the same respect and consideration by the State and community, implying, in this sense, a complex of fundamental rights and duties that ensure both the person against any act of degrading and inhuman nature, such as will ensure you the minimum existential conditions for healthy living, as well as providing and promote their active participation and co-responsibility in the destinations of their own existence and life in fellowship with other human beings, in accordance with due respect for other beings that make up the web of life" (Sarlet, Ingo Wolfgang. Additional information about the dignity of the person human jurisprudence of the Supreme Federal Court fundamental rights in the Supreme Court: swing and criticism / Daniel Sarmiento, Ingo Sarlet (coords) Rio de Janeiro: Lumen Juris 2011, p 51).

<sup>55</sup> TORRES, Ricardo Lobo. O direito ao mínimo existencial. Rio de Janeiro: Renovar, 2009, 352 p.



justification of the universality of human rights. Jürgen Habermas, reflecting on globalization and human rights (the ideological function of these in this context), observes:

In the transition from an order marked by the national government for a cosmopolitan one it's not known, exactly, what is more dangerous: the world (which sinks) of the sovereign subjects of international law that have long lost their innocence or the confuse situation of the institutions and the supranational conferences that can assign questionable legitimations, but which still are dependent on the goodwill of powerful states and alliances. In this labile situation is true that human rights provide the only basis of legitimacy among all recognized for the political community of peoples; nearly all states have adopted the wording of the letter of the UN human rights (but improved). However, the universal validity, content and precedence of human rights remain controversial. The discourse on human rights, based on normative arguments, is even accompanied by the fundamental question whether the form of legitimation would be born in the West generally accepted under the assumptions of other cultures. In a radical way, Western intellectuals defend even the assertion that behind the claim validity [Gültigkeit] universal human rights lurks just a perfidious claim to power (Macht) West.<sup>56</sup>

Cristina Rauter makes a valuable observation and creative in relation to Brazilian prisons: "If Rossi found that the inquisitorial model was Dante's poetry put into law, means that we could paraphrase that the Brazilian penitentiary system is disguised in Dante's poetry".<sup>57</sup>

The "Inferno" as implemented in Brazilian prisons is notorious and authorities do not attempt to hide it.<sup>58</sup> The violation of fundamental rights (human rights brought into the orbit of the ordenamento) within the prison system makes you think what can be done to stop the society's conjuncture of consent with institutional violence. At least

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<sup>56</sup> HABERMAS, Jürgen. A constelação pós nacional: ensaios políticos. Tradução de Márcio Seligmann-Silva. São Paulo: LitteraMundi, 2001, p. 150-151.

<sup>57</sup> RAUTER, Cristina. Manicômios, Prisões, Reformas e Neoliberalismo. In: Discursos Sediciosos. Rio de Janeiro: ICC/Freitas Bastos, 1998, p. 72.

<sup>58</sup> Check out the article that reproduces statement of the Minister of Justice to the effect that he would rather die than be trapped in the Brazilian prison system. Available in: <<http://folha-da-regiao.jusbrasil.com.br/politica/103769797/ministro-da-justica-diz-que-preferia-morrer-a-ficar-presos-por-anos-no-pais>>. Access in 21 jun. 2013.



in legal doctrine, there's no need for consensus to preserve the fundamental right, because it is seen as asset against the majority.<sup>59</sup>

If the rights should be respected, but, in reality, they are not, what can be done? Then it's open the possibility of exercising the right of resistance. The right to resist institutional violence (which violates the rights to life and to physical and mental integrity of the individuals) can arise as an instrument of praise for the effectiveness of the legal abstract.

But how can the right of resistance be exercised? We should remember that there isn't a short list of legitimate actions. The remedy provided in the Constitution (art. 5, XXXIV) is the right to demand from the Government the defense of the rights against malfeasance and abuses of power. However, given the low effectiveness of formalized procedures for the containment of institutional violence, violating the rules enforcing the rule of oppression and explore alternative avenues of protest are the most common forms (via actions or omissions)<sup>60</sup>. It will depend on the concrete situation experienced. Salo de Carvalho realizes that the criminal execution process has no adequate instrumentality to ensure the rights of prisoners (cause) "[...] raises the right of resistance as a manifestation of legitimate redress for the prisoners" (effect).<sup>61</sup>

The so-called "prison conflictive" (which gave rise to organizations known as PCC - Primeiro Comando da Capital<sup>62</sup>, and CV – Comando Vermelho) is the purpose of exposing to society (hesitant) violations of fundamental rights that occur in that environment. Thus, the riots, which are punishable administratively and directed to the world beyond the prison walls, "[...] happen in place of speech or, in other words, are themselves the possible language of those who never had the possibility to speak".<sup>63</sup>

So, we must defend the legality of those actions (nonviolent)<sup>64</sup> wishing to call attention of the political and legal systems to punish policeman who violate the law

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<sup>59</sup> This idea, originally conceived by Dworkin, has been used in Brazil under the influence of writers such as Jorge Reis Novais. Cf.: NOVAIS, Jorge Reis. *Direitos fundamentais: trunfos contra a maioria*. Coimbra: Coimbra Editora, 2006.

<sup>60</sup> GARGARELLA, Roberto. *El derecho de resistencia en situaciones de carencia extrema*. In: GARGARELLA, Roberto. *El derecho a resistir el derecho*. Buenos Aires: Mino y Dávila, 2005, p. 13-48.

<sup>61</sup> CARVALHO, Salo de. *Pena e garantias*. Rio de Janeiro: Lumen Iuris, 2008, p. viii (Introdução).

<sup>62</sup> It is a paradoxical situation: just as the fear manufactured by the mass media, political actors and market serve to boost the resurgence of the penal system, the CCP uses this fear to disturb the political actors (especially in election season) to review the precarious situation of the prison system. Cf.: <<http://www.usp.br/aun/exibir.php?id=367>>. Access in 21 jun. 2013.

<sup>63</sup> ROLIM, Marcos. *O que dizem os Motins*. Disponível em: <[http://rolim.com.br/2006/index.php?option=com\\_content&task=view&id=203&Itemid=99999999](http://rolim.com.br/2006/index.php?option=com_content&task=view&id=203&Itemid=99999999)>. Acesso em 21 jun. 2013.

<sup>64</sup> Indeed, the violence could mischaracterize the act of resistance to institutional brutality. As the acts of violent prisoners are often to be collective (yes, the young middle classes are also violent group), it is



through the use of institutional violence (in several ways: torture, beatings, negligence, trivializing the situation of the prisoners, murders). The State has not the right to choose who will be punished (legality); likewise, if it does not fulfill its duty to provide rights, it may not require the inmate blind obedience to the crime control structure. The retributividade is not the main intent of the exercise of the right of resistance (then, we'd be doing the same thing! The officers attackers become "thugs", equally without rights). The claim for ensuring the fundamental rights is the main issue in collation. How can require 'good behavior' in a "jungle brutality"?

Finally, this study aimed to expose, analytically and critically, some issues that address the topic of crime control. As seen, there are many contradictions in our reality: The state agents do not act illegally without approval, the population, which claims to be inserted in a constitutional democracy, nod with institutional violence. However, we should adopt pessimistic attitude regarding the low-permeability of ethical discourses in defense of human rights of inmates. Struggles for rights only are won with insistence.<sup>65</sup> Human rights encompass, in Theodor Meron's view, not only a body of rights, but mechanisms and procedures to ensure these rights.<sup>66</sup>

## CONCLUSIONS

Although the Federal Constitution (the document that outlines the design of society<sup>67</sup>) bring in its text an extensive list of fundamental rights, they are problems to actualize them. Judicial activism indicates that the insufficient public funds cannot guarantee the minimum existential suggested and that there should be a more accurate reflection of the role of the state to the welfare of its citizens. In the area of custodial institutions, the prevails the tending situation to putrefaction of still-alive bodies (not only in the physical but mental, social and self-referential).

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natural that occur a few isolated acts. For alignment with the prevailing theory presented (Hannah Arendt, Norberto Bobbio and John Rawls), it is understood that the exercise of the right of resistance does not claim to be a lesson in chivalry, just that the use of force is the exception (or that is, if it is unnecessary, must not be used), rather moderate and mild consequences.

<sup>65</sup>As Luigi Ferrajoli says, the positive dimension of fundamental rights only came to be achieved as a result of struggles and revolutions in favor of a conquest against oppression and discrimination regarded in an environment of social injustice that took almost as natural. In this step, Ferrajoli argues that fundamental rights are also designed to guarantee the rights of the weakest. FERRAJOLI, Luigi. *Derechos y garantías: la ley del más débil*. Tradução de Perfecto Andrés Ibáñez e Andrea Greppi, Madri: Trotta, 2004).

<sup>66</sup> MERON, Theodor. *International Law in the age of human rights. General Course on Public International Law*. Hague Academy of International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2004, p. 21.

<sup>67</sup> LORENZETTI, Ricardo Luís. *Fundamentos de Direito Privado*. São Paulo: Revista dos Tribunais, 1998, p. 253.



The people and the government often seem to do not mind the institutional violence, but rather consider it necessary to strengthen the mechanisms of domination and, paradoxically, usufruct rights (eg, it is believed in ensuring security through relentless surveillance of the lower classes).

The fear and the various changes which have taken place in the crime control system show the abandonment of the commitment to building solutions for diffuse social development. The speech in defense of the rights of convicts is ignored (put in the background) by most of society; focuses on retributive function (paying an evil with another evil)<sup>68</sup> of the penal systems.

The science of Law had advances in constructing rational theories towards universal rights, but is limited in practice when resources are insufficient to fulfill demands, or when it's not given importance to promote certain rights to part of the population. There is a disbelief in the inmate's "recovery", therefore, it's concluded that the dispensability of fulfillment of their demands. However, such a (weak) view should not prevail to justify the disrespect of other's dignity. Perhaps, the ethics of otherness proposed by Emmanuel Levinas can fill that void<sup>69</sup>; Levinas preaches an exercise of responsibility between "self" and "other," so that the "other" is me and "I" does not exist without the other<sup>70</sup> (act of faith). This appeal is not misplaced, once God wanted man who loved one another.<sup>7172</sup>

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<sup>68</sup>Without due regard to the proportionality of the sentence.

<sup>69</sup>Zygmunt Bauman observes that "justice is, in many respects, unfaithful to their ethical origins, unable to preserve their heritage in the entire inner wealth - but it cannot forget its origins while being itself righteousness." Thus, the ethical demands, the analysis of Bauman on the Levinas's thought, a certain self-restraint, and human rights appeal to humanity that the State did not consummate. (BAUMAN, Zygmunt. *O mal-estar da pós-modernidade*. Tradução de Mauri Gama, Cláudia Martinelli Gama; revisão técnica de Luís Carlos Fridman. Rio de Janeiro: Jorge Zahar Ed., 1998, p. 66-67). That's why we spoke that the "void" is the existing gap between what is meant and what is ideal (and reach) in concrete.

<sup>70</sup> LEVINAS, Emmanuel. *De Deus que vem a Idéia*. Tradução de Pergentino Stefano Pivatto. Petrópolis, Rio de Janeiro: Vozes, 2002.

<sup>71</sup>"You have heard what was said, 'Love your neighbor and hate your enemy' But I say. Love your enemies and pray for those who persecute you." (Matthew, 5-43-44) 'Love' is an act of faith (trust) in the 'other'.

<sup>72</sup>Zygmunt Bauman talks about the difficulty of loving your neighbor: why should I do that? What will benefit me? This question is common today. After all, such a requirement may seem somewhat unusual, but Bauman explains that the rule "love your neighbor", precisely because it is a low probability of being obeyed, will tend to be reaffirmed with great obstinacy. Bauman believes, rightly, that loving others may require a leap (act) of faith, but the result is the founding act of humanity. "It is also the decisive passage of the survival instinct for morality." Understood in this way, it is concluded that "[...] the survival of a human being becomes humanity's survival in the human being" (BAUMAN, Zygmunt. *Amor líquido*. Tradução de Carlos Alberto Medeiros. Rio de Janeiro: Jorge Zahar Ed., 2004, p. 46). This is an interesting Bauman's view of the discussed topic, see: mulling this question of morality opposed to the instinct of survival, it can be said that the control policies are focused on contemporary tort punitive function (characteristic of punitive state) by a disbelief in humanity (crisis of morality) and consequent



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prioritization of survival - humans are imbued with the XXI century (head to toe) of a worthlessness, distrust, whose cultural manifestation is fear. From what we can see, it seems that this model of punitive state is not working: the criminal justice system has been exacerbated, but the prisons are overcrowded (but not of the deterrent effect that chases) and the feeling of insecurity increases only (catalyzed by the media mass, of course).