

THE CRIMINAL MINIMALISM OF RAÚL ZAFFARONI AND A DIALOGUE WITH PHILOSOPHICAL HERMENEUTICS AS WAYS FOR A RECONSTRUCTION OF THE BRAZILIAN CRIMINAL JUSTICE SYSTEM

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ABSTRACT

The proposal of this paper is to clarify the main aspects of Raúl Zaffaroni's thought about his theoretical model of the criminal justice system, which fits a criminal minimalism. In the same way, it's to demonstrate a close study between the proposal of Zaffaroni and the current Brazilian constitutionalism, particularly under the perspective on hermeneutics. In general, it uses descriptive and analytical methods with statistical data to describe the reality of the criminal policy in Brazil. Moreover, it is necessary to keep in mind the phenomenology present in the final stages of this paper. The most important aspects of the author's idea are the realism of marginalism and the colonialism/neocolonialism. As a result of these two elements there is a possibility of achieving the rescue of the facticity and the history of Latin America's reality. This aspect converges with the proposal of hermeneutics with existential phenomenology, that is to say, it has as a base the philosophy of existential analysis or fundamental ontology. Therefore, it is concluded that the use of hermeneutics to understand and interpret the constitutional text is an appropriate way to correct the current paradigm shift, as well as reconstructing the criminal justice system properly.

Keywords: colonialismo; criminology; hermeneutic; minimalism; phenomenology.

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1. INITIAL CONSIDERATIONS

In the field of contemporary criminological study, at least three epistemological movements stand out that intend, through their respective argumentative frameworks, to develop and sustain a particular punitive model that the state entity must implement and act; being, therefore, the most adequate to the economic and social reality with regard to the capacity to resolve and reduce criminal conflicts of the specific social framework. In other words, there is, on the one hand, the maximalist penal model, sustaining the demand for a strong criminal law, intolerant of any minimally marginal conduct, having as reference still modern ideals. On the other hand, penal abolitionism, which in reality cannot be considered a “model” of a punitive system since it strives for its extinction, and the encouragement of administrative and inter-individual alternatives for conflict resolution. Finally, the minimal punitive model for the construction and performance of the penal system. The focus of this article is to examine Raúl Zaffaroni's minimalist thought, making a parallel with the philosophical hermeneutics of phenomenological premises.

It starts, therefore, from the assumption that both penal maximalism, specifically zero tolerance policies; as far as penal abolitionism, precisely that of Hulsman, are not adequate proposals and paths for the structuring – or, in the case of the latter, disarticulation – of an ideal penal system – not in the utopian or purely perfect sense – to the Brazilian reality. It is in this somewhat vague scope that the minimalist models gained momentum and developed from the second half of the 20th century onwards, in harmony with the growing debates around human rights and the need, after the events of the 2nd World War, of a rescue and a global re-reading of its structures, in order to strengthen its links in the internal legal systems of the countries, as well as the development of public and private international agents for the realization, from different dynamics, of these rights as an adequate guide to all humanity.

Penal minimalism presents authors who constitute it in different ways. The purpose of this article is not to unravel this variety of epistemological paradigms that, although interesting, would extend the work too much, distancing us from the intended telos which, in short, is the search for a theoretical penal model that allows the construction of a punitive system adequate to our socio-political and, inevitably, constitutional reality. It can be said, therefore, that the theoretical framework for this undertaking and, consequently, for the approach to minimalism,

will be Raúl Zaffaroni, since, as will be seen later, he seeks to develop a specific theory for the Latin American reality. .

In any case, it is worth approaching briefly, to put on screen their peculiarities, some authors and the starting points of their constructions to penal minimalism. Among them is Alessandro Baratta who in his book *Criminologia Crítica e Crítica do Direito Penal*, precisely in chapter XV, develops the Alternative Criminal Policy³, a proposal that aims at a socio-political, institutional reform that, in short, is focused on the reality of subaltern classes – vulnerable – alleviating the negative pressures of the punitive system on them. Some central aspects are: a materialist analysis of the production system; develop efficient mechanisms to fight economic crime; “contraction”, reduction, streamlining of the penal system, such as the decriminalization of certain conducts; replacement of criminal sanctions for less violent forms of stigmatization; reform and extinction of the prison-institution as it is; to develop an “alternative consciousness” based on an adaptation of public opinion and ideological processes, seeking to reverse the hegemonic relationship between social classes (BARATTA, 2011, p. 201).

Another author who makes vast contributions to criminology and other areas of knowledge is Luigi Ferrajoli, who in his book *Direito e Razão: A Teoria do Garantismo Penal*, develops his thinking and the structures of his minimalist penal model, specifically in the fifth part of this work. It is important to emphasize that this author, in the construction of his theoretical framework, has a strong multidisciplinary character, working often from a political philosophy, a phenomenology, to a more proper dogmatics of law. Ferrajoli's Minimalism Parts of the Guaranty Theory⁴ which, in fact, can and should be used to work the law as a whole and, consequently, the criminal. It is a theory extremely linked to the notions of fundamental rights - dealing with liberal or negative guarantees and, on the other hand, social or positive guarantees

³ Baratta makes an important distinction, which allows him to make progress in his proposal, between penal policy as the “scope of exercise of the State's punitive function”; and criminal policy with the character of “social and institutional transformation”, in addition to being just a punitive instrument, it is intended that these policies act not, or only and mainly, on crime, deviance, negative behaviors, but on structural problems of the production system and state institutions as a whole, therefore, has a reformist and, in a certain sense, materialist character in affirming the transformation based on the “overcoming of the social relations of capitalist production”. (BARATTA, 2011, p. 201).

⁴ Guaranty will refer to three distinct but related concepts/meanings: a) the idea of a normative model of law, falling strictly on the normative body and its level of guarantee, of fundamental principles and instruments for its achievement; b) a legal theory or theory of divergence, separating “being” from “ought to be”, between the constitutional text and its practical execution, that is, the degree of effectiveness; c) finally, a political philosophy, separating the external (ethical-political) and internal (legal) point of view, its necessary analysis and the problems arising from a crisis between these poles. (FERRAJOLI, 2002. p. 684/686).

-, paradigms of the modern State, that is, the Liberal, the Social and the Democratic, as well as democratic systems – such as formal democracy and substantial democracy (FERRAJOLI, 2002, p. 691/694). In short, it can be said to be a broader path of analysis and criticism, from which minimalism would emerge as an option to be implemented to remedy the crisis of the punitive system, the antinomies it produces, the inefficiency of the Constitution of the Republic. , its guaranteeing principles and the distance between the system and reality.

These are just a few authors who work on the theme and, despite building different and their own paths, they are generally harmonized, as well as Zaffaroni, as will be seen in the next items. All point to a delegitimization of the punitive system, structural problems that cannot be remedied with a simple reform, that is, a new penal code or penal procedure. It is necessary to build a new system, completely reorganized and capable of putting constitutional provisions into practice. In this sense, Zaffaroni will allow us to think of a model suited to our social-political reality.

2. PENAL MAXIMALISM AND THE DOCTRINE OF ZERO TOLERANCE

The rise of penal maximalism occurs in modernity, therefore the emergence of certain elements of this new bourgeois society, which develops in the transition between the Middle Ages and the new modern paradigm, which took place at the beginning of the 18th century and ran through the entire 19th century (FOUCAULT, 2014a, p. 12), were responsible for the social outcry to strong criminal law. And these will be the elements covered in this item. In short, we sought to adapt the punitive model to the new rationalist, libertarian, egalitarian and fraternal discourse that this socio-political context required, that is, it was necessary to seek a new punitive economy capable of harmonically dialoguing with modern assumptions and ideals.

In fact, the transition from a crime of blood to a crime of fraud is part of an entire complex mechanism, which includes the development of production, the increase in wealth, a greater legal and moral valuation of property relations, more surveillance methods. stricter, tighter policing of the population, better-adjusted techniques of discovery, capture, information. (FOUCAULT, 2014a, p. 98)

The first element to be worked on is the development of the bourgeois/capitalist society, responsible for fostering industrialization and, consequently, the valuation of property, having as a point of discussion the need for labor that, now, is no longer composed by servants, but which must still be servile for their upkeep. As will be seen, this entire social arrangement,

ultimately, flows into a complex society and also into a risk society (BECK, 2010, p. 18), which affects the dynamics of the punitive system, as well as the form of application of punishment. However, it is a gradual process, which begins in the mid-eighteenth century, especially with the advent of the Industrial Revolution (CIRINO, 2006, p. 66).

It so happens that, with the rise of a new dominant class, the bourgeois, more precisely the merchants and industrialists, the legal-criminal discourse was transformed in order to reproduce this status quo, maintaining the newly built economic and political hegemony in the hands of this class. For this, the dynamics of the punitive system will act selectively (ZAFFARONI, 2014, p. 43). It is noteworthy that this new social arrangement will give rise to population concentration in cities, causing urbanization, and the consequent emergence of a growing periphery and social marginalization, thus producing undesirables (ZAFFARONI, 2014, p. 44), which will be the clientele preferential action of the punitive power. It is also important to consider that the Industrial Revolution changes the very dynamics of the means of production, due to the introduction of machines, which narrows the relationship between production/labor (CIRINO, 2006, p. 67).

The aforementioned aspects are important because they are directly linked to the new punitive economy that the Modern State will exercise, adding to this the very search for legal-criminal security that will be discussed further on. This new economic arrangement of social relations of capitalist production will marginalize certain social groups, those subjects being excluded from the labor market, defined as a surplus labor force (CIRINO, 2012, p. 18). In this there is a new way of interpreting man, which will become an instrument for production, a “man-machine”, a materialist reduction of the soul, focused on the docility and usefulness of bodies (FOUCAULT, 2014a, p. 135).

This “industrial reserve army” (CIRINO, 2006, p. 66) will be one of the important variables in criminality. It is assumed that with the increase in unemployment, there is also the increase in crime and, therefore, in the rate of incarceration and punishment. However, there is a third and intermediate variable which is criminality itself responsible for making this dynamic more complex and sustaining the criticism of the new punitive model. It is observed that, in fact, the rate of punishment and incarceration can increase even while reducing crime and vice versa, precisely because the labor market directly influences this system (CIRINO, 2006, p. 70/71).

It is noticed that the new form of punishment, incarceration, is directly linked to the production of labor, with the objective of dociling bodies (FOUCAULT, 2014a, p. 28). But in addition, having as a principle a dosimetry of the time of deprivation of freedom of the delinquent, prison directly affects the insertion and presence of the subject in the labor market itself (CIRINO, 2006, p. 67). In other words, the punitive character of this new economy of power affects not only freedom, but also the subject's property and body. There is, in short, the replacement of crime - as an object of judgment - for man, in order to carry out social control through a microphysical, capillary network of power.

The entire process exposed above will lead to the emergence, or creation, of "Undesirables" or also enemies of society, which is the second element that corroborates the demand for a strong criminal law. Starting from the contractualist theory - from a convergence of individual wills to the achievement of a rational instrument capable of sustaining a Civil State, that is, a contract - every subject who commits an act contrary to the well-being of this society, and who paradoxically composes it, must be treated as an enemy and punished. In fact, in this way, this subject becomes a common traitor that has the whole society against him, legitimizing the action of a State that must punish. "The right to punish has shifted from the sovereign's revenge to the defense of society" (FOUCAULT, 2014a, p. 110).

As mentioned above, in this bourgeois/capitalist society of increasing urbanization, we see the emergence of marginal or peripheral regions, where it is possible to find socially segregated groups, therefore, with difficulties in entering the means of production, consequently with less access to capital and, in this way, to an entire consumer society that is beginning to form. In short, there is a relationship between crime-urbanization-demographic density. It also happens that all this urban concentration increases the number of marginal subjects and the difficulty of social control. This will be the main stage for the creation of society's "enemies" and also for the exploitation of punitive power, which ultimately operates as an instrument of social verticalization (ZAFFARONI, 2014, p. 46).

It is worth noting an important change in the dynamics of power that began to emerge from the 18th century onwards. While in the Middle Ages one could affirm the existence of a power over the people – or social body – in modernity there is a power in the people (FOUCAULT, 2014b, p. 231). This change is of fundamental importance, as it will determine the new forms of the State to exercise and control it, which, in the final analysis, will always tend towards sophistication, to the subtlety of processes. And one of the ways to do it was by

creating the idea of the average man: constituting the people as a moral subject, establishing and reaffirming the Manichean notion of right and wrong, of the good man and the delinquent. This dichotomous morality will be the support for countless forms of social control, including, and perhaps mainly, by criminal law.

It was absolutely necessary to constitute the people as a moral subject, therefore separating them from delinquency, therefore sharply separating the group of delinquents, showing them as dangerous not only for the rich but also for the poor, showing them loaded with all addictions and responsible for the greatest dangers (FOUCAULT, 2014b, p. 218).

The undesirables are all those who are on the margins of this new modern, capitalist society. They may be directly linked to the aspect of capital, such as the poor, vagabonds, homeless people, the unemployed; or those who hold some value considered negative for society, such as blacks, mestizos, ethnically at odds with the ideal of that community, the foreigner, the stranger; or, also, etiologically determined, like the insane, incapable. In fact, all these aspects are closely related, there is, therefore, a biopsychosocial stigmatization that builds the enemies of society's well-being (ZAFFARONI, 2014, 21/25). It so happens that the image of poverty is united with a (dis)value and becomes a kind of social disease that must be, somehow, extirpated.

The system of values expressed in it (Criminal Model) reflects, predominantly, the moral universe of a bourgeois-individualist culture, giving the maximum to the protection of private patrimony and orienting itself (...) to achieve forms of deviation typical of socially weaker and marginalized groups (BARATTA, 2011, p. 176).

In a general context, the creation of enemies of the State and society has always been a useful instrument to support a parallel punitive power, of a Second Code (BARATTA, 2011, p. 88), that is, an underground penal model that legitimizes certain arbitrary, discretionary policies and actions. Some examples stand out, such as the case of Nazi anti-Semitism during World War II (ZAFFARONI, 2014, p. 54). Another discourse that has been shaping and solidifying, over the last two decades, a new undesirable is terrorism. Having as an enemy this new global fact, several States have been taking measures to combat it, legitimizing “preventive wars”, authoritarian legislation that violates human rights (ZAFFARONI, 2014, p. 66). The modern ideal of security, in this risk society, as Beck configures (BECK, 2010, p. 17), becomes the legitimizing factor for the use and abuse of power.

For these abstract constructions of enemies to be efficient, they need to really generate a sense of insecurity in society, which creates a feeling of fear in individuals to the point of freely giving up their freedoms, their personal information, their dignity, yearning, thus, for an expressive Criminal Law, in which the State can have greater social control. For this, unlike the Middle Ages, with the ordeals, today there is the publicity of risk, that is, the media, in a broad sense, foments fear when it feeds the image of the enemy. It is important to emphasize the modern concept of risk, which presupposes a possibility of evaluating future misfortunes, that is, this notion occurs in an attempt to realize the modern ideal of mastery of certainties, seeking to avoid and/or circumvent unforeseen uncertainties (GIDDENS, 2003, p. 33).

In this sense, this idea of risk arises only with the rise of modern, capitalist/bourgeois society, as it is one of those responsible for the dynamics of capital, precisely because the economic system seeks control over the future, both from the market and, inevitably, of civilization. It is a concept that arises from modern ideals of control over nature, security, predictability/certainty, of a “good life” in general, based on scientific rationality. Risk is the inevitable element present in the world, whether natural or social, but which can and is circumvented through other mechanisms such as insurance (GIDDENS, 2003, p. 35) and, precisely with regard to criminality, the system penal, which has its punitive power directed at the image of the enemy who represents a risk to the “good life”.

In fact, risk is a modern paradox, because despite being this inevitable element of the world, therefore undesirable according to modern ideals, it is simultaneously responsible for several essential dynamics for the reproduction and maintenance of this industrial/bourgeois society. “In fact, capitalism is unthinkable and impractical without it (risk)” (GIDDENS, 2003, p. 36). In this way, criminality is treated, based on a second code, not just as a phenomenon that must be extirpated, or reduced to the maximum, from society. But also, and perhaps mainly, as a factor of social control and capital management, that is, crime is necessary. The next item will address the maximalist penal model, which intends to achieve social security based on a maximum, expressive punitive power.

Sustained by this maximalist discourse, as well as by the alleged scientism of the North American theory of Broken Windows, the Zero Tolerance program is legitimized and socially accepted. First, the Broken Windows theory, published in 1982, argues that the slightest infraction, when tolerated, leads to a feeling of anomie of the State and, in this way, encourages

other subjects to commit increasingly significant crimes. Broken Windows will produce a high state police pairing to avoid minimal social disorder.

The Zero Tolerance policy, therefore, presupposes a hypertrophied Penal System, a quick, violent response and all moral conduct that escapes the pattern of identity constituted by the bourgeois class and an industrial/capitalist society - nothing is tolerated, so tolerance zero. The justification for this exasperation will be social defense through the affirmation and reaffirmation of state power in sectors where there are distinct social values. It is perceived that this dynamics of the penal system combined with the form of punishment of prison institutions will be responsible for stigmatizing and segregating the undesirables, the probable threat to the social good (BAUMAN, 1999, p. 84).

In summary, this zero tolerance policy demonstrates the following syllogism: All undesirable conduct is punished, preventing them from progressing to crimes with greater offensive potential; for this to be done, more punishment needs to be done; thus, to reduce the crime rate it is necessary to increase the performance of the penal system. It is, therefore, a discourse that has a certain meaning when we ignore the social minutiae, especially when observing the results of its implementation in the North American city of New York (BELLI, 2004, p. 73). In this sense, the State gains great legitimacy for surveillance and repression (BELLI, 2004, p. 79/82).

This policy gained popularity in several countries, including Brazil which, from the 1990s onwards, sought to implement it, specifically the governor of the Federal District, Joaquim Roriz, in January 1999, applied the Zero Tolerance and, for its execution, it immediately hired 800 civil police officers, as a way of responding to the wave of crimes faced (WACQUANT, 2001, p. 20). The speech was widely used by politicians and the media, which is currently characterized as sensationalist, but which is still popular among the masses (BELLI, 2004, p. 61). The program was received and reproduced as a miraculous solution to social security problems, even more so because society, as mentioned earlier when addressing the risk society, lives under a feeling of insecurity and fear. Politicians saw in the speech a fertile field for electoral marketing, easy to convince the public, moreover, an opportunity to pair the State, make it more active, stronger, capable of maintaining social verticalization.

Politicians speak to the masses, exploit the growing fear and sense of terror caused by violent crime and its ad nauseam spread through the media. Public safety technicians, enthusiastic about the New York experience, tend to speak to a more restricted audience. They seek to reach out to legal operators, ruling elites, businesspeople and the middle classes, who, despite being less victimized by crime than the underprivileged classes that inhabit the peripheries and favelas, are equally terrified and apparently willing to support policies more assertive. (BELLI, 2004, p. 63)

From the implementation of this type of policy, the penal system starts to work in a selective way, it is called the Labeling Approach, also known as the theory of labeling or social labeling (BARATTA, 2011, p. 85). In other words, he will work with modern assumptions, such as the Manichean dichotomy, the etiological existence of the criminal, the preferential clientele of the sanctioning system. In this sense, it is easy to reproduce prejudiced, individualistic discourses of values of a certain class. Today it is possible to glimpse the result of its application in general in the United States when talking about Race Profiling (BELLI, 2004, p. 75), which is the fact that the US police are mostly racist, a stigmatization supported by the etiological ideology -racial. Contrary to what the theory delivers, its praxis encourages social conflict, especially when it comes to distinct communities, resulting in segregationist relations, as well as gradually building a negative image of the police force and the institutions of the penal system (WACQUANT, 2001, p. 24).

Concluding this first point, the Modern State, in this specific case the Penal System, needed to change the punitive dynamics to harmonize them with the new arrangement of power, which was no longer about the people, but about the people. Thus, social control became more sophisticated, subtle and useful, influenced by the composition of the new industrial/bourgeois society, responsible for urban agglomeration; for the origin of both the right to property and the crimes of this order; the scientific rationality that systematized all modern behavior and ideal, supported by the Enlightenment movement; ideals such as predictability, security, control of nature, the search for absolute truth, the dichotomy between good and evil, right and wrong; from this Manichaeism, the creation of undesirables, or enemies of society, to those who flee from the identity patterns of the average man. The Penal System used these wishes to strengthen itself, and incarceration as an industry of control and production of delinquency.

3. CRISIS OF LEGITIMACY AND THE BRAZIL OF TODAY

It will place on critical ground certain modern notions that founded a whole dynamic of action by the State power and socioeconomic organization. The first step that will be taken is to highlight the factual inexistence of the notion of the common or average man, which in short would be an ideal model of being of men, one that should be followed and achieved by everyone, being considered, therefore, as the good man . The average man does not exist, in fact his creation is a mere abstraction that works very well as a way to legitimize the action of the punitive system, in other words, it is a support point, a reference to be followed (HULSMAN, 1993, p. 55/56), that is, a guideline to be followed by criminal institutions that provides a specific framework for the population that will mostly be affected by it, that is, a preferential clientele.

The ideal of the middle man - being constituted from values selected by a ruling class, as the values to be reproduced in the new order that is proposed, an order linked to the promotion of the subject of modernity, under the aegis of the modern state, destined to support, in this sense and scope of discussion, an industrial/bourgeois society, therefore economically privileged groups – has two very relevant effects: a) as a reference point, it becomes a model to be sought by everyone. Thus, it becomes a parameter for the legal-criminal discourse to operate in a planning manner, that is, from a legal text, it will constitute a "should be" for the being-who-is-not-yet-is, working in the logic of a come-to-be possible of a being that, in fact, will never be (ZAFFARONI, 2017, p. 19); b) this dynamic of social adequacy will be glimpsed in the colonization of globally marginalized countries. In short, the constituent values of the average man will be reproduced, generating the loss of each nation's own cultural identity, the so-called technoscientific colonialism or neocolonialism (ZAFFARONI, 2017, p. 76).

It is a phenomenon derived from planetary power or grafted onto its network in a marginal position. The knowledge of the central ideological factories, when transnationalized, becomes dysfunctional for the exercise of the power of marginal penal systems, leaving theoretical disinformation as the only way for their agencies to hide their power. It is not in vain, therefore, that the bodies of the Latin American penal system favor the reiteration (...) of the more traditional criminal-judicial discourse (...) of the central discourses, in function of a "scientific" chauvinism. (ZAFFARONI, 2017, p. 36)

In this sense, the notion of the middle man, interacting and sustaining the legal-criminal discourse, constituting the central modern values of a given society, will antagonize the subjects between those who are what-one-should-be and those who are not yet they are. These last ones will be touched by the penal meshes so that they become what-they-are-not. However, incarceration - in the way it is constituted - will not efficiently provide this planning of the subject, on the contrary, it will sentence him to never be what-one-should and, in this way, will be inserted again in the penal meshes, the so-called secondary criminalization. This dynamic of the power to punish gives the system the character of perversity in its etymological sense (ZAFFARONI, 2017, p. 19).

One of the effects of the application of this perverse legal-criminal discourse will be the social split between the good man and the delinquent man, that is, the modern black and white world, Manichaeism. This problem can be found in the central countries of the planetary system, such as the Race Profiling phenomenon. However, its impacts are much greater in marginal countries due to the distance between the values that shape their culture, way of life, language, ethnicity and the values that constitute the common man - which is reproduced by the system as a "should-be" - be superior to those found in the central countries themselves, to the subjects and intranational values of these States. In this way, the punitive system will work in a logic of extinction of the enemy, of that individual who is outside the state community (ZAFFARONI, 2014, p. 21).

In our peripheral and marginal region, this in the sense of values to be embraced, in Latin America, there is a history of violence and socio-political instabilities. Zaffaroni will defend the idea that this region "is, in substance, the result of a formidable interaction process of planetary marginalization, marked by syncretism" (ZAFFARONI, 2017, p. 168). In other words, it can be said that Latin American countries were the stage of a long process of colonization and migration, responsible for fostering an extensive cultural multiplicity, aggravating the dynamics of planning the legal-criminal discourse. In short, there is a confusion that situates the crime as a war situation and the offender as an opponent, as an enemy of the State and Society, a deep-rooted notion of hostility (ZAFFARONI, 2017, p. 161).

This will be the core of the delegitimation of the perverse legal-criminal discourse, it is also the focus of criticism in the way the maximalist punitive system acts, as the main solution to criminality is the hypertrophy of this power, its military bodies, its institutions and of the legal texts. As a consequence, what can be seen are discretionary penalties, which are out of

harmony with the post-modern humanist context; a selective dynamic, which stigmatizes when it goes through the penal networks and then segregates, marginalizes; that it is not efficient in guaranteeing security, including legal security; and that, instead of preserving the subject's freedom, it represses it; instead of guaranteeing life, it kills; instead of re-educating the delinquent, it reproduces it. This is the scenario of marginalized countries, including Brazil.

The point now is to elucidate the specifically Brazilian situation with regard to criminality and incarceration. For this, the situation report No. 4, of June 2018, developed by the State, focusing on the economic costs of crime in Brazil, will be used as a data source. It is noteworthy that due to the hypertrophy of the Zero Tolerance system, which requires the maximalist penal model, expenses to maintain it are also high; but in addition, as it is a dynamic that does not efficiently solve the problem of crime, it is constantly being fed, as it needs to grow to fight, this is another problematic and fragile point of this legal-criminal discourse.

As for the issue of criminality, based on homicide rates, which is in line with the position established by Zaffaroni in supporting the delegitimation by the facts themselves, the fact of death is undeniable, "no one would be so foolish as to deny that the dead are dead" (ZAFFARONI, 2017, p. 38/39). Brazil, which has 3% of the global population, concentrates around 14% of global homicides. It is one of the highest rates, alongside countries like South Africa, Rwanda, Democratic Republic of Congo, which are also part of the marginalized group of the global system. Between 1996 and 2003 there was an increase from 35 thousand to 48 thousand homicides per year; between 2003 and 2007, there was a drop from 48 thousand to 44 thousand; from 2008 to 2015, there were 54 thousand deaths per year.

With regard to the economic costs of crime, it will be proven that greater investments in the punitive machine do not mean an increase in security or a reduction in crime. It should be noted that, of course, spending on punitive power tends to generate negative revenues, as it is a system that, in the Brazilian reality, does not produce capital/profit, and so it should be, as this is not the objective of punishment and incarceration. The problem we want to bring to light is the administration of public funds, which the maximalist penal model requires an ever-increasing share. In the period from 1996 to 2015 there was a jump in public security spending, from 32 billion reais to 90 billion a year, at the Union level. The same occurs with private security, which went from 20 billion reais to 60 billion.

As for incarceration, the indices are not positive at all. In the period from 1995 to 2015 there was an increase of 318.15% in the number of prisoners. According to INFOPEN 2016, the Brazilian prison population is 726,712 inmates, on average (INFOPEN, 2016, p. 08/09). Translating this rate to the cost of this institution, from 6 billion reais it jumped to 16 billion. Despite the system holding more and more, it is not possible to see a reality with a reduction in crimes, on the contrary, it is clear that the entire system is in an ever deeper crisis. Another problem generated by incarceration and mainly by the increase in the number of prisoners is that these subjects, under penalty of restrictive freedom, are outside society and the means of production themselves, which ultimately translates into a reduction in the country's overall productive capacity, that is, in addition to the system itself not producing capital, it also reduces production levels and capacities.

Overall, the cost of crime has risen by about 4.5% per year. Nevertheless, the imprisonment rate also increased, from 2000 to 2016, an increase of 157% (INFOPEN, 2016, p. 12), a fact that cannot be denied and raises hypotheses: a) the penal system is failing to reduce and inhibition of crimes; b) or is punishing more and in a discretionary way. In short, both possibilities are true and simultaneous. Finally, it is possible to visualize the selectivity of punitive power when we are faced with a prison population composed of 64% blacks (INFOPEN, 2016, p. 32). Furthermore, regarding the education of the prison population and, consequently, of the preferential clientele of the punitive power, 51% do not have complete primary education and only 9% completed secondary education (INFOPEN, 2016, p. 33).

The maximalist penal model has a certain logic in its way of acting, that is, it apparently works effectively in the fight against criminality. However, to be able to work in the dynamics of Zero Tolerance, it is necessary to identify behaviors and groups that approach what the criminal is, a preferential clientele antagonistic to that average man and his values. Thus, the system that is born and acts is selective, but, in addition, being quick and intolerant it becomes discretionary, not harmonizing with the rights that emerge after the second half of the 20th century and neoconstitutionalism. In fact, this dynamic tends to aggravate conflicts, as it is possible to demonstrate with the aforementioned data, crime rises, imprisonment also increases, consequently the prison population, as well as the economic costs of maintaining the entire system. The hypertrophy of this power makes it less effective, incarceration will fail in its apparent objective, which is to re-educate the delinquent and reinsert him into society. Although the speech has a certain level of sophistication, in practice it is problematic.

4. HULSMAN'S THEORY AND ITS PROBLEMS FOR THE BRAZILIAN CONTEXT

In a way, Abolitionism works opposite to Broken Windows theory, Zero Tolerance policies and maximalist punitive models. The abolitionism proposed in the book headed by Louk Hulsman called “Lost Penalties: The Penal System in Question” (HULSMAN, 1993, p. 101) ultimately proposes the end of the penal system. It should be noted that punitive and coercive powers will still remain as possibilities of the State, in force under society, however the bases of the state control model, as they are currently organized and active, would be completely reinvented. The idea is to implement new forms of punishment - outside the criminal scope, not characterizing them as such, in their current sense - healthier in the sense of being less harmful to the subject and the social body, but mainly more humanized, sophisticated and, for the author, potentially more effective. “It ceases to apply the punitive model, which has become ineffective, to try the therapeutic or conciliatory model” (HULSMAN, 1993, p. 101).

Hulsman will criticize a series of modern ideals, some exposed above, that shape the penal models conventionally considered valid as: the Manichean presuppositions; the ideal of the middle man; the relativity of the concept of crime, as well as its shallow construction used by criminal law, “there is nothing in the nature of the fact, in its intrinsic nature, that allows us to recognize whether it is a crime or not” (HULSMAN, 1993, p. 63), fundamental theoretical elaboration to structure and legitimize the idea of decriminalization, the mainstay of abolitionism. The author's great innovation, therefore, his important contribution to rethinking the functioning of such a system, from a perspective of solidarity, is to invert the interest of penal sanction – in fact, punishment by another administrative sphere – from the State to the victim (ZAFFARONI, 2017, p. 99).

To support his abolitionist theory, the idea of a therapeutic and conciliatory punishment, Hulsman inverts the pole of legitimacy and the interest of punishment. The subject who had violated his legal asset protected by the State has, or must, in this case, be the real one interested in the punishment and act directly on it. In a way, legitimacy leaves the scope of the State and the modern construction of the social body, which sustains the former, and migrates to the subject(s) who were expressly affected and injured by the author's conduct. “the penal system steals the conflict from the people directly involved in it.” (HULSMAN, 1993, p. 82). According to this theory, the penalty contains two elements: a) the power relationship between the one who punishes (State) and the one who will be punished, the first being recognized by the victim as legitimate for such action; b) elements of penance and suffering imposed by the

application of punishment, but which, in practice, as a rule, do not add anything to the reality of the victim.

Another important point, in view of the abolition of the system in question, but not only in this scenario, is the defense of the elimination of vocabulary resulting from the concept of "crime", that is, it is necessary to extirpate words such as "criminal", "crime". The idea behind this is the stigmatizing weight that such terminologies have, thus affecting the image of the perpetrator of the conduct that, now, can no longer be called criminal. Hulsman gives interesting examples such as the term "servile" for "housemaid", "concubine" for "partner", the effect is to make the necessary label that implies the nomenclature and categorization of things less pejorative (BACILA, 2015, p. 135).

For Hulsman's abolitionism, it is also essential to break with the established understanding of the "gravity" of conduct. That the penal system should act in all criminal conduct, but mainly in serious cases and in due proportion, that is, the idea of a certain criminal progression. In the abolitionist case, this idea remains somewhat open, as well as the reaction on the acts, since the person entitled to exercise punitive power is the interested party, the real person affected by the conduct. Thus, it will analyze and subsequently measure the notion of "gravity" and "reaction" (BARATTA, 2011, p. 93). In fact, from the rupture of the myth of egalitarian Criminal Law, it is clear that really the notion of harmfulness of conduct does not determine the system's reaction, "The status of criminal is independent of the social harmfulness of the actions and the seriousness of the infractions" (BARATTA, 2011, p. 162).

It is clear, therefore, that the crucial point of abolitionist thinking is in "returning to the people (directly) involved the domain over their conflicts" (HULSMAN, 1993, p. 102). The necessary relationship between the author and the victim is defended, a face-to-face meeting that enables a dialogue that, in the author's view, leads to a clarification of the facts, reasons, damages, providing a kind of mutual agreement. In this way, there is no fixed line of punishment, on the contrary, decisions about the sanction should be made specifically for the specific case and only by the attacked subjects. Abolitionism proposes a "reconstruction of solidary bonds of horizontal or community sympathy" (ZAFFARONI, 2017, p. 104). For Hulsman this is the idea of a humanist and really efficient penalty, noting that its application would take place in another legal sphere, as the penal would be extinct.

The sore point for the criticism of Hulsman is that he built a theoretical complex that in practice proves to be naive. It so happens that abolitionism, in order to be applied, implemented and efficient, as far as possible and in its own way, does not only need the extinction of the penal system and the re-reading of the notion of punitive power. In fact, something much more complex is required, a restructuring of the entire social field, of all the institutions that directly interfere in the functioning of the community body. This is because his theory, as seen, inverts the pole of legitimacy, giving great power to the subjects and, here, we are not entering into the merits of this inversion, but only recognizing the difficulties of doing it, the risks and problems that can arise from it. if there is no consistent social structure.

Secondly, to affirm that the criminal response is of interest between parties is to refuse, which Hulsman refuses, the idea that values with a high degree of social interest deserve more efficient protections - that the gravity of the protected legal interest must be disregarded and finally that penal subsidiarity is something to be despised, as it takes care of everything without the penal. This is a crucial point, as it results in a relativization of legal assets, in this case, constitutional, to be protected in different degrees. Its impact directly affects the inversion of the poles and a punitive dynamic based on the direct interaction between the perpetrator of the criminal conduct and the subject whose legal rights were violated, requiring both parties to be very well oriented and willing to reach a consensus.

This role, in a mediating sense, of the State is incompatible with certain realities, especially those of marginalized countries such as Brazil. Customarily, the social body sees in the State power, more precisely in the Judiciary, a kind of national power, responsible for resolving the miserable social conflicts, which does not find a fruitful solution outside the legal-coercive scope. This is about a gap that Hulsman faces when reading Brazilian society and its current and historical reality, as a country that is on the margins of the planetary system.

In this way, the criticism elaborated here in the face of Hulsman's abolitionism focuses on the difficulties of the dynamics he defended, which Zaffaroni synthesizes in the motto "reaching the conflict itself" (ZAFFARONI, 2017, p. 99). Individuals are required to have a great level of socio-political commitment, a deep intellectual maturation of the subjects who must be open mainly in the reflection of and about the Other, in view of the dense subjectivity that punishment requires in this model. This without going into the merits - no longer in the intent of criticism, but of practical appreciation - of how the system and criminal law will be

reorganized once it is extinct, that is, which legal and legislative locus will receive those first, the creation of new ones state bodies to meet the needs that, by chance, may arise.

5. ZAFFARONI'S THEORETICAL MODEL

By the author of *Em busca das penas perdidas*, one of the central works of his thought, which will be widely used here, penal minimalism should be seen as a path to abolitionism, but, through the interpretation of its theoretical framework, this model should not be thought of in order to eventually be or materialize the abolitionism. What Zaffaroni builds aims to organize, reform, modify a state of affairs in order to allow the relegitimation of the punitive system as a whole - its judicial, executive, legislative and also non-judicial institutions -, based on that, the results achieved with the reduction of criminality and, in addition, of discretion, it is possible to glimpse, in an almost natural way, the option of implementing an abolitionism, not identical, either, to the one constructed by Hulsman. It is in this sense that Zaffaroni states that the “most immediate objective must be directed towards reducing the number of deaths and generating spaces for social freedom” (ZAFFARONI, 2017, p. 175), that is, the reconstruction of a fabric social community.

As stated, Zaffaroni will seek to formulate a theory that specifically captures the Latin American reality, which is the factor that made him the theoretical framework here. However, this does not mean that his thinking does not use epistemological paradigms from authors who escape this reality. It can be said, in fact, that Zaffaroni has three main supports: a) Marxist theory, selecting a few authors, including Baratta, relating criminality and/or criminalization with the capitalist production system; b) symbolic interactionism and phenomenology, which will help support the reproduction of “delinquency” in the prison-institution, as well as delimit an objective reality of the phenomenon; and, finally, c) Foucault's theory of power-knowledge, microphysics of power and institutions of kidnapping. The author will not simply mix them up, producing something, at the very least, contradictory, but rather articulate them in his own way, including pointing out the theoretical limitations of these constructions, to allow him to observe the phenomenon as a whole from different perspectives, that is, diagnosing the illegitimacy of the system from paths that will converge.

The starting point, so to speak, of Zaffaroni's thought to build a punitive system, a legitimate criminal legal discourse, that is, an adequate model for the political-social situation, is the marginal realism that will make it possible to illuminate the problems of marginalized and to explain, from a gradual and historical colonialization movement, the way in which not only the penal system, but the whole reality of Latin American countries was constructed. Zaffaroni will clarify what he understands by "realism": a) the material meaning of the world and external to us; b) as an attribute of "evil", that is, it really exists, as a Latin American cultural problematic; c) for an approximation of the phenomena of the penal system; d) a reading capable of constructing a model that is not ideal, idealistic, but adequate to reality; e) indicating the existing violations in the marginal region against human life (ZAFFARONI, 2017, p. 161/162). This already allows checking the starting point, that is, some issues that will be worked on, as well as what is intended to be built.

As he clarified the interpretative forms of "realism", Zaffaroni unravels the expression "marginal" that will be used by him and will compose marginal realism: a) an idea of peripheral location of planetary power; b) relationship of dependence to the central power; c) the populations located in this region subject to the central power, specifically Latin America; d) and, finally, a "marginalized" configuration of these populations based on cultural, in short, ideological incidence, arising from colonialism, neocolonialism and technocolonialism (ZAFFARONI, 2017, p. 164/166). The idea of marginal realism can be synthesized as a tool capable of bringing to light both a historical process of cultural, economic and political domination, as well as the development of penal systems from this mirroring and coercive influence, in a sense, of countries as well as a diagnosis of the facticity of marginalized countries, including Brazil.

Our marginal realism intends to contemplate an approximation with the objective reality of the penal system that, through logical-real structures, can also serve as a basis for a new criminal-juridical discourse that guides the decisions of judicial agencies as part of a oriented tactic for the same strategy that delimits the field of criminological knowledge. (ZAFFARONI, 2017, p. 172)

The facticity diagnosed by Zaffaroni, which composes the arrangement of marginal realism, of marginalized countries, specifically the Latin Americans, including Brazil, is historically constituted from colonialization movements. It is in this sense that the idea of colonialism, neocolonialism and technocolonialism gains paramount importance in his

thinking. It is worth, therefore, shed light on these concepts, as well as, after, pointing out some observations regarding the dynamics that integrate them. For Zaffaroni, colonialism is predominantly a 15th century movement based on theocratic traditions for the subordination and inferiorization of other civilizations; on the other hand, neocolonialism starts in the eighteenth century from other discourses, rationalist, modern, scientific, positivist, linked to biological studies, which in the final analysis will be called eugenics (ZAFFARONI, 2012, p. 110). Neocolonialism, according to the author himself, was an instrument used by Nazi Germany.

In other words, neocolonialism, after being used emphatically during World War II, especially by the Nazis, produced on a scale a phenomenon that was previously only punctual, the concentration camps, which, in the words of Zaffaroni, “has been legitimized with rationalizations from positivist racism” (ZAFFARONI, 2012, p. 109). Here, an observation and, perhaps, a criticism in the sense of how colonialism or neocolonialism work, that is, their power dynamics, is worthwhile. What is intended is not to invalidate the construction of Zaffaroni, but to clarify some points allowing its expansion. Zaffaroni elaborates, from Foucault's kidnapping institutions, the concept of institution-colony that would characterize our marginal region, including smaller institutions, such as prison, even stating that the institution-colony would be a large concentration camp, being formed by peripheral countries and maintained, from a vertical reproduction, by the central countries (ZAFFARONI, 2017, p. 74/78).

The observation that will be made is regarding the production and results that result from the dynamics of action of colonialism or neocolonialism. First, the correlation between power-knowledge produced by both forms of colonialism is clear, according to Foucault "there is no exercise of power without a certain economy of truth discourses that work in this power, from and through it." (FOUCAULT, 2018, p. 22). However, it is necessary to crystallize that its operation produces two distinct results: a) firstly, according to Zaffaroni, it can be interpreted as a centrifugal movement, that is, of separation, of splitting, finally, of segregation – the good man and the evil man ; the middle man and the sick, the delinquent, the inferior, the latter always having to be separated from the central social environment and taken to the peripheries – which enables the production of kidnapping institutions, concentration camps, Zaffaroni's own institution-colony; b) second, the very idea of social control, perhaps closer to the basic idea of colonialization, that is, the destitution of an identity based on the insertion of alien identities, which is done based on discourses of truth. Here it is not about a centrifugal

movement, much less a centripetal one, but about the very idea of inferiorization and civilizing subordination, seeking, in short, an ideological domination.

It was absolutely necessary to constitute the people as a moral subject, therefore separating them from delinquency, therefore clearly separating the group of delinquents, showing them as dangerous not only for the rich, but also for the poor, showing them loaded with vices and responsible for the greatest dangers. (FOUCALT, 2014, p. 218).

It is interesting, in this sense, that colonialism in Zaffaroni has this double meaning that is not explicitly given in his work, but when it sustains the Latin American concentration camp and, formerly, ideological reproduction, constituents of marginal realism, these factors are inevitably implied. An example of how this mechanism works today can be seen with the phenomenon of terrorism. Terrorist discourse arises in the central region and is assimilated by the marginal region that adheres to the discourse and strengthens it, as a discourse of truth. On the other hand, terrorism produces a centrifugal movement, as there is a previously defined face, the terrorist, the enemy, hostility is characterized and disseminated, this produces the concentration zones, not in the same mold as the Nazi camps, but segregation is crystallized. It thus directly affects social values that are gradually being reconfigured. Another example would be the "satanization", in the words of Zaffaroni, of Marxism, which in Latin America designates "everything that constitutes or threatens to constitute a counterpower to the militarized verticalization of our peripheral societies" (ZAFFARONI, 2017, p. 36), therefore, assimilated with a certain fear and even contempt in regional discourses and ideologies.

It is from this state of affairs diagnosed by Zaffaroni that the delegitimized, arbitrary, violent functioning of the punitive system in the region will be explained. It is a perverse discourse, since even realizing the impossibility of adapting to the planning of the central criminal-juridical structures, it still insists on the idea, reproducing it as a true discourse. The criticism is that one cannot misunderstand being, that is, take refuge or isolate oneself from a "should be" (ZAFFARONI, 2017, p. 19). In other words, it is necessary to think of a "should be" proper to the being that it is, and not be mirrored in universalizing discourses, especially when such discourses make up a historical colonialist arrangement.

Before properly approaching Zaffaroni's penal theoretical model, it is worth turning our eyes to ideological reproduction, since, for this author's thought, the maintenance of perverse discourses is a key point to rethink the punitive system. For Zaffaroni, the mass media are great creators of illusion that reach the population, preventing them from realizing the "fallacy" of

criminal legal discourses, distinguishing two levels and forms of action: a) transnationalized, which refers to the material produced by these media, as well as the substance of this material, which for the author, for the most part, projects a Manichean idea, a feeling of insecurity for the existence of an “evil”, as well as a certain contempt for human life and dignity; b) the level of national circumstances, which produce, in short, sensationalist materials, with discourse and shallow campaigns of “law and order”, the need to do “justice” at any cost, causing moral indignation and, on the other hand, the idea of the system's effectiveness in the face of certain threats to social well-being (ZAFFARONI, 2017, p. 128).

Therefore, for Zaffaroni, the mass media is one of the neuralgic points of ideological reproduction and support of the delegitimized discourse of the punitive system, since it will produce a media criminology, that is, the subjects build and adhere to a “vision of criminal cuestión” (ZAFFARONI, 2012, p. 216) distorted. It will produce and reproduce, the latter specifically in marginal realities, stereotypes that will be stigmatized, labeled and, later, socially segregated - here a notion of primary criminalization - as well as touched by the penal system, adding to the constitution of the being, in its social identity, plus one (dis)value (ZAFFARONI, 2012, p. 218/219). It is in this sense that one of Zaffaroni's proposals, for his theoretical model, is to intervene in the contents produced by this agency: a) “neutralization of the criminal system's violent propaganda apparatus” in the media; b) technical control over the news, in order to avoid the publication of fallacious messages – an idea that is close to fake news – as well as substances that can instigate violence (ZAFFARONI, 2017, p. 175). It is a delicate debate that the present work does not intend to enter into the merits⁵.

La urgência de resposta concreta y coyuntural lleva a dos grandes contradicciones etiológicas, pues por un lado atribuye la criminalidade a una decisión individual, y por otro estigmatiza a un conjunto com caracteres sociales parecidos; además, proclama una confianza absoluta em la función preventiva disuasoria de la pena, pero al mismo tempo promueve la compra de todos los médios físicos de impedimento y defensa. Como la emotividad impide que el destinatário perceba las contradicciones, los controles electrónicos y mecánicos han aumentado en forma impresionante. (ZAFFARONI, 2012, p. 225)

⁵ Here, it is necessary to consider that this path can lead us to the idea of censorship, of restricting freedom of expression. Zaffaroni will seek to defend his construction, making some hypothetical distinctions from practical cases and how they should be properly read in his model of thought. Anyway, between hypothetical and practical cases, there is a relevant distance when in everyday praxis. We recognize the importance of establishing filters for the production of more adequate media content, but we also understand the risks and difficulties that this can and should entail in an eventual realization.

In addition to the mass media, there are other institutions, or in Zaffaroni's words, "ideological factories of reproduction" and assimilation, such as the university itself, or the means of capital production. Mass media makes up a complex fabric, but it is a fundamental part of any rethink, not just in criminology. Another factor is the "executive agencies" of the penal system, which have a high configurating power, not being judicial institutions, such as the police apparatus and similar militarization services, which are shaped from a moralizing external discourse, that is, a central ideology, imported, and that in its praxis seeks to reproduce it. Even with corrupt actions, acting in an abstract legality, but simultaneously against it (ZAFFARONI, 2017, p. 136/137), such as the cases of militia organizations, a kind of parastatal institution.

Taking a step forward in the proposal of a minimum penal model, Zaffaroni will weave two basic considerations for an adequate marginal response, which can also be glimpsed in other theories in the same sense, with similar constructions. First, what the author will call the jus-humanist imperative, in other words, a solid and factual harmony with human rights, transforming the penal system itself into a tool to guarantee them, since they cannot be considered conquered and materialized due only to the constitutional and international letters that affirmed them (ZAFFARONI, 2017, p. 147/149). In this sense, the answer also contains an ethical imperative – even approaching Kantian thought – since the marginal reality shows an inverse context to that proposed by the discourse, a proposal, therefore, in a way, optimistic, as it seeks to break a perverse paradigm placed and reproduced, reducing violence, gradually killing a Manichean and "evil" vision, as well as valuing humanist ideals (ZAFFARONI, 2017, p. 153/156).

Therefore, the response to the delegitimized legal-criminal discourse must be based on what was explained above. Thus, Zaffaroni will build his model from elements that legitimize a new discourse. These serve as bases for structuring the principles, which will be discussed later, of the constructed penal model. What must be analyzed is: a) the exercise of power by the system cannot be verticalizing, as well as simply imported or assimilated from a neocolonialization process; b) it is necessary to rethink the penalty, its function and application. It is important to build a penal framework close to the conflicting social reality, and not idealistic, as this makes a pragmatic reading difficult, leading the system, in short, to schizophrenia; c) "negative elements" that produce horizons of epistemological projection in which the system should act, in this context, specifically, it is delimited by penalties and their

concepts, based on legislative action. The aim here is to balance these projection horizons, increasing or reducing the power of agencies linked to the system (ZAFFARONI, 2017, p. 182/184).

It is worth noting that, perhaps, the most relevant point is the idealist-realist clash and the characteristics of each one in this context of discussion. An idealistic penal model is built in a closed, deterministic, “immutable” way, capable of having ready-made answers, previously constructed, for any situation, thus it is a precious model that foresees adequate answers to all factual circumstances. On the other hand, the realist construction is open, more malleable to mutations, “presents a share of uncertainty” precisely because it does not carry ready-made answers for everything, because it is connected with facticity and globality, in a more pragmatic way (ZAFFARONI, 2017, p. 187). In other words, while the idealist model seeks to intervene in the world and read it from ideal discourses, submitting reality to ideality - modern trend - the realist model incorporates ontic data, structuring itself from the concrete world - movement phenomenological. Even if its reading is more limited and uncertain, it is more precise and adequate, capable of guaranteeing legitimate criminal-juridical discourses, this is Zaffaroni's path.

In this sense, Zaffaroni's penal theoretical model will be structured, which also brings a guaranteeing character, as it strengthens the presence of penal guarantees in the system, not only as guiding principles, but as a tool to limit the irrationality of violence generated by its practice. We can synthesize this thinking in the principle “minimum violation/maximum achievement”, this is Zaffaroni's rule of minimalism, the way the system should act, a solid commitment to criminal guarantees and, consequently, to human rights (ZAFFARONI, 2017, p. 235).

Zaffaroni will build some basic principles and synthesize the entire theoretical framework mentioned above, that is, principles necessary for an adequate legal-criminal discourse and a no longer perverse functioning of the system, limiting the violations it causes, as well as gradually reducing the rates of social crime. Therefore, light will be shed on these relevant points of Zaffaroni's theoretical model, dividing them into two groups⁶:

⁶ Todos os princípios estão referenciados em: (ZAFFARONI, 2017. p. 239/242)

1) Formalist principles: Aims at the formal delimitation of the constitution and dynamics of action of the penal system.

- a) *Principle of legal reserve or maximum existence of legality in the strict sense: It strives for maximum respect for the legality of the penalty, considering that it will be rethought from the rescue of the concrete world.*
- b) *Principle of maximum taxability: All penal types must be clearly determined, that is, there must not be white penal types, without certain limits. Zaffaroni also defends the prohibition of analogy of criminal laws.*
- c) *Principle of non-retroactivity: The conduct to be punished must have an abstract criminal law previously determined and with ex nunc effects.*
- d) *Principle of Maximum subordination to substantive criminal law: Bearing in mind Zaffaroni's idea that the greatest volume of discretion and violations of subjects' rights occur in agencies that are outside the control of Criminal Law – for example, executive agencies such as the police, and executive punishment such as imprisonment – from the reconstruction of the penal system based on the molds established by this model, any law, material or procedural, that impacts on the limitation of rights must be subordinated to the same delimitations of the punitive system.*
- e) *Principle of popular representation: Criminal laws must be drafted by the legislative agency directly guided by the constitutional field and with popular representation.*

2) Humanist principles: Directed to the practical performance of the system, always with a humanist and guaranteeing concern, guided by human rights and the constitution.

- a) *Principle of maximum limitation of the contingent response: It foresees a negative action of the judicial agency in face of a criminal law introduced without due constitutional respect, popular and technical participation. So the judiciary has the duty to declare it unconstitutional.*
- b) *Principle of harm: The punitive system can only act when there is a criminal legal asset violated. It is necessary to emphasize the role of ultima ratio of the minimum penal model.*
- c) *Principle of minimum proportionality: The idea of ultima ratio is also present here, since the system should not act in an insignificant fact, with low harm or that violates less relevant legal goods, which are not criminal.*

- d) *Principle of minimum respect for humanity: Close to judicial pardon, provided for in article 121, § 5, of the Penal Code, relating to wrongful death. However, it must be applied more broadly, that is, when the subject who committed the crime also suffered from the facts, or because of the circumstances was also injured to some extent, the exercise of power may waive the penalty or impute it to the legal minimum.*
- e) *Principle of relative suitability: Based on the idea that criminal intervention does not resolve conflicts, but only punishes them, repressing them, legislative agencies cannot offer symbolic solutions, but rather paths that share a collective work.*
- f) *Principle that limits harm to the victim: The penal system should not intervene when this may cause greater damage, harm to the victim, in view of the system's natural margin of irrationality.*
- g) *Principle of minimal transcendence of punitive intervention: The irrationality of the system inevitably implies a transcendence of punitive intervention in the subject, causing, for example, the construction of labels, negative stigmas. Thus, power must be exercised in a way that avoids as much as possible this irrational and natural violence of the system.*

It is possible to point out, after an interpretation, the neuralgic points that guide the system built from this theoretical basis to penal minimalism, and also, contrary to what one might think, the effective reduction of violence, of criminality. It is primarily about recognizing the problems arising from colonialism and neocolonialism, allowing the observation of social control and the reproduction of these discourses as true. Furthermore, it is important to rescue the concrete world, the facticity proper to the Latin American reality, making it possible to reconstruct an adequate horizon of projection in which the system should effectively act and even prevent or limit the performance of other meta-legal agencies. For these reasons, as well as being based on a humanist and guaranteeist discourse, in which the system must be guided, this framework harmonizes with the constitutionalism in force in Brazil, which will be further explored in the next item.

6. THE ADEQUATE MODEL FOR BRAZILIAN CONSTITUTIONALISM: DIALOGUE WITH PHILOSOPHICAL HERMENEUTICS.

Raúl Zaffaroni was used as a theoretical framework, analyzing his minimalist penal model and assimilating it as an adequate starting point for a rethinking of criminology in Latin America, in marginalized countries, including Brazil. The construction that has been carried out so far already indicates a lot the state-of-things that harmonize with constitutionalism and must be implemented. However, precisely this phenomenon had not been adequately analyzed. This will be the challenge of this item, that is, to work constitutionalism in light of the Brazilian reality and contemporaneity, even so keeping the focus on the criminal sphere.

The Brazilian constitutional movement is complex and can be divided briefly into three moments: a) The Constitutionalism of the Empire; b) the Constitutionalism of the first republic; c) The constitutionalism of the Social State (BONAVIDES, 2013, p. 361). When properly worked, it is possible to notice the bad weather that this non-linear phenomenon has suffered over the decades⁷ until the creation and validity of the 1988 constitutional charter, which will be the analysis paradigm for Zaffaroni's minimalist perspective. Anyway, this is not the end of the story. In fact, the new Constitution inaugurated sophisticated problems and, in this way, difficult to be remedied, demanding, in the last analysis, a new way of rationalizing the constitutional text, its relationship with the infra-constitutional diplomas and, finally, its correlation with the world ontic, that is, the rescue of the concrete world and consequently the senses, is the retaking of knowledge based on being.

The Constitution of the Republic of 1988 inaugurated the so-called Democratic State of Law – as foreseen in its preamble – which, according to Bonavides, belongs to this third constitutional moment, but its character is not just social. The difference between the social and the democratic is subtle, but extremely relevant. Lenio makes a distinction regarding the intervention role of these models, the first has an assistance character, while the second has a social function (STRECK, 2014, p. 68). It is not a question of greater State intervention, but more active and efficient. The Democratic has instruments that guarantee fundamental rights, that is, not only the positive ones in the Constitution, but it seeks to materialize them, changing the social status quo, this is a normative plus (STRECK, 2014, p. 100). Still, Bonavides weaves that the “Constitution of the Social State in democracy is the Constitution of conflict”

⁷ O trabalho não comporta a análise deste vasto e complexo movimento, assim, para mais detalhes ver: CARVALHO, José Murilo. *Cidadania no Brasil: O longo caminho*.

(BONAVIDES, 2013, p. 380), and it really is, since the Constitution has a role against the majority, and should be inserted in social and State the legitimate concern with minority and vulnerable groups, imposing to the infra-constitutional order the elaboration and/or adaptation of instruments, programs and policies capable of enshrining fundamental rights.

It is necessary to go deeper into what characterizes this current constitutional paradigm and what challenges it poses and faces. To address it, the terminology neoconstitutionalism will be used, understood as an answer – and a model of engineering power and State organization – both of the liberal and social State – here the limitation of Bonavides in characterizing the current moment as “Social State” – that is, in the last analysis, from the original constitutionalist structure, developed, guided and limited to legal positivism, to legality. It is, therefore, a new paradigm, having, therefore, a disruptive character (STRECK, 2016a, p. 01).

The point is that positivism was built on total legalism, that is, a “right-as-system-of-rules” (STRECK, 2016a, p. 04), providing an oblivion of the facticity of the world, which by moving if naturally, it imposed practical and problematic cases that were not adequately assimilated by the law. It is about the predominance of idealism over realism. Phenomena such as judicial discretion, and the schizophrenicization of the system itself – a theme that has already been worked on before – are problems that must be faced from perspectives that leave aside both natural law and classical positivism (SIVLA FILHO, 2017, p. 105) . Such problems arise from an inadequate reading of the constitutional text, which does not communicate adequately with the current institutions and, even, normative diplomas, such as criminal law. This is one of the connection points of Zaffaroni's thought with neoconstitutionalism, the need to develop a less idealistic and more realistic penal model.

Therefore, the validity of the Constitution of the Republic of 1988 did not simultaneously or easily bring a break with the positivist paradigm, but on the contrary, it brought to light the legal-political limitations of the Brazilian State, consequently of the penal system. All the news brought by the Democratic State and the Constitution were not properly implemented and put into effect. We find ourselves in different paradigmatic times, that is, institutions and society itself can be considered modern in their foundational assumptions because they have not strayed from the shackles of positivism, which does not properly dialogue with post-modernity. Modernity is still on the way, while our 1988 Constitution radiates a contemporary must-be. In a way, there is still an inadequate reading of the constitutional charter in a country of late modernity (SILVA FILHO, 2017, p. 90/91).

Based on this theoretical and legal framework, it is also possible to perceive the lack of legitimacy of the penal system and, therefore, the need to develop a model capable of rescuing the ontic world and working it properly. It is in this sense that philosophical hermeneutics plays a fundamental role in this rearrangement; in short, what is sought is to superimpose the modern "subject-object" epistemological scheme - and consequently solipsism - in view of its strong link with modern trends, such as natural law and classical positivism - perspectives that do not fit with neoconstitutionalism, and may produce, for example, the schizophrenicization of law and an interpretive discretion. Thus, it intends to establish the so-called "hermeneutic circle", a comprehensive-interpretive model that goes beyond a foundation, but rather understands a way-of-being and a facticity (STRECK, 2016a, p. 05).

The solipsist subject is the one who interprets the world - and the beings in the interior of the world - and thus understands it, that is, he places himself outside the interpreted world, as a ready and superior data, subjecting what is touched by him. The problem with this is that it will read the Law and the institutions linked to the State from its ego, "it tells the world from its private language", as well as it can be considered that "the modern subject, in which the subject / scheme object is seated are the core of authoritarianism." (STRECK, 2017b, p. 67). Phenomenology, philosophical hermeneutics, are thought of as the most compatible epistemological, theoretical and, consequently, critical alternative for contemporary analysis, specifically based on Brazilian neoconstitutionalism, which is inaugurated through the 1988 constitutional charter, in which the Democratic Rule of Law is established (STRECK, 2014, p. 68). It must be mentioned that one of the great problems of neoconstitutionalism was to maintain to some extent a Law "post-Auschwitz" (STRECK, 2017b, p. 147) that still used the matrix of rationality based on solipsism, which resulted in problems of discretion, as well as in the paradigmatic mismatches between the constitutional text and the legal institutions of the State, as well as their own operators and applicators, who are still in the moorings of modernity.

With regard to philosophical hermeneutics, the phenomenological basis used in this article will come from Heidegger and those later thinkers who were largely influenced by his thinking, such as Gadamer, Ernildo Stein, Lenio Streck, developing more precisely an applied hermeneutics beyond the existential question. Two preliminary points are relevant, the first is that the text of law - the constitution itself -, as well as the State and its constituent framework, are considered phenomena and, as will be seen, between the pure law and the norm there is a so-called ontological difference (STRECK, 2017b, p. 49). The second point is that

interpretation is not a condition of possibility for understanding, but precisely the opposite, that is, prior understanding achieves a certain interpretation of the experienced phenomenon that, thus, will be understood again, which is called fusion of horizons. It is somewhat crystal clear that a kind of hermeneutic circle is built - it will be discussed a posteriori - that links an existential tradition to the phenomenon and/or particular entity interpreted, it is worth mentioning that this is not a vicious circle, that is, an objectifying mechanism, a mere procedural technique, which would lead us, firstly, to classical/traditional hermeneutics (GADAMER, 2018, p. 355), as well as to non-substantialist, but procedural hermeneutics currents (STRECK, 2016b, p. 120), such as of Habermas.

One of the most relevant factors to understand the scope and impact of the delegitimization of the legal-criminal discourse is the neoconstitutional tendency to protect minorities and vulnerable groups, which, in addition, provided the plural development of society and subjects. Something that escapes the modern Manichean ideology, already much criticized and outdated, as "it exposes the possibility and the need for individuals to aspire not to a reduced group of values or principles (...) but to a varied axiological and principled role" (STRECK, 2017a, p. 02). The resulting problem is that the penal system, as it was historically constituted, mainly in the case of the Latin American reality, and as it stands today, does not communicate adequately with this pluralist and guaranteeist presupposition of neoconstitutionalism. That is, it continues to reproduce a colonialist, perverse discourse that, more than ever, has become delegitimized in the face of this constitutional charter.

It is from this that liberal and communitarian penalists will be distinguished. While the former defend individualist-enlightenment-classical matrices, the latter seek to consolidate neoconstitutional principles and the defense of a collective character (STRECK, 2017a, p. 06). It is in this sense that Streck will develop and sustain the idea of positive guarantee, going beyond the classic (negative) guarantee – which ultimately defends only a downsizing of the punitive system (STRECK, 2017a, p. 19). Because neoconstitutionalism encompasses a wider range of socio-individual values, the problem of simple penal reductionism can be faced, so it is necessary to understand that the Constitution determines both a protection of citizens against the State and a protection of citizens through the State. This imposes a new rationality and power dynamics of the punitive system, which, in addition to punishing, must also promote the effectiveness of the rights and values protected in its scope, even if it is in ultima ratio..

If before the State and its legal-institutional instruments had the task of protecting only individual liberal rights against the “evil” (sic) of the (absenteeist) State, today this State – which has undergone profound transformations – must be concerned with these new dimensions. That's why Baptista Machado and Baratta will draw attention to the fact that the task of this new State must respond to the security needs of all rights, including in this list the benefits provided by the State (economic rights , social and cultural) and not only that part of rights called the provision of protection in particular against aggressions arising from the criminal behavior of certain people. (STRECK, 2017a, p. 26)

It is with this constitutional reality that Zaffaroni's theoretical model, worked above, gains great corroboration to carry out, to legitimize a critique, to deconstruct the post system and the entire perverse state of affairs, reconstructing it from a new constitutionally harmonic logic and with greater capacity for solid implementation, as it is necessary to consider that it is a gradual process, not sudden. That is, the use of a minimal theoretical model that guides a new punitive system is the first, and most important, step towards an effective reduction of crime and the systemic corruption of the State and society. The criminal problem does not start in penal networks, but derives from a systemic social problem that affects many institutions, such as schools. The perverse punitive speech will produce a verticalization and reproduction of these conflicts. Thus, the problems will not be solved through the most violent state instance of power, that is, the penal system in its classical punitivism model. Adapting to neoconstitutionalism is fundamental and the first step to consolidate a theoretical model like that of Zaffaroni.

7. FINAL CONSIDERATIONS

It is assumed that the punitive model of rationality predominant in our region, as well as in other countries such as the United States, that is, the maximalism of the penal system as an alternative to fighting crime is not functional, being unable to reduce the criminal indexes of the countries, on the contrary, promotes a fomentation of systemic violence. In this sense, the import of the Zero Tolerance policy allows to demonstrate Zaffaroni's idea of neocolonialism, that is, the implementation of sui generis ideologies, from family structure to public security policies based, reflected, copied, from the central countries of the globe, which demonstrate disconnection from the reality in which they were implemented and, therefore, a crisis in the precise sense of distance between rationality-discourse-practice.

INFOPEN data and economic costs of crime⁸ allow to crystallize the inefficiency of the current punitive system; the increase in imprisonment rates, in the number of prisoners in prisons, does not imply a reduction in the crime rate, on the contrary, a significant increase in crimes has been demonstrated over the decades. The economic reality of the current system demonstrates the high expenses to maintain a maximalist punitivism that tends to grow. It is noteworthy that this scope does not provide economic gains, it was not designed for that and cannot, therefore, be used. However, the expenses are worrying considering that it reproduces and sustains a failed model.

Therefore, a different path from the one supported by maximalism is proposed. Hulsman's alternative, that is, his Abolitionist model, is a fundamental theoretical framework both to corroborate the critique of the illegitimacy of the legal-criminal discourse, as well as to propose new structures of punishment. It is important to highlight that, although the penal system itself does not exist in this model, punishment still remains and is applied in other legal instances of social control – administrative spheres, for example. However, it is a path that has its problems and limitations, mainly because it does not fit the Brazilian reality. It implies a complete change in the legislative, judicial and executive system, but, in addition, a significant social commitment, that is, a well-organized, oriented and politically active society.

The proposed equilibrium is the minimalist punishment alternatives, specifically Zaffaroni's. As seen, a whole theory is developed focused on the reality of marginal regions, in Latin America, including Brazil. It demonstrates how, historically, colonialism and neocolonialism have imposed ideologies, values, theoretical and organizational models – such as Zero Tolerance – as a viable alternative for countries with completely different developments, cultures and values. As Zaffaroni says, there is a great cultural syncretism that constitutes our entire marginal region. Firstly, this allows us to understand how these localities still suffer from outdated ideals, and how the institutions of the penal system act from the idea of an enemy, a hostility that fosters social conflicts; on the other hand, it allows a significant rescue of reality, of facticity, of the ontic world, largely breaking the link with the central region of the globe and building a punitive system in harmony with the local reality.

⁸ INFOPEN data (statistical information system on the Brazilian prison system) can be found at the following electronic address: <http://depen.gov.br/DEPEN/depen/sisdepen/infopen>. The data regarding the economic cost of the national criminal system can be accessed through scenario No. 04 of 2018 of the Economic Costs of Crime in Brazil report, available at: <https://download.uol.com.br/noticias/2018/relatorio/custos-economicos-da-criminalidade-no-brasil-06-2018.pdf>

This is the relevant point for the work's telos, since neoconstitutionalism implies a new and necessary way of reading the constitutional charter. In other words, it is about linking the entire infraconstitutional legal system to contemporary constitutionalism and understanding reality not from a solipsistic Subject-Object scheme, since, in fact, this scheme distances us from reality and causes problems significant when analyzed in the scope of State and Law, for example the schizophrenia of criminal law.

It is necessary to solidify the rationality of a philosophical hermeneutics, understanding the ways-of-being-in-the-world. For this it is necessary, first, a rescue of facticity, worldliness and tradition, since they constitute the being and allow its opening; simultaneously, the very understanding of the being of things, for example, it is necessary to know what the penalty or a certain offense is, based on what these entities are and/or should be, they propose to be. Finally, the theoretical model constructed by Zaffaroni provides this type of reading, as it rescues not only the ontic world, but also the ontological one. However, it is only the first step, it is a complex rethink in which neoconstitutionalism should serve as a guide, as well as maintaining a multi/interdisciplinary idea with several other types of knowledge, such as philosophy. Only in this way will an adequate understanding of a more volatile, pluralistic and diversified reality that the contemporary world naturally imposes will be possible.

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