

louk hulsman and penal abolitionism

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It is impossible to classify the abolitionism. It is property of no one. Penal abolitionists are from various provenances. They renounce the universals, which are proper of the courts and modern justice. Penal abolitionists invent new traditions together with those involved in situations-problem and fight the scholarly language that feeds the selective modern and contemporary law system. They highlight the selective devices of the system, triggered to judge and sentence the poor, the miserable, the outsiders, the subversives – those who imperil the conservation of order. Among them, libertarians neither wait nor prepare the utopia of justice in the future society with the historical criticism of the present, but accomplish immediately – with a *direct action* aimed at experimentations of liberty.

Penal abolitionism is not property of jurists, of political and ideological doctrines or of conclusive remarks of pure thinkers who affirm to whom, to what and why abolitionism is linked to this or that. A libertarian penal abolitionist is connected to a flux of continuous and associative resistances, capable of shivering certainties and conformities, particularly those based on contemporary prophecies – developed both by conscience-driver intellectuals and directors of impersonal proceedings.

Penal abolitionism adds differences inside itself. It is not a school of thought, but a generous association of activists against inequalities, who live together with internal differences and know how to deal with partnerships at the boundaries with other practices that aim at the obstruction of punishment. However, libertarian penal abolitionists move

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forward, fearless of stepping on unknown ground – proper of those situated beyond the limits to inhabit the thresholds of liberty. Penal abolitionism can cross frontiers, follows thresholds and remains uncontrollable and ungovernable. But such liberty in dealing with dangers and risks inspires fears and threats coming from conformed inhabitants from the top to the bottom of the organizations and, especially, from the court – be it more or less progressive.

Renewed reformists often intend to capture the potency of liberty and protest of penal abolitionism through the administration of results deriving from negotiations in which the penal abolitionist necessarily needs to give in before a judgment, the *reality* of facts, the laws and penalties. In other occasions, they intend to reduce penal abolitionism to an admirable utopia or an impossible dream before the violence of the real and immediate needs. This way, reformists place it in an unsurpassable limit, an unreachable venue or simply ignore it. Politely, they disqualify it, fully armed of an overstated positivism or safely installed in political, philosophical, doctrinarian and scientific shelters of the owners of an unquestionable truth – watered by the scent of a god, of the *a priori*, of the sleepy catch-phrase of synthesis, of the rhetoric discourse about fighting crime associated to the imperative need for security, or... Society changes and, within it, reformists renew repetitions.

Penal abolitionism has emerged as a resistance in the society of control, which combines and bring about a metamorphosis and penalties with disciplinary and sovereignty devices. In this society of control, the penal abolitionist faces, therefore, the unexpected effect provoked by a profusion of rights. It has established, paradoxically, another incarcerating practice outside the prisons. Life under rights of minorities and majorities distributes people according to their identities, which recompose the policies of the ghetto, now beyond prison walls, expanding frontiers and establishing connections between zones and persons. In this context, the penal abolitionist does not only fight the traditional forms of incarceration, renewed by the new electronic technologies of surveillance, but also the growing penalization regime that further strengthens the culture of punishment.

Before and after the society of control, penal abolitionism continues to be unclassifiable, liberator and property of no one. We have learnt it with Louk Hulsman.

Models and programs

Some say, such as Raul Zaffaroni², that libertarians have taken over Louk Hulsman's abolitionist proposals and that he lacks any connection with anarchisms. One shall neither restrain Louk's unclassifiable practice, nor ask for permission to a generous and ground-shaking thinker such as Hulsman. However, others, such as Luigi Ferrajoli³, place abolitionism in a utopian level, since Max Stirner, to isolate it on behalf of his doctrine of *garantism*, replayed in paragraphs and pages of their endless books.

In both cases, we are before the vices and virtues of writers that struggle for the winning word, the institutionalization of the truth of justice, of the universal law and of the tribunal. These scholars produce moral treatise that speed up or hamper the everlasting *machine* of the reform of reformers, which must be always fed. They enhance arguments, usually humanists, to multiply ways of punishing with more or less energy the body and attitudes, establishing various governments of soul and conducts. They bring together conservatives and progressives by promoting "open debates" in academic events, experts' seminars, television programs and classes. They seem opposite poles, when in fact they are only constitutive parts of the same uniform and continuous pluralism in the democratically applied punishment regime.

The neoliberal expansion, since the 1980s, reaffirmed the regime of strengthening punishments when it favored the immediate adherence of political forces, both right and left wing, to security programs. We came from the libertarian experimentations, where Louk Hulsman's penal abolitionism emerged, to a situation in which mobilizations, propaganda, *civil society* organizations and government policies tend increasingly to enhance fears, the police, surveillances, accusations (rewarded or not), criminalization of behaviors (including a slight increase in the punishment of white-collar criminals) and penalizations. With this, the belief in the education through punishment has been renewed, through which we will achieve the peace desired by the sovereign (be the family, king or people) and the

² Eugenio Raul Zaffaroni. *Em busca das penas perdidas*. Rio de Janeiro: Revan, 2001.

³ Luigi Ferrajoli. *Direito e razão. Teoria do garantismo penal*. São Paulo: Editora TR, 2006. See also the important book by Mireille Delmas-Marty. *Modelos e movimentos de política criminal* [Modeles et mouvements de politique criminelle]. Rio de Janeiro: Revan, 1992.

accomplishment of the long-awaited utopia – either the liberal perpetual peace, the precarious peace of conservatives or the human emancipation of socialists.

Attached to the illuminist models of political and human emancipation, even the *critics* of the prison do not refrain themselves from updating the punishment regime *preaching* the importance of the monogamous family, the need for pacifist religions before the fundamentalist effects deriving from religious terrorism, the glorification of programs aimed at strengthening the human capital – as Michel Foucault well stated.⁴ The punitive model has almost achieved a global consensus. The prison designed with security incorporated electronic surveillance devices for an increasingly particular criminal, proceeding from *crimes* committed in the free society and the *prison community*. The prison was also renewed and started to be managed in order to restrain rebellions and integrate prisoners and family members in a dreadful picture that encompasses unexpected corporate illegalities; even more, it went over the walls to spaces in the city, placing convicts in monitoring programs – with the support of non-governmental organizations, often funded by foundations that benefit from the profit of companies and banks. And an astonishing political effect brought about by terrorism led to even more cruel ways of confinement, monitoring and intercepting in the society of control through the practices of *life policing*.

More than punishing and arresting, monitoring and monitoring, the imprisonment in the era of utmost belief in democracy has become also the way of organizing the workers, in which one is forced to seek one or more jobs, composing a movable redesign made of legalities and illegalities that promote stability to the forces of exploitation and domination. Connected to computer and information technologies, they produce products under the regime of programs and diplomatic protocols through which everyone must produce to stakeholders, who are often the workers themselves. In a time when the vertical system of organization yields space to decentralized and more subtle forms of power, as highlighted by Richard Sennett⁵, we live the transition of the disciplinary society to the society of

⁴ Michel Foucault. *Naissance de la biopolitique. Cours au Collège de France. 1978-1979*. Paris: Gallimard/Seuil, 2004.

⁵ Richard Sennett. *A nova cultura do capitalismo* [The culture of new capitalism]. Rio de Janeiro: Record, 2006. See also the author's important thesis connecting production and police in *O artífice* [The craftsman]. Rio de Janeiro: Record, 2009.

control, as pointed out by Gilles Deleuze⁶, in such a way that specific or radical resistances start to receive special investment. They must be minimized through the inclusion in both democratic forms of political representation and the endless ways of programmatic participation in the economy, or rather, in the political and economic merge of democratization and police control over the production of life. If this is not possible, they have to be eliminated based on the paradigm of fighting the trans-territorial terrorism, confirmed since the emergence of Al-Qaeda. The society of control cannot bear resistances.

Before this punitive and repressive reality, covered by a determinist democratic conduct, aimed at the inclusion, the democratic government with mechanisms of exception and enhancement of the rights of minorities becomes convenient. Out of the effect of *May 1968*, the third generation of rights was established, formalizing and developing the attempts for inclusion through affirmative actions; out of the liberal computer and information effect, has emerged the fourth generation of rights, including the *commons*, new author rights, regulations over the military-diplomatic electronic. Under these reactive programs, the model of disciplinary punishment also transformed the surveillances and punishments through programs and democratic variations of production. The effects of illuminist utopias, the classifications, languages and appropriations have redefined themselves, no longer by the confrontation of models, replacement of sovereign or even by sharing disciplinary practices of production and politics (socialism and capitalism), but by variations (also announced by the end of the regime of disciplines through which socialism and capitalism have governed), resulting in the society of control, since the inevitable globalization.

Under these conditions, is Louk Hulsman's liberator penal abolitionism still valid?

The essay

I have once heard, from Nils Christie, that Louk Hulsman should write more, publish a longer work in order to provide stronger basis and more respectability to his solid

⁶ Gilles Deleuze. *Conversações* [Pourparlers]. São Paulo: 34 Letras, 1992. Gilles Deleuze & Claire Parnet. *Diálogos* [Dialogues]. São Paulo: Escuta, 1998.

proposals. We were inside a car driving through Sao Paulo, in 1997. We had invited him, together with Louk Hulsman, Thomas Mathiessen and Sebastian Scheerer, to an international seminar on penal abolitionism at PUC-SP.

When I look at Louk Hulsman's well-known readers and their enormous works, and even when I am holding books considered to be classics in our culture, I realize that the number of pages and their marked length take us to a place, to a conclusion and to an invitation to join a utopia. They are like the great books of Illuminism and the long novels of the 19th century, which counted on literate reader's free time. However, in the same 19th century, the exhaustion of the long novel was already announced – with the new and dissolute poetry of Arthur Rimbaud, which broke up with the academy, the metrics, the predictable issues and sounds by being short and intense. A new philosophy emerged with Nietzsche, introducing aphorisms, preparing an unexpected philosophy of language in *Thus spoke Zarathustra*. Therefore, in the end of the 20th century, Michel Foucault, when he reshaped his work *The history of sexuality*, announced the relevance of the *essay*⁷. More than a presentation of the philosophic issue or mere experience, the essay shaped as freeing early experience.

Hulsman admired in Foucault his distance from the prophetic intellectual, conductor, *enlightener*, in detriment of an intellectual attitude of contributing to the rear-guard, instead of joining the vanguards. He has become an essayist instead of a theorist; the establisher before the follower; the defender of brevity and urgency in fighting punishments and severities before manuals and compendiums.

However, both the long restoring and the demolishing thought, such as the speed of communication, have their place nowadays – through the publicity for producing an immediate finished product and hamper protests or through the speed of communications to intercept and resist. New conditions for resistance to the immediate are developed to invent a vanishing line, in which the *experimental essay* is essential, to ruin in play, through *direct action* capable of presenting differences and make them exist to challenge the ongoing

⁷ Michel Foucault. *O uso dos prazeres* [L'usage des plaisirs]. Rio de Janeiro: Graal, 1984. On the similarities between genealogy and ethics in Foucault and their relation with anarchism, see Salvo Vaccaro, Todd May, Saul Newman, Daniel Colson, Edson Passetti, and particularly Michel Foucault in "Do governo dos vivos". Revista Verve: Nu-Sol/São Paulo, 2007, v. 12, pp 270-298.

computer and informational communication and question the authority of the hundreds of pages of the owners of the truths and the criticism on the *truth* – including the established authorship.

Attentive to gestures, subtleties and moves, Louk Hulsman's abolitionism practices a *direct action*: before the formality of magistrates and tribunals, the grandiloquence of economists and the turmoil of psychology and sociology – before the misery, the selectivity of the system in punishing the poor on behalf of the prevention of the *vulnerable*, and its dissimulation in ephemeral and exemplary penalties of *white-collar crimes*. Attacking the universality of the law is, above all, to deal with each situation as a specific problem and with every solution as unique, considering the existence of each one of us. And as a work in progress (and progress taken in the proudhonian sense of curbing authoritarian practices, of governments), invent new languages and diverse approaches among rear-guard intellectuals and movements against the regime of punishment.

Louk Hulsman's penal abolitionism is an essay of libertarian existence, challenging as a *direct action*, provoking and establishing a contemporary way of resisting (in the foucaultian sense of active, innovative and freeing resistance) of inhabiting a vanishing line (in the deleuzian understanding that everything begins with an escape, with an invention). But how can this be a resistance to variations in the society of control if Hulsman speaks of models of penal abolitionism? Let us accept his invitation to *essay* [fui confirmar e existe *essay* como verbo intransitivo – pode ficar assim mesmo!] with his experimentations of liberty.

Models and modulations

Penal abolitionism does not intend to establish a model, even when it reaches out to some *alternative* models (conciliation, compensation, therapy, educative) when it deals with the effects of situation-problems, without excluding the punitive model, if accepted by the parties.

What matters to him is to break apart with the universal of punishment established in the criminal law, the penalization, the culture of punishment, the general prevention, and also with the *alternative*. His proposals of models are opened to innovations in the relationships

and in dealing with situation-problems and guided by the conciliation mechanism that drives civil law. From this standpoint, the alternative is not restricted to a new shape of the *same*, but it becomes a possibility to pass, surpass the limits, breaking with models and moving away from modulations. In Hulsman, the alternative is not finalist, but the opening of a new series, endless, to practices of liberty and, for this very reason, demands breaking up with models.

Hulsman neither distorts the law nor disguises it with more religion than inherited by the Jewish-Christian tradition. It only points out that if there is a *choice* between conciliation and punishment, we should choose the former, as relationships become healthier and life freer. It associates the end of punishment inside one's self to a favorable inaugural attitude to those who pretend to be abolitionists. It opens up possibilities for an inventive language and innovation in the relations among those involved in situations-problem. It is not about legitimizing penalizations *outside the prison walls*, or to invest in socially accepted cells, institutionalize the alternatives or prepare to the arrival of the revolution with a new and *liberator* law. Hulsman keeps distance from reformists from both left and right.

The libertarianism in his discourse is not directly linked to anarchisms, but it does not separate itself through a simple or sophisticated exercise of reason – such as some guardians of the laws of justice and knowledge have intended. Libertarianism is an invention of those who experiment liberations. Therefore, when we speak about libertarianism, we are neither referring to practices similar to liberalism and representations, nor referring to ethical-political opposition to authoritarian socialism or a socialism carried out by the conduction of *us* by a superior conscience. The libertarianism practices *direct action* and is at the threshold of breaking apart with the Idea, the Spirit, the Superior, the sovereign. It is inside the struggle between social forces, producing events and concepts compatible to the practice of liberty. For Proudhon, since the 19th century, the libertarian law is not built through the adoption of another universal that purifies the sins of the religious law or the mistakes, distortions or perversions of modern law. For anarchists, since Proudhon, there is only a liberator law when established by the parties involved around a given object – understood as both material production and events that generate customs capable of dissolving the sovereign power, in the family, in the production, in the state.

Hulsman's libertarianism comes close to anarchism not for a doctrinarian filiation, but for its practice of *direct action*. It is not about attraction of manipulations through ideological dispositions, but experimentations. In this sense, the reflections, essays and performances by Nu-Sol – Nucleus of Libertarian Sociability⁸, in Brazil, have pointed out the overcoming of the stage of reference to models, including derivations through their own variations and immobilizers in the contemporary society of control – when it provokes new confrontations fostered by the notion of *response-course*.

Response-course libertarian abolitionism

I shall initially highlight that the plethora of second and third generation rights, through the practices of inclusion in the society of control in the globalized capitalism, as referred before, immobilizes resistances when it fosters the emergence of several secondary elites derived from rights of minority (blacks, homosexuals, disable people, women...). This is about a new democratic device for capturing protests through public calling for participation and provokes new police actions of mutual surveillance.

The tribunal proceedings are disseminated to the population in the outskirts through an organized action of these elites to put into operation a diverse set of *councils* for surveillance and participation, connected to the state control. This way, free citizens organized in NGOs (non-governmental organizations) and establishing contracts of public-private partnerships with companies undertake supplementary functions to police repression, monitoring *suspects*, now classified as *vulnerable*, in opened or closed penalization regimes, and even after having served out a sentence. Together with these secondary elites, the surrounding tribunals and complimentary police, were established the new ongoing, endless and unfinished devices for democratic control that transformed models in modulations.

If Hulsman's models can be captured by the alternative modulations in the society of control and his abolitionism can be domesticated in restorative justice, the potential for invention also leads us to the response-course. It marks a separation from the transcendence

⁸ See website at www.nu-sol.org and the journal Verve at <http://www.nu-sol.org/verve/verve1.php>, with writings by Salete Oliveira, Thiago Rodrigues, Thiago Sousa Santos, Acácio Augusto and myself.

of the models, including the universal conciliatory of the civil law, in detriment of organizing responses to situations-problem in such a way that they do not take over the victim's will through the procedural and abstract exercise of the lawyer and of the public attorney, towards the end of not only the penal selectivity, but also the very penal system: an end that would honestly start by eliminating imprisonment of youth, inside and outside prison walls – a possible gap for *another* education.

The response-course – as a shared, joint, lived decision, taken to a reciprocity – is neither conclusive nor an administration of the continuous surveillance or taken on behalf of a *monitored freedom*. *Response-course* is an anti-model and anti-modulation pathway, which affirms liberty and recognizes the inexistence of absolutes: the ones involved know that other situations-problem might emerge. And we, libertarians, want it fulfilled by liberator resistances, with one or more vanishing lines.

Together with Louk Hulsman, we speak against money and public effort investment in prison to the poor and subversive, as we know how much cheaper it is to respond to the victim with compensation and how stupid it is to payback an infraction with crime – penal law and theatre-tribunal, with sentences and rotten prisons that renew prison facilities and illegalisms in capitalist corporations, more or less humanized. There has never been any perversion or banality of evil in that; there has been only corporate management that emerges from practices of concentration camps, mobs and state, attached to the belief in *zero tolerance*, participatory and representative democracy, surveillance and security in fluxes that characterize this time of *moderate conservatism*.

Walking with Hulsman and with anarchists – when freed from the universal human emancipation – allows us to deal with the present day inside and outside of the inventive possibilities of liberty, dissolving these boundaries; free from the comforting utopias and close to the thresholds of inventive heterotopias, accomplishing in the present now, without accommodating in another dream, ideal or praise for the order.⁹

⁹ By Louk Hulsman, in Portuguese, especially regarding penal abolitionism: *Penas perdidas. O sistema penal em questão*. Rio de Janeiro: Luam, 1993; “Temas e conceitos numa abordagem abolicionista da justiça criminal”, In Edson Passetti & Roberto B. Dias da Silva. *Conversações abolicionistas. Uma crítica do sistema penal e da sociedade punitiva*. São Paulo: Instituto Brasileiro de Ciências Criminais / PEPG Ciências Sociais PUC-SP, 1997, pp.189-213. *Discursos Sediciosos entrevista Louk Hulsman*. Revista Discursos Sediciosos. Crime, direito e sociedade. Instituto Carioca de Criminologia/ Freitas Bastos Editora, 1998, nos. 5 e 6, pp. 9-

The law, to remain in Hulsman's abolitionist field, as a right to an object or event resulting in common agreement between the parties, deals with differences while avoiding synthesis, and stops discriminations and their new divisions generated by minority rights, conformed in secondary elites. Intercepting state racism in *civil* society is to encourage the citizen to *disobey* and to learn that in capitalism there is no legality without illegalities. There is no universal law that is not property of a hierarchical superior – whether called state or any exercise of sovereign power. Governing is more than an act of sovereignty and control over the lives, a biopolitics. Therefore, what is at stake is to give up loving the obedience and the petty powers of order, to inhabit the frontier and demolish it.

Since there is no ultimate goal, but situations-problem, the surpassing of models entails response-course, unique and unfinished, enhancing the spaces to experiment in them the vast ground of freedom that are unknown for us.

Louk Hulsman has come to put things out of control. Cheers!

English translation by Andre Degenszajn

12; "alternativas à justiça criminal". In Edson Passetti (org) *Curso livre de abolicionismo penal*. São Paulo/Rio de Janeiro: Nu-Sol/Revan, 2004, pp. 35-68. There are several commentators on the work of Louk Hulsman. Particularly, Louk Hulsman's *dossier*. In Revista Verve, São Paulo: Nu-Sol, pp. 13-72, with articles by Vera Malaguti Batista, Maria Lucia Karam, Nilo Batista e Saete Oliveira, including a poem by his daughter Jehanne Hulsman. See especially "Abolicionismo libertário, verbetes". In <http://www.nu-sol.org/verbetes/index.php?id=58>.