

ARTICLE

# From an ‘espresso definition’ to an ‘empowering definition’ of restorative justice: a dialogue from the South with Lode Walgrave

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## 1 Introduction: the consequential concept of restorative justice by Lode Walgrave

In the article titled ‘Concerns about the meaning of “restorative justice”. Reflections of a veteran’ (this issue), Lode Walgrave proposes a reflection on the concept of restorative justice. According to the author, restorative justice is ‘now a commonly known phrase, a much-implemented, often legalised practice, the inspiration for transformative movements and a subject of academic theorising and empirical research’ (Walgrave, this issue). Simultaneously, however, Walgrave detects an issue regarding the limits of restorative justice:

While many still see it mainly as a way of responding to crime, others, at the other end of the spectrum, consider restorative justice as a wide movement to transform the way we are living together on this planet (Walgrave, this issue).

For him, this second conception is problematic in its elasticity and vagueness, threatening the field’s epistemological and social credibility. Moreover, he feels that it could be especially detrimental for research and assessment, ‘the reflection side of the action-reflection cycle’. Thus, a less vague concept would be needed for science to be able to empirically evaluate restorative justice.

Dialoguing with many authors who theorise on restorative justice, Walgrave proposes a universalist concept in the form of an ‘espresso definition’, presented as ‘consequential restorative justice’. In his words,

like an espresso, it is short, because it is limited to its core of doing justice after the occurrence of an offence, and strong, because it pushes the priority for restorative/reparative responses consequentially through to penetrate the juridical procedures and sanctions (Walgrave, this issue).

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In this article, we will critically engage in the debate about the limits of restorative justice, from our standpoint as scholars from Latin America and specifically from Brazil.

## 2 Our positionality: texts, contexts and arguments

As already clarified in the editorial and elsewhere in this special issue, Lode Walgrave requires no introduction. He is one of the protagonists in the theoretical construction of restorative justice in the Global North. Because of this, we feel very distinguished and honoured for the opportunity to be part of this important debate by bringing our concerns and arguments from our Southern perspective.

The revision of the concept of restorative justice arises in a moment more than opportune, both from the theoretical and the contextual, global, regional and local points of view. Our world has been living one of the most complex and dramatic contexts of its recent history, a moment of 'capitalist barbarism' (Menegat, 2012),<sup>1</sup> producing a planetary and humanitarian destruction without any precedents. Simultaneously, the far-right gains ground around the world, particularly in Brazil with the ascension of former President Jair Bolsonaro and of '*bolsonarismo*' (Andrade, 2020). Having lost the elections in 2022, Bolsonaro leaves the legacy of a country devastated by irresponsibility, corruption, precarisation of life, fear and hate cultures and massive deaths.<sup>2</sup>

While the transition of government is revealing the horrors produced by the last presidency, Brazilians are also realising that there is a line of continuity with our past, which is marked by colonialism, slavery, patriarchy, militarisation and dictatorships. Those horrors of the last government are not accidents in our history but a resumption and increasing of the deepest structural injustices. The state of Brazil was founded and follows its pathway over a violent ground, such as the genocide of originary peoples and of African peoples, who were trafficked and

- 1 For 'capitalist barbarism' we follow Menegat (2012) and Batista (2012) in the comprehension of the stage of capitalism in which the 'content' it produces does not fit anymore inside the political and juridical 'forms' constructed to institutionalise it, making it to lose its civilisational character. It is the moment in which, under the domain of the third technical-scientific revolution, 'dead labour' prevails over 'living labour', leaving human beings without any capacity of inclusion in the system. This system needs 'war' as a method of social control, emitting morbid symptoms in a generalised way.
- 2 Numerous deaths during the pandemic of COVID-19, environmental destruction, deforestation and invasion of Indigenous lands to illegal mining and livestock, genocide of originary peoples, the increase of racism, misogyny, transphobia, xenophobia, speciesism and many other unnominated forms of violence. The strengthening of militias, the fake news industry used by agents of the governments, the destruction of institutions and protective legislations of public and citizenship policies, with extreme seriousness in the fields of health and education, the murder of Marielle Franco (<https://theintercept.com/2019/01/17/marielle-franco-brazil-assassination-suspect/>) and many other barbaric crimes which never clarified. Harms of such greatness turn back on the lights which were already off over a past of structural injustices. Having as a matrix the patriarchal colonisation and the slaveholding estate, such injustices extend over production and reproduction ways of social life.

enslaved throughout three centuries; sexism and the naturalisation of violence against women and LGBTQIA+ people; and a range of social inequalities.

Being that colonial rationality is the foundation of this violent historical process, one of the main kinds of injustice in Brazil and in the Global South is epistemic injustice. The epistemological exclusion is one of the consequences of the emergence of the 'race' as a tool that hierarchises beings, peoples and knowledges (Quijano, 2005; Segato, 2021). Discussing violence and justice systems presupposes an understanding of how modernity/coloniality structures the definition of justice and the production of the modern systems of justice.

There is, thus, an overdue reckoning to be done in our society, which puts the systems of justice in a central place. In this context, we deposit in the emergent movement of restorative justice a potent accountability, reparation and transformative hope. As a consequence of this reasoning and as it will be further developed throughout this text, we would like to argue for the adoption of wider lenses to receive restorative justice in the Latinity and in the Brazilianness. This means, among other issues, striving to move beyond the limits of interindividual and criminal offences to reach the powerful, massive and collective harms to peoples, more-than-human animals, ecosystems and territories.

Therefore, despite the temptation of analysing all the arguments employed by Walgrave to support his consequential definition of restorative justice, the short space we have constrains us to highlight only four interrelated aspects. They correspond to the redefinitions that have been proposed from within our marginal region, which is Latin America and Brazil.

The first aspect relates to Walgrave's insistence of keeping restorative justice functionally dependent on the current criminal justice system. This inseparability opens a necessary debate to the clarification of how this relationship could and should work. Which justice deals with what? How? With which formation? With which tools? The author remains silent about those questions, which gives us some difficulties to move forward in this analysis. The second refers to the epistemological dependence on the legal definition of 'crime' and 'punishment'. The third aspect regards the limitation imposed on restorative justice to interindividual relationships. Covering all these aspects, the fourth one is the universalist feature of the presented concept by Walgrave. We will start from this last aspect.

We situate our article in the academic perspective of critical criminology, especially Latin American critical criminology, from a decolonial (Bernardino-Costa, Maldonado-Torres & Grosfoguel, 2020; Quijano, 2005) and abolitionist epistemology and praxis.<sup>3</sup> We bring to this dialogue theoretical and empirical research carried out in Brazil (Achutti & Pallamolla, 2021; Andrade, 2018; Andrade & Pedra, 2017; Machado, Graf & Catareli, 2021; Oliveira, 2022; Orth & Graf, 2021; Pallamolla, 2017) and in other countries about restorative justice and its

3 We will prioritise the expression 'decolonial', but we are aware of the discussions around the plurality of epistemologies, such as the postcolonial (Mbembe, 2018), anticolonial, counter-colonial and so on (Bernardino-Costa et al., 2020). The main point of convergence of all these perceptions is the centrality of 'race' in the colonial process to produce death, torture and domination. In the case of Latin American critical criminology, the epistemologies are still wider, also involving the Marxist theory of dependence (Marini, 2005).

epistemological challenges, with an interdisciplinary approach (Budó, França & Natali, 2023; Budó & Pali 2023; Van Buggenhout & Budó, 2022).

We advocate here that any theoretical development about what restorative justice is depends on the comprehension and overcoming of colonial rationality, which is reproduced daily in the structures of our Western societies.

### **3 The problem of universalism in the consequential concept of restorative justice**

Restorative justice is nowadays a field in movement, characterised by transcontinental open debates. In this sense, the practice of restorative justice often precedes theorisation, and there is no consensus or crystallisation of a totalising paradigm of how to implement it. This space of freedom and incompleteness is not a problem, however, but rather a democratic mark of the field. From this perspective, the first concerning point of the consequential concept of restorative justice commented on here is exactly its pretension to universality.

Historically, abstraction and universalism have been characteristics typically attributed to knowledge produced in the Global North, as if the standpoint of the Global North was a reference from which all the 'specific' knowledge should adapt. From the perspective of this 'international division of scientific labour', scientists from the Global South should contribute to science by talking about the specificities of their contexts – mainly providing data – while scientists from the Global North should think and theorise universally about them (Connell, Pearse, Collyer, Maia & Morrell, 2018).

Thus, the first impact of Walgrave's concept, even though it is not limited to this specific concept of restorative justice, is that it is not historically and contextually grounded. If we comprehend, nonetheless, that all knowledge is situated, we also understand that the pretension of being universal is a way of exercising power. As decolonial studies have shown, discourses have race, class, gender, nationality, sexuality and so on. The pretence of universality translates and transports those identities from the perspective of the enunciator from the Global North. Beyond bearing latent meanings in their enunciation, the universal and abstract theories will be operationalised in different contexts and interact in a dialectical way with them, producing different synthesis and consequences. The structures, then, determine how we understand the meaning of restorative justice. Leaving them in the margins of the debate, as if they were mere scenery, is a symptom of this colonial universalism.

### **4 What the consequential concept includes in restorative justice: penal system, crime, interindividual conflicts and conservative potentiality**

Independent of any attempt to provide restorative justice with an abstract and universal concept, our lenses compel us to consider that, when contextualised, it will operate inside concrete penal systems. Effectively, one of the fundamental diagnoses in the field of critical criminology is about 'penal selectivity', as revealed

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by numerous filters of structural oppression, such as class, race, gender, sexuality, nationality and so on. Structural oppression is still more radical in the peripheries of the planet (Andrade, 2005; Zaffaroni, 1991), increased by corruption and genocidal institutional violence.

The processes of criminalisation do not have the aim of reducing or preventing harmful behaviour, but rather of controlling marginalised social groups (Baratta, 2002). The social, ethnic, race and gender markers used to select the people who will be the objects of those processes are, as a rule, the opposite of the people who are responsible for the legislative production of criminal law and the criminal law enforcement in concrete cases. Parliamentarians who make the law, as well as prosecutors and judges who enforce criminal law, are mostly white men and come from high-middle-class or wealthy families (Alves, 2017). In Brazil, crimes against individual property and crimes related to the commercialisation and possession of illicit substances represent more than 60 per cent of criminal court cases. The consequence is mass incarceration of Black and poor people, didactically exposing the selectivity and the genocidal character of the criminal justice system (Alexander, 2012; Andrade, 2012; Brazil, 2022; Flauzina, 2008; Zaffaroni, 1991).

This debate derives from critical criminologies and victimologies (Aniyar de Castro, 1983; Baratta, 2002; Del Olmo, 1990; Zaffaroni, 1991; among others) and from penal abolitionism as matrices of the restorative movement (Achutti, 2016; Christie, 1977; Hulsman, 1997; Scheerer et al., 1989). From the delegitimisation of the penal system to alternatives of social control, all fruitful contributions of those fields remain wasted and emptied in Walgrave's conceptual proposal. For these reasons, we also resume the need for a decolonial praxis (Walsh, 2018) to imagine the future of restorative justice.

Recovering these perspectives and guided by decolonial and Southern epistemologies, we ask: are the delegitimised prisons of Brazil compatible with the restorative principles, values and ideals? Can restorative justice live together with those delegitimised violent prisons supported by a genocidal State (Flauzina, 2008,

2014; Zaffaroni, 2022)?<sup>4</sup> Can restorative justice work together with a system that re-victimises victims of crimes instead of protecting them? If restorative justice depends on concrete penal systems, it will not only co-participate in their functionality, but it will also co-participate in their reproduction and re-legitimation, which research carried out in Brazil has clearly demonstrated (Andrade, 2018).

In 2012, through its resolution No. 225/2012, the National Council of Justice (CNJ) positioned the judiciary as the protagonist in the conception of restorative justice in Brazil. The same document provides that the restorative procedure can be an alternative or a complement to the penal procedure (or infraction procedure, in the case of defendants under eighteen years of age). Recent research on restorative justice in Brazil has shown that even though the resolution allows for the restorative alternative, it has not been implemented in practice (Andrade & Pedra, 2017; see also Andrade, 2018; Oliveira, 2022; Pallamolla, 2017). In the adult criminal justice system especially, it is more common that the criminal procedure is not suspended while the restorative procedure is carried out, while in the juvenile procedures the suspension of the court case is more accepted. In this way, the judiciary exercises a double power: the selective power to decide which cases will proceed to restorative justice, which is still discretionary, and the selective power to approve (or refuse) the agreements eventually reached at the end of the restorative procedure. The judges also define the possible impact of this agreement over a criminal or infractionsal verdict (Andrade, 2018<sup>5</sup>).

- 4 The thesis that there is still a genocide in progress by Brazilian and other Latin American states against Black, originary and traditional peoples is developed by many authors. We briefly highlight the thought of Eugenio Raúl Zaffaroni and the concept of 'drip genocide' (*genocidio por goteo*), rooted in the extremely high homicide rates and the extremely high Gini coefficient, representing types of systematic deaths due to the action and omission of the states, and having as its main victims Black and originary peoples. Flauzina (2014) supports the thesis that the juridical concept of genocide is not applied to prosecute states such as Brazil and the United States in these cases because of the white supremacism that determined a strict concept in the convention on genocide, avoiding the criminalisation of the most powerful and white countries, and normalising the idea that only non-white people could be accused of genocide in the International Criminal Court. In 2019, a group of Indigenous lawyers articulated a request to the International Criminal Court to investigate an accusation of genocide and crimes against humanity perpetrated against the Indigenous peoples of Brazil committed by president Jair Messias Bolsonaro, especially Mundurucu, Yanomami, Kaingang, Guarani Kaiowá, Ticuna, Guajajara and Terena peoples. The state omission during the COVID-19 crisis also increased the death rates among Indigenous peoples (see Articulation of Indigenous peoples of Brazil. Unprecedented: APIB denounces Bolsonaro before the ICC in The Hague, for Indigenous genocide, 9 September 2021. Retrieved from <https://apiboficial.org/2021/08/09/unprecedented-apib-denounces-bolsonaro-before-the-icc-in-the-hague-for-indigenous-genocide/?lang=en> [last accessed 1 September 2023]).
- 5 The research 'Piloting restorative justice: the role of the Judiciary' was carried out within a programme of grants by the National Council of Justice (CNJ) of Brazil's Ministry of Justice and conducted from June 2016 to December 2018, under the coordination of the first author, together with fellow researcher Alline Jorge Pedra Birol (Andrade, 2018).

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Furthermore, the research showed the endurance of the punitive and positivistic paradigm and, simultaneously, of some myths of restorative justice,<sup>6</sup> which serve as epistemic and ideological obstacles to the introduction and advance of restorative justice inside Brazil's current criminal justice system. Relegated to the margins or to the peripheries of the current justice system, restorative justice not only faces difficulties to progress but also experiences a distortion of its concepts and representations.

## 5 What does the consequential concept exclude from restorative justice?

In this section, we will talk about two important topics that, from our point of view, are left out from the consequential concept of restorative justice. The first is about the transformative potentiality of restorative justice, which presupposes to overcome the system of justice constructed in the framework of modernity/coloniality. The second is about the conflicts beyond interindividual relationships, such as collective and massive victimisation.

### 5.1 *The transformative potential of restorative justice*

By limiting the concept of restorative justice to criminal law, the liberating, transformative, humanist and democratic potential that defines it is also limited. Epistemologically, it ends up reiterating traditional criminology's methodological dependence on the causal-explanative paradigm, which in turn fulfils the instrumentalising and legitimising function of the selective decisions of criminal law (Andrade, 2015; Baratta, 2002).

In this sense, the methodological and functional limitation of restorative justice to the model of the current criminal justice system implies its 'conservation', as it does not affect the state monopoly of justice. In other words, it does not affect state monism, the defining core of justice in modernity/coloniality and the status of the state as holder of the power to distribute justice. The conceptual limitation of Walgrave's proposal not only keeps but also strengthens the current paradigm that consolidated the criminal justice system as a mechanism of power, control and domination.

For this reason, Lode Walgrave's proposal seems to collide with a foundational principle of restorativism, which is the 'devolution' of the power and autonomy to those directly or indirectly involved in and affected by a situation-problem (not necessarily defined as a crime) to be the protagonists of the reaction-response. Being the protagonists, they engage with their needs, feelings and agreements, following the legitimate, legal and constitutional parameters and respecting the human rights. We are referring to 'participation' as a democratic touchstone of restorative justice; stakeholders re-appropriate their own conflicts as concrete empowerment (Christie, 1977).

6 Some of these myths are that restorative justice is an alternative 'method' of conflict resolution, that it is applicable only to minor or less serious crimes or infractions, that it is equivalent to impunity, or that it is a swift justice, capable of unburdening the judiciary power, and for which instant training is sufficient.

By decentralising the state and its monopoly of justice, the pillar of participation allows the so-called community to act as a protagonist, with a range of consequences to the construction of a shared new paradigm of justice (Fonseca Rosenblatt, 2015). We refer to the widening of its social and democratic basis and, therefore, to the potential increase of the capacity to seek equalisations and symmetries historically withheld by the hierarchical, bureaucratised and ritualised space of justice in 'togas'.

Thus, from our perspective, a fundamental question to be answered is whether or not it is possible to (re)construct the current paradigm of justice beyond the limits of domination and the violent, exclusionary and stigmatising social controls that make it functional. Even if we admit huge difficulties, we understand that it is possible and the more democratic move allowed by restorative justice is to enhance, *pari passu*, the shift from justice 'over' the other to justice 'with' the other. This process, however, will require equidistance from criminal justice and a redistribution of its power to deliver justice.

### **5.2 Collective conflicts and harm: structural and institutional violence**

According to Eurocentric lenses, such as Howard Zehr's (2008, 2012) and Lode Walgrave's, restorative justice is used for micro-relations, that is, harmful interindividual relationships, following the legal framework that defines crime and punishment. Notwithstanding, the movement that the Southern epistemologies must operate in this perception is to reposition it beyond interindividual relationships to also reach collective relationships and the massive harms caused by structures, institutions and corporations. In this direction, the lenses must be turned to the inequalities and historical injustices created by structural and institutional violence, such as colonialism, racism, slavery, the markets, institutions of the capitalist state, and capitalism itself, as well as dictatorships, authoritarianisms, fascisms and democratic incompleteness. In this list of institutions responsible for the (re)production of historical injustices lies the current (in)justice system, delegitimised because of its role as co-participant of the violence, especially in Brazil and all of Latin America. However, the imperatives for restorative justice transcend both the legal framework that defines crime and punishment (mainly of imprisonment) and the interindividual relationships to which those definitions refer.

In this sense, the most harmful conducts to humanity and to the planet are not circumscribed in the legal definition of crime, in the interindividual relationships and in the territoriality of national states, as the critical criminologies and victimologies have exposed throughout the past five decades (Bernal, Cabezas, Forero, Rivera & Vidal, 2014; Schwendinger & Schwendinger, 1970). We refer to the harms perpetrated in the colonial past, marked by slavery, in the recent past of dictatorships in the 1960s and 1970s in Latin America and, in the present, of dependent capitalism still characterised by coloniality. The relationship between this past and present guide us to see a huge menace to the future, including the extinction of species and the incapacity of the Earth to sustain the conditions for human life.



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The globalisation of capitalism, under the scrutiny of the third technoscientific revolution, and the increasing predatory character of production, accumulation and consumption have unleashed a chain of destructive processes (Foster, Clark & York, 2010; Stretesky, Long & Lynch, 2013). Many of them are considered catastrophes, tragedies or even accidents. However, what is at stake here is an accountability to be distributed among people, institutions and corporations (Amazon Watch, 2020; Whyte, 2020).

The threat to nature by capitalism is also related to another epistemological issue to be dealt with by a transformative conception of justice, which is anthropocentrism. The detachment between human beings and ecosystems, as well as the hierarchisation that perceives humans as superiors to nature and more-than-human animals, cognitively justify the ecosystems' massive destruction (Krenak, 2019). This process is also rooted in the context of European modernity, bringing what Escobar (2011) calls coloniality of nature.

Realising that those massive harms cannot be studied under the legal framework of crime, researchers dedicated to their studies in criminology have adopted the social harm approach (Hillyard & Tombs, 2005; Pemberton, 2014). This is the case for authors in the fields of green criminology and the crimes of the powerful (Barak, 2015; Budó, Goyes, Natali, Sollund & Brisman, 2022; Goyes, 2019; South, 2014). The main goal of this approach is to define as objects of criminological harms that cannot be framed in the legal definition of crime. The second goal is to allow us to imagine justice beyond the criminal justice system and its cognitive limitations. According to this perspective, the incapacity of the criminal justice system to really deal with social conflicts is not only a mistake in the itinerary or even a problem of conjuncture. The crimes of the powerful and other harms that are not covered by the law or that are outside of concrete criminal justice systems are actually inherent in capitalism and necessary to the maintenance of the structures of power. The criminal justice system can be seen, thus, as a colonial tool, which is structurally selective for the good of the people who dominate the political, economic, racial and gender power.

Regarding the environmental problems, we now return to Walgrave's article, where the author cites Forsyth and colleagues' (2021) approach to highlight how restorative justice has been an excellent alternative to solve conflicts derived from environmental crimes. Actually, there is a new sub-field of restorative justice already being consolidated, which is called 'environmental restorative justice' (Forsyth et al., 2021; Pali, Tepper & Forsyth, 2022). We find here a contradiction. For this approach to be possible inside the limited concept proposed by Walgrave, all the great environmental harms that have occurred in Brazil would be totally outside of restorative responses. For example, criminal law and the criminal justice system are completely insufficient to address the invasion of originary people's lands and destruction of nature. This is not an individual problem, but an issue that relates to national and international political decisions about capital accumulation. Therefore, deforestation to grow soybeans and to raise cattle, legal and illegal mining, and even the timber traffic have not found any possibility of criminalisation under the Brazilian legislation (Amazon Watch, 2020; Bueno & Lima, 2022).

This epistemological restriction to the legal definition and to law enforcement limits the access of restorative justice to situations in which the harm derives from 'games' of economic and political power. And this limitation occurs exactly in the cases in which restorative justice would not only be a satisfactory alternative for reparation and restoration of the relationships but would also assist the production of a democratic debate, with the participation of the community. In this sense, restorative justice could be combined with other principles, such as truth and memory, focusing not only on the past but on the future as well, to ensure that such massive harms do not repeat (Killean, 2022; Rodríguez, 2022). Therefore, environmental restorative justice in Latin America demands an open path to the development of a perception of justice which also integrates the principles of transitional justice. This idea perfectly aligns with the warning brought by Clamp (2020), who maintains that the context of large violations of human rights promoted by the state and other powerful agents must be taken into consideration to comprehend the role of restorative justice.

These contexts bring huge complexities to the original constructions and executions of restorative justice, which are typical of contexts of consolidated liberal democracy and economic stability. Some of those complexities are the result of the seriousness of the harms, the difficulty in recognising the human and more-than-human victims, the difficulty of identifying the perpetrators, and the problematic lack of accountability when the harmful behaviours are performed by state agents, paramilitary groups or even big transnational corporations. Moreover, in this marginal region, national and transnational companies have acted as agents of destruction, with huge obstacles for accountability, taking advantage of structural violence (Aniyar de Castro, 1980; Böhm, 2019, 2020; Del Olmo, 1987). As Clamp (2020) argues, in the reflection about the concept of restorative justice, there is little consideration given to the integration of the transitional justice discourse.

To deal with this shortcoming it is necessary to go beyond the traditional definition of crime. This is the first step in addressing the harms of local, national and global political and economic organisations. Without dealing with the destructive and unsustainable development of capitalism, it is not possible to imagine changes in the destruction it leaves along its wake (Barak, 2015; Menegat, 2012; Whyte, 2020).

There are already initiatives from the Global North that bring corporate victimisation to the theoretical field of restorative justice. This is the case for Aertsen (2018, 2022), who highlights the practical obstacles in bringing companies to participate in a restorative procedure, or even to identify the victims, their demands, and who would represent them (Budó & Pali, 2023).

However, to walk in this direction, a process of detachment of justice, social control and domination, in the interindividual relationships as well as in the collective spheres, must be triggered (including people, nature and more-than-human animals). Restorativism seems to be a path with no return to potentialise this transit from 'micro' to 'macro' and again to 'micro'. This would consolidate a justice in movement, capable of moving from individual violence to structural violence, passing by symbolic and institutional violence.

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Finally, it would be possible to produce responses other than punishment and imprisonment and definitively overcome the binomial crime-punishment. The search is, then, for a new structure of accountability that is not constructed over a basis of external coercion but of inclusive and dialogic procedures of mutual sensitisation and convincing. From there, the potential of the restorative practices emerges as spaces to democratically address individual and collective harms. With this possibility, the gigantic financial, human and social costs of the prisons could be minimised.

## 6 Final considerations

In Brazil, the opportunity of reckoning with slavery and the genocide of Black and Indigenous peoples and with the *continuum* of social, gender and racial inequalities was lost under the auspices of ‘amnesty’. We have never had an accountability process to deal with the genocidal past or with the torturers of the most recent dictatorship (1964-1985). In this country, where the massive deaths are a product of the performances of the state – marked by structural violence promoted by the colonial violence – we have the perpetuation of immune elites. This is a paradoxical immunisation in the country that ranks third only to the United States and China in the sad *podium* of incarcerated people in the world. This is a justice of ostensive selectivity, considering that those people in jail are not randomly recruited. Brazil represses, punishes and kills a lot of Black and poor men and day by day it is also increasing the incarceration rates of Black women. The war on drugs is not our war, but it is nowadays the epicentre of this selective functionality for which Black young men and women are paying with their lives.

Thus, re-anchoring the debate about the concept of a new justice – the restorative one – in Brazil implies a great responsibility of recognising it as a concrete construction and not as an abstract model, or even as a ‘datum’. Because of this, we must reposition the current justice system as a paradigm of inequality and domination. There are only a few contradictory, contingent spaces where transformative initiatives have been allowed in, but these are so small that they only confirm this state of affairs.

Instead of ‘combating’ violence, the criminal justice has been violent, with its unequal, disproportional and illegal criminalisations and punishments. At the same time, it keeps immune the state and the elites, even when they cause humanitarian and environmental atrocities. Let the ‘unconstitutional state of affairs’ of the carceral system<sup>7</sup> (Brazil, 2015) and its killer police speak for a criminal

7 In 2015, the Supreme Federal Court recognised that the current carceral system should be understood in a situation of ‘unconstitutional state of affairs’ because of the incoherence of concrete penalties with the conventional, constitutional and infra-constitutional rules (see: [https://portal.stf.jus.br/internacional/content.asp?id=159922&ori=3&idioma=en\\_us](https://portal.stf.jus.br/internacional/content.asp?id=159922&ori=3&idioma=en_us) [last accessed 16 September 2023]).

state. Let the immeasurable environmental tragedies such as Brumadinho<sup>8</sup> or the renewed eco-genocide against the Yanomami people<sup>9</sup> speak for the criminal markets (see also Crook, Short & South, 2018).

It is because of its historicity that the criminal justice system is not a legitimate model to receive and anchor restorativeness. As research has demonstrated, the current criminal justice system resists the reception to restorative justice and transfers its marks to the new paradigm, undermining its genuineness, values and potential.

In this brief reflection from the South, we are heading in a different direction from that one pointed by the prestigious author. From our planetary margins, from this South called Brazil, it is necessary to talk about a substantial justice from the place it does not inhabit, from the place of the dominated, oppressed, inferiorised, minorised, discriminated, disrespected, repressed and excluded. It is necessary to speak of justice from the secular persistence of its silences for those who live in the lower social, sexual, ethnic-racial, age, capacity and environmental pole; from those who have not experienced it but who have an omnipresence of police and prison in their lives.

The challenges are enormous, we know, because restorative justice germinated in contexts of economic and democratic stability, built at a high human, cultural and environmental cost of centuries of plunder and exploitation of slave labour in the colonial context. Looking from the South, from Latinity and Brazilianness, implicates looking from regions that are marked by democratic discontinuity that follow the same history of Global North liberal democracies but on the opposite side of the colonial process. In this marginal region, there exists a thread that unites different forms of authoritarianism, dictatorship and fascism to the repression and punitiveness of the public safety and criminal justice systems, always amalgamated with militarism and a logic of war. In this context of capitalist barbarism, the state institutions of social control search for combating the so-called intern enemy, still following the doctrine of national security from the dictatorship.

- 8 On 5 November 2015, the Fundão Dam, located in the city of Mariana, in the state of Minas Gerais, exploited by Samarco Mineradora, collapsed. Samarco, the company responsible for the mining of iron, pertains to two other giants: Vale and BHP Billiton. The tailings travelled more than 600 km along the river Doce, bringing everything – people, animals, houses, cars, from Minas Gerais to Espírito Santo into the ocean – provoking still inestimable socio-environmental harms. Seventeen people were killed: children, adults, old people, women, men. As much as 85 per cent of the constructions in the localities were completely destroyed. On 25 January 2019, another dam, this one exploited only by the company Vale, collapsed. This Córrego do Feijão dam was located in Brumadinho, still in the state of Minas Gerais. As much as 12 million cubic meters of iron ore tailings spilled from the dam, this time far less quantity of dust, but reaching a more populated place. At least 270 people died, and 248 bodies were found and identified until now. Most of the people who died were workers from Vale, as the tailings reached the refectory where people were having lunch. About 24,000 people were forced to leave their residences and to be displaced from the area after the collapse (Silva, 2021) (see: <https://www.wsj.com/articles/brazils-vale-vowed-never-another-dam-collapse-then-an-even-worse-one-11577809114> [last accessed 16 September 2023]).
- 9 'During Jair Bolsonaro's far-right government, the number of children under 5 years old who died from preventable causes increased 29 per cent in Yanomami territory: 569 young Indigenous children died in the last 4 years from diseases that are treatable' (see: <https://sumauma.com/en/nao-estamos-conseguindo-contar-os-corpos/> [last accessed 16 September 2023]).

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However, if the challenges of this proposal are enormous, its refusal cannot be in the name of social credibility or the impossibility of science to evaluate it. Losing spaces where the emergent restorative movement can exist also means losing the potential to prevent the loss of human lives to the forces of law and order.

Accordingly, engaging in a wide and critical perspective of restorative justice is the way to reinvent justice in this region. The foundational act of this new justice is to imagine how the state can, symbolically and/or instrumentally, repair the harms perpetrated and perpetuated by its own genocidal history against the peoples who still insist on surviving despite continued structural, institutional, symbolic and interindividual violence. The state must publicly assume its responsibility by the harms of colonisation, slavery, genocides, military dictatorships and the necrophile government of Bolsonaro. Only then is a new paradigm possible, one that at least symbolically founds another structure of justice, whose protagonist will be the people and their communities. Perhaps at this point the adjective 'restorative' will become limited to describe a justice that works as a noun.

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