



# HUMAN RIGHTS AND IMPRISONMENT: LEGITIMISING THE PENALTY OR A PATH TO ABOLITION?

Paula N. M. Rosa\* & Sofia L. Santurio\*\*

\*PhD and M.A. in Criminal Law at the Faculty of Law of the University of São Paulo – USP; Lecturer in Criminology at Northumbria University. E-mail: paula.rosa@northumbria.ac.uk. ORCID: <https://orcid.org/0000-0003-0746-0686>

\*\*LL.M. in Public International Law with specialisation in International Criminal Law; Legal Clinician at the University of Amsterdam, Coordinator Fair Trials Clinic. E-mail: s.larrierasanturio@uva.nl. ORCID: <https://orcid.org/0000-0001-7141-3150>

## HYPOTHESIS

- International human rights law (IHRL) can be an important tool in the abolitionist struggle.

## METHOD

- Literature review

## ABOLITIONIST THEORIES: CONTRIBUTIONS

Abolitionism is diverse in its approaches and propositions (see Lamusse, 2021). A few examples:

- **Prisons** are places in which numerous violations of human rights are committed, they **are a source of suffering**, embodying state violence.
- Efforts to **'rehabilitate'** within prisons have been **unsuccessful**.
- The criminal justice system is **selective**; it exacerbates existing vulnerabilities and creates new ones (e.g. mental instability, health problems, etc.).
- Abolitionism supports reforms that challenge the basic prison structure, **aiming to reduce rather than legitimise/expand** it (e.g. extended leaves, visits, and other policies to open up prison) (Mathiesen, 1986).

## PRISONS AND IHRL

### IHRL and criminal justice system: a paradoxical relationship

IHRL has either limited States' punitive power (e.g. prohibiting corporal punishment and torture, and limiting the death penalty) or protected fundamental rights by requiring or encouraging the correct use of the criminal justice system (e.g. duty to investigate and punish, and victims' rights).

### So far: IHRL has limited types of punishment

- Corporal punishment (IACtHR: *Caesar vs. Trinidad and Tobago*; ECtHR: *Tyrer vs. UK*)
- Death penalty (IACtHR: Advisory Opinion 3/83; ECtHR: *Al-Sadoon and Mufdhi vs. UK*)
- Life sentence (IACtHR: *Mendoza et. al. vs. Argentina*; ECtHR: *Murray vs. The Netherlands*)

- **IHRL seeks** to improve prison conditions without challenging the legitimacy of prisons as punishment (reformist).
- **But** it has limited their use: e.g. imposing international minimum standards and limiting the use of pretrial detention.
- The mechanisms for the protection of human rights can be an important tool for abolitionist struggles:
  - Number of rulings regarding violations of human rights in prisons: circumstantial deficiency vs. structural deficiency.
  - Violence in the criminal justice system and prison become evident from the number of articles dedicated to the subject in international instruments + instruments entirely focused on ill treatment and prohibition of torture. E.g.:

Art. 5, UDHR	<ul style="list-style-type: none"> <li>• Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</li> <li>• Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</li> <li>• Inter-American Convention to Prevent and Punish Torture</li> <li>• UN Standard Minimum Rules for the Treatment of Prisoners</li> </ul>
Art. 7, ICCPR	
Art. 5, ACHR	
Art. 3, ECHR	
Art. 5, ACHPR	
Art. 8, ArCHR	

- **Last 50 years:** the international community has shown a **tendency to minimize the use of imprisonment**.

E.g.: the decrease in the legitimacy of prison from the UN Standard Minimum Rules for the Treatment of Prisoners in 1955 to its revision in 2015 (Mandela Rules).

## PRISONS AND IHRL AS A TOOL FOR ABOLITIONIST STRUGGLES

- The inherent dignity of every human being.
- Prison as pain and suffering: recognises a certain amount as acceptable, but this changes. **Evolution towards intolerance to inflicting pain.**
- The legitimate prison penalty is the one that **limits its interference** on fundamental rights (e.g. right to privacy, to family life, to autonomy, etc.) **to the minimum** that is inherent to the deprivation of liberty.

'(...) under this provision [Article 3 of the Convention] the State must ensure that a person is detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (...)' (ECtHR. *Kudla vs. Poland*, 2000, par. 94)

'Deprivation of liberty generally causes, as its unavoidable consequence, the impairment of other human rights, besides the right to personal liberty. However, said impairment of rights arising from the deprivation of liberty or as its collateral effect, must be strictly minimized. Furthermore, the State must ensure that the manner and method of any deprivation of liberty do not exceed the unavoidable level of suffering inherent in detention and that the detainee is not subjected to sufferings or hardships exceeding the unavoidable suffering inherent in detention (...)' (IACtHR. *Montero-Aranguren et al (Detention Center of Catia) vs. Venezuela*. 2006. par. 86)

- These minimum standards are non-negotiable.

'The Court further reiterates that Article 3 (art. 3), which enshrines one of the fundamental values of democratic societies (...), prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. (...)' (ECtHR, *Ahmed vs. Austria*, 1996, par. 39-40)

'(...) certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. (...) It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult. (...)' (CCPR, *Womah Mukong vs. Cameroon*, 1994, par. 9.3)

'(...) As the Commission has observed in previous cases, these standards apply irrespective of the nature of the conduct for which the person in question has been imprisoned and regardless of the level of development of a particular State Party to the Convention.' (IACmHR, *Joseph Thomas vs. Jamaica*, 2001, par. 132)

- Selectivity of the criminal justice system and how vulnerability is reinforced in prisons (IACtHR: Advisory Opinion 29/22; SPT, 2010, CAT/OP/12/6; ECtHR: *Rooman vs. Belgium*).

## REFLEXIONS AND POSSIBILITIES

- IHRL: **continuous reaffirmation** of the dignity of all human beings **and protection** of basic rights; a systematic and broad compilation of the violations caused by imprisonment; a field open to evolution.
- Academic research:
  - **engagement** with the international field: exchange of information, experiences and ideas.
  - continuously **challenges** the legitimacy of prisons, other penalties, and the criminal justice system, proposing **alternative solutions and directions**, based on concrete data.
- **Interaction** between the fields can contribute to the **advancement** (and reduction) of the criminal justice system, in this continuous movement **towards the abolition** of prison and other forms of oppression.
- IHRL must be **open to the reality and experiences** of all the countries in the world, **instead of reproducing the logic of 'developed western countries'**. Interaction with academics and practitioners can allow that.
- IHRL represents political victories in the recognition of basic human rights; academia can draw from the data offered by IHRL and keep it in check.