

IN DEPTH

## Against punitivism and impunity in Mexico: a new justice

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**Punitivist approaches seek to create security by punishing those who do not obey the law.** In this conception, punishment tends to mean jail, and this is known as justice. Punitivist legislative authorities focus on developing laws of punishment in order to guarantee security, while the executive seeks to enforce those laws by spending public resources on weapons, police, the military, prisons, etc. The courts respond by imposing harsh penalties, especially on poor people, and often for property crimes.

The resources being spent on punitive mechanisms are, by extension, not being invested in other social areas, deepening the inequities and risk factors that cause criminal behaviour to continue and increase, resulting in societies in constant conflict in which violence is normalised. If punitivism works, more people are jailed. That is its supposed indicator of success. In fact, this is a measure of failure: prisons exacerbate violence and the precarious conditions within them are perfect breeding grounds for recidivism.

It is worth setting out the differences between the anti-carceral and anti-punitive movements. As the name suggests, the first focusses on the idea that prisons should be shut, as the vast majority punish poor, racialised people who have committed minor crimes. Prisons, the argument goes, do not act as deterrents to crime, and neither do they prevent recidivism or redress any harm.

Anti-punitive perspectives, meanwhile, see justice as the production of mechanisms designed to prevent criminal behaviour. Given finite resources, prevention is prioritised

over punishment. When crimes occur, efforts are concentrated on redressing the harm done and applying alternative sanctions, with prison reserved as the last resort for only the most serious acts.

While it may seem contradictory, impunity is among the consequences of punitivism, because the more crimes need to be punished, the less institutional capacity is available to investigate and prosecute them with the necessary guarantees.

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It is worth asking whether anti-punitivist approaches increase the risks of secondary victimisation, lack of protection and abdication of responsibility by the state. In my view, the same solution still applies: to prevent this, efforts must be made to distinguish between different types of act, while at the same time expanding the possibilities of justice.

Certain acts are of such gravity and social impact that they deserve punishment, which may in some cases be jail. Such acts include homicide, femicide, kidnapping, enforced disappearance and rape. And it is to ensure that such behaviour can be penalised (and, therefore, deterred) that other types of justice should be used for less serious acts.

### **Punitivism in numbers: Mexico**

I will use my country, Mexico, as a point of reference. According to figures from the National Institute of Statistics and Geography (INEGI),<sup>[1]</sup> in 2021 28,1 million crimes were committed against 22,1 million victims. That is 17% of Mexico's population. However, in 93% of cases, the crimes were either not reported or judicial proceedings were not begun. Of the remaining 7%, only 1,1% ended in penal consequences.

The main problem with punitivism is that by not establishing priorities, impunity increases and aggressors are less likely to take responsibility. When all crimes are serious, none is. When justice systems are obliged to prosecute and try for robbery, marijuana possession, enforced disappearance and homicide, it is highly likely that they will concentrate on punishing the first two, which are usually easier to investigate and are committed by people with fewer resources.

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Taking the 28 million crimes INEGI estimates were committed in 2021 as a starting point, if 10% of perpetrators are punished with imprisonment, that translates to over 2 million people going to prison and levels of impunity that remain above 90%.

So, the way to prevent more victims is not by strengthening the traditional justice system, it is by reducing crime. Then, the state can more effectively punish the most serious crimes with jail, while addressing less serious behaviour in a differentiated manner that facilitates redress for any harm. Among other things, this means ensuring that aggressors have the economic resources to compensate for the damage caused.

### **Impunity in gender-based and sexual crime**

Feminist positions may vary, but they agree on a central agenda: violence is the common denominator of what we reject. We differ, however, on the right way to address this violence.

When addressing gender-based and sexual crimes, punitivist approaches tend to emerge. Certain feminists demand prison not only for femicide, injury and rape, but also for behaviour that may be considered less serious, such as sexual harassment, digital violence and a parent refusing to provide food for children.

However, a growing movement opposes the view that all types of gender-based violence must necessarily be punished with imprisonment. Anti-punitive feminism argues that traditional justice involves the imposition of a patriarchal vision, since the means of achieving it – military, police, weapons, prisons, etc. – reproduce gender stereotypes and values that are associated with men, such as strength, aggression, toughness, control over the body and the power to subdue, resulting in the replication of violence. Hence, new visions of justice are proposed that call into question the predominance of merely punitive justice.

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The contemporary public debate engages with both of these visions. Mexico’s recently approved “Olimpia Law”<sup>[2]</sup> is one example. In short, this law targets anyone who records, photographs or creates real or simulated photos, videos or sexual materials, and those who disseminate them without the prior consent of the person involved or by using deception. The punishment is imprisonment.

Our belief, as anti-punitive feminists, is that the high levels of impunity mean that while some – very few – men may be punished with imprisonment, the sexist structure upholding these crimes will not be altered. It may in fact be strengthened, as other mechanisms that could impede it are not deployed. In other words, neither prevention nor redress will be achieved.

If aggressors do not feel threatened because the chance of punishment is very low they will not be deterred from their behaviour. Since the only form of justice sought is imprisonment and perpetrators do not, in the main, go to jail, the victims will not receive the intended justice and re-victimisation will continue.

So, we can keep demanding an end to impunity, but the state has spent billions on a justice system whose failure has been proven, while violence increases and prevention is neglected.

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There is another possibility, albeit remote: that aggressors end up in prison for about four and a half years – the average sentence for these crimes. Every day in prison they will face attacks and food and resource shortages, a perfect formula for increasing cycles of violence. This may mean that similar or more serious behaviour will be repeated with new victims when they leave.

More than the deprivation of liberty, it is cruel prison conditions that are the real punishment: overcrowding, daily violence and corruption. For the incarcerated, prisons are mostly places that lack real employment opportunities that provide sufficient wages to make amends for the harm done, they lack access to culture, emotional care and drug detoxification programmes, meaning the state itself creates the necessary conditions to perpetuate criminal conduct.

The anti-punitive feminist approach therefore proposes tackling impunity by opening up the possibility of pursuing types of justice that differ from the patriarchal formula that justifies cruelty and the use of force and whose result – as we know – is yet more violence. It is thus committed to strengthening the implementation of restorative justice. For many victims, it is of paramount importance to establish personal requirements for redress that are in line with their needs – for example, that the aggressor assume responsibility and acknowledge their mistake or apologise publicly. Meanwhile, the state must conduct effective monitoring and follow-up so that this behaviour is not repeated, which should include therapy, not approaching the victim,

community work and social reintegration without violence.

### **A new approach to justice**

A new model of justice that takes a preventive and restorative approach must distinguish between behaviour that causes high social impact and serious human rights violations and illegal behaviour that can be resolved by alternative justice mechanisms. Priority must be given to what needs pursuing most urgently. Logically, this should be what is most serious, what it is in our interests for punishment to dissuade. And we must distinguish between consequences, authorities and means of prevention and redress.

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Returning to the example of Mexico, of the 28,1 million crimes committed in 2021, 60% was property crime: robbery, fraud and extortion. Following the criminal law principle that the penalty should be proportionate to the harm caused, punishment for crimes that cause material damage should not be inflicted on the body, in other words, by placing the culprit in jail. Similarly, in crimes related to property damage (the majority, 33%) the main interest of both the victim and the state should be to recover what was stolen and to prevent the crime being repeated. In this type of crime, punishment with prison is thus not only useless, but counterproductive. It will further impoverish both the perpetrator and their family, while increasing the risk of recidivism.

One proposal is to set up an alternative property justice system that focusses on redress made while remaining at liberty, such as community work, which in turn

facilitates integration and social justice in order to effectively prevent recidivism.

In short, a new approach to justice is needed, in which:

1. The primary aim of justice is to ensure that crimes do not occur. From this perspective, priority should be given to investing resources in prevention rather than punishment. A legal framework would need constructing that promotes preventive approaches that acknowledge multi-causality and therefore take a comprehensive, transversal, specialised and gender-sensitive approach.
- Behaviour that causes high social impact and serious human rights violations should be distinguished from illegal behaviour that can be resolved by alternative justice mechanisms. Once this is achieved, the state's punitive activity can be concentrated on effectively investigating and punishing the most serious crimes.

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- The responses to crime must change. In the traditional approach, a crime is an offence against the law that requires punishment by the state. In restorative justice, a crime is an offence against the victim and the appropriate response is to try to make the perpetrator take responsibility for the harm done and, as far as possible, restore the well-being of those involved, including society.
- Recognise that jail is a means of punishment, not social reintegration. Imprisonment and its consequences do not prevent recidivism, but deepen the cycles of violence for those deprived of their liberty, as well as for their families and social environment. It should, therefore, be the last resort of the justice system.

In conclusion, it is important to underline that the current punitive justice model does not deter the commission of crimes, penalise in a differentiated way, provide efficient methods of alternative justice, or redress harms. To change the method and establish new premises for social coexistence, the focus of justice must change. To move from a failed justice system to one that allows social reconciliation, the patriarchal historical forms of combatting violence must be questioned. That means questioning prohibition, weapons and punishment as means of achieving a justice that rarely transpires. Committing to anti-punitive methods can do much more to eliminate violence than punitivism because it involves diversifying strategies and actions in order to strengthen justice and peacebuilding.

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[1] INEGI. *Encuesta Nacional de Victimización y Percepción de la Seguridad Pública*, 2022.

[2] The Olimpia Law is a set of legal norms that aim to recognise digital violence and punish crimes that violate people's sexual privacy using digital media, also known as cyberviolence. These norms are contained in the General Law on Women's Access to a Life Free of Violence (published in the Official Federal Gazette February 1st 2007 and amended on December 17th 2015) and the Federal Penal Code.

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## About the author

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## Photography

Agents of the Puebla State Police (Mexico), April 20, 2020. Author: Alejandro Munoz (Shutterstock).