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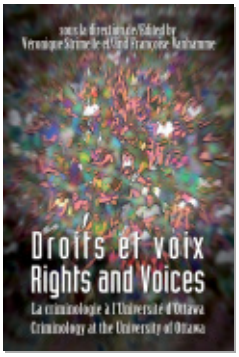

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II

Observing Evolution and Understanding the Path to Cognitive Innovation in the Field of Criminal Law

by

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INTRODUCTION

Recently, in a text entitled *Codification et réformes pénales* (Codification and Penal Reforms), Alvaro Pires has hypothetically suggested the non-evolution of the criminal justice system (Pires 2002, 90–91). At first sight, such a claim might appear to be rather radical, considering that in the past few decades changes have indeed been brought forward to modify some of the system's structures and its modes of operation. For instance, David Garland (2001, 174) has pointed out that:

> at the structural level, change has been a matter of *assimilating new elements* (the victim, crime prevention, restorative justice); *altering balances and relations* (between punishment and welfare, state provision and commercial provision, instrumental means and expressive ends, the rights of offenders and the protection of the public); and *changing the field's relation to its environment* (above all, its relation to the political process, to public opinion, and to the crime control activities of civil society).

However, although change can be observed here and there in the structures of the criminal justice system, Garland himself does not hesitate to admit that, generally speaking, "the modern institutions of criminal justice have shown themselves to be quite resilient in the face of change," and he argues that these institutions "have exerted an inertia of their own, an ability to withstand shocks and to defuse the impact of externally imposed change" (Garland 2001, 174). This tends to give some credibility to Pires's rather provocative hypothesis, but if it is to be shown to be a truly heuristic claim, a closer analysis will be required.

In the first section of this paper, I argue in favour of the hypothesis and suggest that there are indeed some normative areas within the criminal justice system where specific structures, those related to punishment to be specific, have remained relatively unchanged, and have indeed crystallized since the middle of the 18th century, creating significant obstacles to reform and evolution. According to Pires, within the realm of the criminal law a particular "system of thought," which has been theoretically defined as the "modern penal rationality" (Pires 1998, 2001a, 2001b), has cognitively dictated the Western approach to conflict resolution, while putting most of its emphasis on attributing blame, distributing pain, and imposing social exclusion.

In the second section, I turn to another related problem, which concerns cognitive innovation, and the conditions under which a "new" system of thought could emerge within the criminal justice system and serve as a support for less hostile and more responsive approaches to crime.

In the third and final section, I introduce some epistemological considerations as to why I have not identified the transformation of the environment as one of the main catalysts for the transformation of the system. Contrary to the dominant sociological perspective and to Garland's theoretical stance, I suggest that there is no such thing as "externally imposed change" (Garland 2001, 174), for sources of pressure or of information from the environment are conceptualized as being internally monitored by the system itself, through its own structures, and following its own logic. Building on this theoretical proposition, I suggest that social systems or institutions are not "reactive and adaptive" (Garland 2001, 6). Rather, they are *selectively* reactive and adaptive to their environment, thereby playing an active role in defining

what can be changed and what must remain the same within their own structures. This theoretical stance serves better than the traditional one to redirect the main focus of the analysis onto the system itself, rather than its environment.

All three sections relate to one fundamental question that has yet to be further explored in the field of criminology: if the possibility of a new regime in the field of criminal justice were ever to be taken seriously *by the system itself*, what kind of changes would need to be implemented so that a significant evolution could be sociologically observed? The following developments should aim at demonstrating the pertinence of this question, as well as at providing some possible answers.

1. THE HYPOTHESIS OF NON-EVOLUTION AND THE IMPACT OF MODERN PENAL RATIONALITY

To develop his hypothesis of the "non-evolution" of the criminal justice system, Pires conducted an analysis of the fundamental changes that led many observers in the 18th and 19th centuries to describe the historical moment as an "evolution" or as a "*changement de régime*" (regime change) for the criminal justice system. What would be referred to as the *ancien régime* had not only been changed, it had been significantly transformed. Many observers began to refer to the emerging reality as a new system, as modernity for criminal law. Under the influence of "great reformers" such as Beccaria, Servan, Dupaty, Lacretelle, Duport, Pastoret, Target, and Bergasse (Foucault 1979, 75)—and one could add to the list the undeniable influence of Kant's work with regard to retributive justice (Pires 1998, 147)—innovation and creativity in the realm of cognition (ideas, philosophy, fundamentals) allowed for what appeared at the time to be an "enigmatic leniency" (Foucault 1979, 75), an intriguingly "soft" justice.

Whenever observers put forward the idea of such a regime change, the most important transformations on which they commonly insisted were those pertaining to punishment and those related to legal procedure (Pires 2002, 90). Within the structural architecture of the criminal justice system, those were the normative areas that constituted the main point of focus, whereas little emphasis, if any, was usually placed on

cognitive difficulty in approaching conflict resolution in a creative way. It also raises the question of what is to be held responsible for this standstill.

In that respect, Pires suggests the influence of one particular system of thought, "modern penal rationality" (*rationalité pénale moderne*, Pires 1998, 2001a, 2001b), which all through modernity has dominated westernized ways of approaching conflict resolution in the field of criminal law. Modern penal rationality should be conceived as a self-description institutionalized by the system itself to govern the decision-making process pertaining to punishment and conflict resolution. It resonates within the legislative process, with regard to the creation of criminal law, as much as it does within the legal process, with regard to its application. It legitimizes forms of punishment based on attributing blame, distributing pain, and/or imposing social exclusion. In that sense, Pires qualifies the self-description of modern penal rationality by portraying it as "hostile, abstract, negative, and atomist" (Pires 2001a, 184; see also Pires, Cellard and Pelletier 2001, 198). Pires explains (2001a, 184; my translation):

> Hostile, because [in thinking and constructing reality through the rhetoric of the modern penal rationality] we tend to see the deviant as the enemy of the entire group, and aim at establishing a sort of necessary, indeed ontological, equivalence between the value of the offended good and the affliction to be inflicted on the delinquent. Abstract, because the (concrete) pain caused through punishment is recognized yet conceived as such that it *ought to cause* an immaterial moral good ("re-establishing justice through pain," "reinforcing the morality of the honest crowd," and so on) or as an invisible, practical and future good (deterrence). Negative, since these theories *exclude all other sanctions* that would aim at reaffirming the law through positive action (compensation, for example), while insisting that *only the concrete and immediate pain inflicted* on the deviant can produce well-being [or comfort] for the group, or can reaffirm the value of the norm. And, finally, atomist, considering that the punishment—under the most optimistic hypothesis—does not have to be concerned with the concrete social bonds between individuals, yet if it is, it is in an utterly secondary and accessory manner.

Over the years since the beginning of modernity, this hostile, abstract, negative and atomist self-description has "wormed its way" into the semantics of punishment, notably into theories of retribution, deterrence, repudiation/denunciation, and rehabilitation. With the exception of the theory of rehabilitation, all these theories have had and still have a strong tendency to reduce justice and conflict resolution to the ideas of attributing blame, distributing pain, and/or imposing social exclusion. As for the theory of rehabilitation, while it is not pain-oriented *per se*, its relationship with pain is more one of indifference than one of concern and dismissal. Rehabilitation tolerates suffering as long as it does not impinge on the conditions of treatment, just as other theories of punishment—namely, repudiation and deterrence—can tolerate the idea of treatment as long as it does not interfere with the necessity of punishment.

In that gap of reciprocal tolerance, the idea of incarceration continues to form a consensus among otherwise distinct and often conflicting theories. In other words, beyond their differences and disagreements, modern theories of punishment meet eye to eye with the idea of social exclusion and, on that specific point of convergence, they all contribute to supporting, maintaining, and promoting—some would say against all odds—the possibility of incarceration. This strict focus on incarceration has come to overshadow less negative legal sanctions, which are otherwise objectively possible, but do not appear as such through the cognitive filters used by the system to distinguish meaningful from non-meaningful information.

The particular "system of thought" that appears to be supported by modern theories of punishment becomes manifest and creates effects in different networks of social communication. It is recursively activated in the legal communication of criminal courts whenever judges and prosecutors are asked to share—in the context of an interview, for instance—the justifications behind their otherwise contingent decisions. This qualitative method was recently used in Margarida Garcia's doctoral thesis to explore and understand the *rationale* deployed by judges and prosecutors when they are asked to reflect on the legitimacy of punishment in relation to human rights. Her research shows, among other things, that the most influential rationale is encrypted in the logic of modern penal rationality and limits the possibility of

their favouring a more "human-rights-friendly criminal justice system" (Garcia 2009, 21).

The courts, as the main organizations at "the centre of the legal system" (Luhmann 2004, 294), determine, or at least strongly influence, the internal routines of the criminal justice system. They therefore play a decisive role in the system's relationship to change and evolution. Consequently, from a theoretical perspective, we cannot foresee a revolution in the "legal culture" of criminal law without the contribution of the criminal courts with regard to cognitive innovations. A cultural revolution in that legal sphere calls for a cognitive revolution at the same macro-sociological level of modern penal rationality. This brings to light the need for cognitive innovations and the emergence of a new system of thought, one that can evolve around more positive forms of conflict resolution, and away from the dominant values of attributing blame and distributing pain.

2. COGNITIVE INNOVATIONS WITHIN STRUCTURES PERTAINING TO PUNISHMENT

We can turn to Pires (2001a, 2001b) to conceptualize *modern penal rationality* as the dominant "system of thought" or as the most influential "legal culture" in the self-reproductive process of the criminal justice system. However, Pires himself carefully avoids extending the parameters of this cognitive hegemony to a point where it becomes impossible to recognize the emergence of more marginalized yet competitive "systems of thought."

At least in the history of criminal law reform in Canada, cognitive innovations have indeed emerged, notably through "organizations of legal reflection" (Dubé 2007, 2008; Dubé and Cauchie, 2007), otherwise referred to as law reform commissions. The existing cognitive innovations might not resonate at the centre of the system, and they might not have brought significant changes to the system's historicity, but, nonetheless, even confined to the periphery, they have long supported alternatives. If they were to be retroactively reassessed, and as such internally triggered, they could come out of their latent state and start producing new realities in the field of criminal law.

the norms relating to the definition of what does or does not constitute criminal behaviour. This led Pires to believe that transformations within the norms pertaining to definitions of criminal behaviour "are no doubt extremely important in many respects, but, at the same time, they are also largely insignificant in respect to characterizing a regime evolution in the criminal justice system" (Pires 2002, 91; my translation).

As for norms of procedure, their transformation is also considered extremely important in many respects, but one can ask oneself whether or not in the 18th and 19th centuries they would have stood a chance of characterizing a regime change if there had not also been simultaneous major transformations in the norms of punishment. I would argue that, if the gallows and the public executioner had remained central elements in the criminal justice system, many observers would have been reluctant to talk about a regime change based solely on transformations in the realm of procedure. In other words, it is hypothetically suggested that, in order to observe an evolution or a regime change that would be deep enough to significantly affect the way we conceptualize the identity of our criminal justice system, one has to observe deep and significant transformations within the realm of punishment. In fact, this is exactly what has not been carried out in our criminal justice system since the end of the 19th century, and all through modernity: a deep and significant transformation of the norms pertaining to punishment is still missing. Rather, across the Western world, what can be observed in that respect is a form of structural crystallization, of "non-evolution." As of today, regardless of all the problems that have become associated with incarceration, it can still be considered—at least symbolically—"the essential form of punishment" (Foucault 1979, 115).

From a sociological point of view, this form of stagnation in the realm of punishment calls for an explanation. It is worth mentioning here that, even in the middle of the 18th century, "the idea of penal imprisonment is explicitly criticized by many reformers" (Foucault 1979, 114). It is perhaps even more important to observe that most of the contemporary problems associated with incarceration had already been explicitly identified: it was considered "incapable of corresponding to the specificity of crimes; . . . useless, even harmful, to society; . . . costly; it maintains convicts in idleness, it multiplies their vices" (Foucault 1979, 114). This points to a problem of redundancy in criminal law and to a

In fact, cognitive innovations in the field of criminal law are not bound to simply contradict the ideas at the core of *modern penal rationality*. In that respect, building on Foucault's observations regarding what he calls discursive "points of diffraction" (Foucault 1976, 66), one important point that needs to be made is that, "instead of constituting a mere defect of coherence," beyond the incompatibilities that emerge from their mere existence, cognitive innovations do form alternatives to ideas confined to the currently dominant system of thought. In other words, comparing the innovative ideas to the dominant ones, we can still theoretically recognize that, "even if they do not have the same importance, and if they were not equally represented in the population of effective statements, they [do] appear in the form of 'either . . . or' " (Foucault 1976, 66). As such, in the field of criminal law these cognitive innovations can take on an important role in the system's relationship to change and evolution.

According to Niklas Luhmann (1999), the process leading to evolution consists of three fundamental states: variety, selection, and stabilization. Within this theoretical framework, the system first needs to constitute variety for itself—its own "variety pool" (Ashby 1970)—which simply designates a range of possibilities that can hypothetically be actualized within the pre-established conditions of self-regulation. Actualization takes form when the system operates a positive selection on a specific possibility, temporarily excluding others. Finally, with time, if that same possibility is recursively selected or constantly reiterated, it stabilizes and modifies the system's historicity. As such, through the process of stabilization the structural or cognitive modifications introduced by the selection of a new variety can either be firmly integrated as part of the system's "normal" operations—possibly contributing to establishing a new routine—or else categorically rejected.

As for the role of cognitive innovations in this same process, these come into play when they can internally provide cognitive support to a newly selected and still unstable variety. In other words, innovative ideas can create legitimacy around a daring decision (variety) that could not otherwise be cognitively supported by the dominant "system of thought." Being cognitively supported by innovative ideas—just as incarceration has been faithfully supported by all the main theories of punishment (deterrence, retribution, and repudiation, as well as

rehabilitation, which is no exception here)—the daring decision can better face the contingencies around stabilization and thus improve its chances of being retained and integrated as part of a new systemic order. Without the cognitive support of innovation, or without the cognitive support of an alternative "system of thought," it is indeed believed that the newly selected variety—depending, of course, on how challenging it is to the traditional order—would have a much shorter life expectancy. Since it has been said that "only variety can destroy variety" (Ashby 1970, 207), if newly selected varieties are ever to overcome the old ones, they need their own cognitive support, their own "legal culture" and theories, and their own "system of thought."

What is being suggested here, hypothetically, has been empirically observed in the case of rehabilitation, which, for a long period down to the middle of the 20th century, rested "on the proposition that an offender *must be imprisoned* in order to provide an opportunity for his reform" (Ouimet 1969, 187; my emphasis). In the mid-1960s, this assumption started to be deconstructed by contrasting views. Prison was being more and more negatively depicted as an institution that "tears the individual away from such family, community, education and employment responsibilities, and isolates him in an abnormal society where he is exposed to a criminal value system" (Ouimet 1969, 308). The Canadian Committee on Corrections simply could not "conceive a device less suited to preparing people to live in the normal community than the traditional prison" (Ouimet 1969, 308). Reflecting on that specific problem, and drawing on "mounting evidence that treatment in the community may frequently be much more effective" (Ouimet 1969, 187), the Committee went against the established order, and introduced the innovative idea that rehabilitation could be better served when pursued and managed outside rather than inside prison walls.

This paradigmatic change in thinking about rehabilitation increased the complexity of the system, putting it in a better position to face the corresponding and ever-increasing complexity of its environment. It could now refer to two theories of rehabilitation rather than just one: the older one, the "first modernity theory of rehabilitation"; and the newer one, the "second modernity theory of rehabilitation" (see Dubé 2008). More importantly, this increased complexity on the cognitive level of the system allows for more complexity or more variety

on the operational level. By referring to the "first modernity theory of rehabilitation" the system can, of course, keep on trusting to social exclusion as the primary condition for successful treatment; by referring to the "second modernity theory of rehabilitation" the system can choose rather to avoid that old path and start putting its trust in social inclusion as the primary condition for successful treatment.[2]

These observations on rehabilitation lead to one last point with regard to cognitive innovations: their relationship to the formation of an alternative "system of thought." If we keep referring to Foucault's remarks on the notion of "points of diffraction," we shall be called upon to consider cognitive innovations as "link points of systematization," since Foucault argues that these "dispersions . . . do not simply constitute gaps, non-identities, discontinuous series, they come to form discursive sub-groups" (Foucault 1976, 66). "Discursive sub-groups" are here referred to as alternative "systems of thought."

A new "system of thought" that is not determined or controlled by modern penal rationality could eventually institutionalize/generalize its own semantics, in a form perhaps completely different from that described by Pires as hostile, abstract, negative and atomist. The "macro" could then exert its influence on the micro. Like any other "act of language" (as described by Austin 1977), the alternative "system of thought" could start producing its own "performative effects," notably by influencing at a more micro level the ways in which decisions are made in different organizations, including the central court organizations.

Human beings are, of course, autonomous agents. That being said, one should avoid falling into an idealistic representation of an independent and self-governed agent, free from social constraints, thinking and acting freely in any given circumstance. Michel Crozier and Erhard Friedberg (1977) have shown that, no matter what the structure, its hierarchy or its firmness, human beings as actors in the system always retain a minimum of liberty. Still, these two authors felt the need to lower expectations by subtly adding that "actors are *never totally* free," and, in some ways, are "recuperated" by the official system (Crozier and Friedberg 1977, 44).

This underlines the crucial role of cognitive innovations in the field of criminal law. It also justifies the time and resources spent on

that same logic, in order to put the criminal justice system on the path of reform we would first need to address its environment, control the demand for more punishment, better educate the public, promote the value of alternatives, change the general perception of the criminalized individual, bring a different political party to power, and so on. This environmental approach tends to represent the criminal justice system as an entity determined from the outside, as if inputs from the environment eventually translate into coherent outputs within the system. It leaves unaddressed the influence of the system's own structures and logics in its response to environmental pressures. It does not recognize the mere fact that often enough the system ignores outside pressures, and tends to follow its own tradition and its own logic. Finally, it makes us unaware of the system's "responsibilities" in deciding what ought to be changed and what must remain unaltered, thereby contributing to delaying the moment of development to the day when all the external conditions in favour of transformation can be gathered.

In support of this assumption, it is worth mentioning here, with regard to the evolution of the criminal justice system in the 18th and 19th centuries, that the reform of the *ancien régime* "was not prepared outside the legal machinery and against all its representatives; it was prepared, for the most part, from within, by a large number of magistrates, and on the basis of shared objectives and the power conflicts that divided them" (Foucault 1979, 79).

Some observers have taken another path in the process of conceptualizing the relationship between the system and its environment. In this alternative perspective, which I shall explore on the basis of Niklas Luhmann's system theory, it is the system itself, as a self-referential entity, rather than the environment, that serves as the primary cause of all the changes that take place, or do not take place, within the system's own structures. Of course, the environment may influence the process of change, but as the process unfolds the environment cannot determine what comes about as change within the system. As such, "systems that procure causality for themselves can no longer be 'causally explained' (except in the reductive schema of an observer)" (Luhmann 1984, 41). One can even say that in such self-referential systems "the structures are being modified as a consequence of the system's functioning"; it is the "internal constraints that determine the evolution of the network"

(Atlan 1983, 117; my translation). In this perspective, then, institutions, organizations, and social systems in general, far from passively adapting to external pressures, are in fact conceptualized as actively and selectively responding to it according to their own structural and cognitive networks, and according to their own routines or patterns of self-regulation.

In order for this perspective to avoid any misunderstanding that could infringe on its development as a valid tool in sociology, some questions need to be addressed. If one were to establish oneself on the basis of this theoretical perspective, and observe sociological phenomena pertaining to change and evolution, would one necessarily end up in a tautological position? Are we facing here a conservative theory of determinism that can only conceptualize an eternal self-reproduction of the same?

Luhmann's concept of self-regulation implies that we conceptualize the evolution of the system "as embedded in the past," although this "does not prevent it from changing" or from turning to its environment to explore new possibilities (Bakken and Hernes 2003, 70). Such systems "observe" their environment, but as Heinrich Ahlemeyer explains, they do so "selectively and system-specifically, [as] information about the environment is always self-produced by the system (see Garcia 2007) *and not simply a fact of the environment that existed independently of the observations and judgment of the system*" (Ahlemeyer 2001, 63; my emphasis). This is in line with the insightful remark made by Gregory Bateson (1972, 315) suggesting that, within the boundaries of these self-regulated systems, information from outside makes a difference if, and only if, information can be treated as such within the system itself, that is, as meaningful information rather than as indistinct "noise." Conservatism is thus avoided, and the perspective of circularity allows for a sociological and more complex analysis of the system's relationship to its environment.

One should probably add, as Gunther Teubner does, that this notion of self-reference is not to be interpreted as defending "a monadological isolation of the law, but [rather as insisting on] the autonomous construction of legal models of reality under the impression of environmental perturbations: legal order from social noise!" (Teubner 1989, 740). This explains why Luhmann opposes the notion

of "trigger causality" (*Auslösekausalität*) to the notion of "effect causality" (*Durchgriffskausalität*) (Seidl 2005, 23). As Luhmann himself points out (1988, 335):

> A system can reproduce itself only in an environment. If it were not continually irritated, stimulated, disturbed and faced with changes in the environment, it would after a short time terminate its own operations, cease its autopoiesis. . . . The question remains *how* the environment impinges on the system, and what relevance this has for the system's self-production, for the continuation of its own operations.

This epistemological shift causes the first perspective to reconfigure in a totally different way our main and focal problem regarding the conditions regulating the relationship of the criminal justice system to change and evolution. Instead of focusing strictly on the environment and the kinds of pressure it places on the system's structures, the new perspective invites the sociologist to take into account the system's internal mechanisms, its own routines and patterns of self-regulation. Following that path, we may seek to explore the possibility that the key element for a better understanding of the system's relationship to change and evolution is not so much the environment's "culture" as, mainly, the system itself and, perhaps, its long-lasting and all-embracing *culture of attributing blame and distributing pain*. In other words, if a cultural revolution is needed so that fundamental changes can take place in the system's structures, it does not concern—at least not solely—the environment so much as it concerns the system itself.

The same hypothesis leads on to the following question: how can the criminal justice system actively engage in its own process of "cultural revolution" or self-reform, knowing that ultimately—if we accept the prerequisite of self-regulation—it is the system itself that is to be found at the very source of its own changes? Building on the perspective of self-regulation causally triggered from within, the observer who wishes to address the sociological problem of change and evolution in the field of criminal law can legitimately and relevantly turn to the internal legal structures—or legal cultures—to consider the effects being produced inside by those cognitive elements that, all through modernity, have

trying to sociologically understand their conditions of emergence. That being said, if a better understanding of the criminal justice system's relationship to change and evolution has indeed come from Pires's coherent conceptualization of modern penal rationality, it is still difficult to assess a general sociological understanding of the systemic mechanisms involved in the emergence of innovations. We still need to elucidate the sociological conditions that favour, or infringe on, the formation of new "systems of thought" in the field of criminal law. My own recent analysis (see Dubé 2008) of the report of the Canadian Committee on Corrections (Ouimet 1969) has shown only part of the sociological complexity that lies beneath that process, but the conclusions drawn from that research have yet to be used as a general hypothesis or as a starting point for further analysis.

3. EPISTEMOLOGICAL CONSIDERATIONS WITH REGARD TO THE SYSTEM'S ENVIRONMENT

So far I have argued that if the criminal justice system were ever to liberate itself from its own cognitive reductionism and start integrating more complexity in defining what ought to be its role in advanced modernity, changes in the criminal justice system would have to be carried out from within. But questions remain. What about the environment? What about the inputs from *outside*? Don't they resonate on the frontiers of the system and provoke transformations that can then be observed within it? Sociologically speaking, the answers to these questions vary according to which perspective is selected to conceptualize and interpret the system's relationship to its environment. Two theoretical perspectives can be considered. I shall call the first one the "environmental perspective," and contrast it to the second, which I shall call the "self-referential perspective."

From the point of view of the environmental perspective, which is still the dominant one in contemporary sociology, it is suggested that social institutions tend to react and adapt to their environments. This theoretical perspective implies that, in order to see significant changes being actualized within the system, significant changes first have to take place in the system's environment. Therefore, following

dictated what is to be legally treated as meaningful information and what is to be legally treated as indistinct "noise." The observer can then ask him or herself what kind of difference these cognitive elements have made, or failed to make, to that self-regulating process.

This particular problem calls for a macro-sociological point of view. I shall insist on the importance of adopting the right perspective in order to observe the realities that will be described below. I consider it an epistemological heresy whenever an observer, not seeing what another observer can see, contests the validity and the existence of what otherwise is being observed. Instead of doubting the existence of a certain reality, one ought to *first* take into consideration whether he or she is adopting the right perspective to see what the perspective was meant to show. A city map provides sufficient information on how to drive from one neighbourhood to another, but it does not tell anyone how to travel the country from coast to coast: in that case, everyone understands right away that it is the instrument being used that does not have the right perspective. No one would suggest, on the basis of a city map, that the country does not exist. I shall here take advantage of the enlightening remarks of Boaventura De Sousa Santos: "every scale reveals a reality while distorting or hiding others, [and as such] the scale is a 'coherent oversight' that needs to be applied coherently" (De Sousa Santos 1988, 386; my translation).

Here, indeed, a macro-sociological point of view will allow the observer to describe the set of "legal models of reality" or the variety of "self-descriptions" that have been internally constructed by the criminal justice system as guidelines for its own operations. Adopting that same macro-sociological point of view, the observer can then theoretically polarize these empirically observed self-descriptions according to their relationship to change. Some self-descriptions are more resistant to innovation than others are. They do not see the need to conduct self-correction through the exploration of new possibilities. Some other self-descriptions are more sensitive to reform and grasp the need for a "cultural revolution" from cognitive innovations. In every case, the observation should try to understand better how these self-descriptions of the criminal justice system come to influence—or fail to influence—what Heinz von Foerster (1991) calls the system's "historicity," that is, its development and its "individuality," which, for

Luhmann, is a direct and inevitable consequence of its self-reproduction (Seidl 2003, 131).

CONCLUSION

In this paper I have targeted "modern penal rationality" as constituting, within the criminal justice system, the dominant system of thought that has been delaying a regime change or a new evolution of the system, mostly with regard to what pertains to norms of punishment. On the basis of Foucault's work, I have also explored the concept of cognitive innovation and developed the hypothesis that, in order to provoke evolution in the field of criminal justice, cognitive innovations have to be systematized in order to form an alternative "system of thought," less hostile, abstract, negative and atomist than the dominant one. Finally, I have introduced some epistemological information aimed at justifying the system-centred-approach I have used—as opposed to an environment-centred-approach—in order to conceptualize the problem of evolution in the field of criminal law.

NOTES

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2. I would like to thank Alvaro Pires for these distinctions with regard to rehabilitation and its associated theories.

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