

**INTERROGATING RIGHTS-BASED DISCOURSES:
Constitutional shifts and punitive expansion in Ecuador**

Silvana Tapia Tapia, Universidad de Kent, UK

The global expansion of penalty —that is, the institutional complex dedicated to punishment through formal systems of criminal justice, including laws, procedures and sanctions— has been associated broadly with the market-oriented goals of neoliberalism and the decline of the welfare state, which has in turn resulted in the weakening of rehabilitation approaches and the strengthening of retribution and vengeance discourses (Garland, 2012; Simon, 1998). Some studies have found a pattern whereby (European) social-democracies tend to have the lowest incarceration rates, while neoliberal states tend to have the highest (Larrauri, 2009); incarceration has likewise been identified as a governmental technology that characterises neoliberal orders (Simon, 2007; Wacquant, 2009), where prisons have become profitable industries, thus deepening the subordination of the most marginalised of groups (Christie, 2000; Sudbury, 2005). These neoliberal discourses prioritise security and individual responsibility, reaffirming a retributive approach to criminal justice and sidelining issues of social redistribution in favour of a carceral enterprise.

This project engages with such debates through the case-study of the criminalisation of violence against women (VAW) in Ecuador's new penal code. Existing scholarship has addressed the role of "governance feminism" (that is, feminist circuits that have gained access to the local and international networks through which legal power circulates) in mainstreaming carceral politics by advocating for harsher penal laws on sexual violence (Bernstein, 2007; 2012; Halley, Kotiswaran, Shamir, & Thomas, 2006; Halley, 2008). This focus, it has been argued, overshadows past social movements' concerns with inequality, taking the form of a moralising discourse, which facilitates the convergence of women's organisations with conservative sectors such as right-wing religious groups (Bernstein, 2012). These trends, aligned with state-centered rule preferences that emphasise criminal enforcement, have been referred to as "carceral feminism".

From these perspectives, it would make sense to suppose that returning to questions of redistribution, recentring social and economic rights, would have some effect in displacing carceral narratives. However, during the last decade, Ecuador and other "pink tide" Latin American countries underwent processes of political and legal reform which have been generally regarded as averse to neoliberalism and as projects of social redistribution (Grugel & Ruggirozzi, 2012; Ospina, 2009; Radcliffe, 2012). The stance assumed by the Ecuadorian regime was manifest in the enactment of a constitution that has been framed as both rights-based and decolonial, since it incorporated a profuse catalogue of rights as well as innovative notions taken from Andean cosmovisions, which do not centre carcerality in their approaches to justice. Nevertheless, this has not impeded penalty from thriving, as some analyses have argued that incarceration is on the rise in the region (Sozzo, 2015). Likewise, the new Ecuadorian Penal Code of 2014 created various new criminal offences, including different forms of VAW, and aggravated the sanctions for existing crimes. These paradoxes demand further examination of the conditions that have allowed penalty to thrive in an allegedly post-neoliberal scenario.

In this context, this project scrutinises the discursive production undertaken by women's organisations and state agencies in the country in the form of working agendas, reports, and campaign materials on VAW from the 1980s onwards, and it is informed by the testimonies of self-identified feminists involved in the historical trajectory of legal reform on VAW, which were gathered during fieldwork carried out in Ecuador in 2015. While many see penalisation as an advancement in the field of women's rights, its ensuing effects have also been contested due to their potential inadequacy in

responding to the needs of violence survivors. At the same time, activists and lawmakers regard penalisation as a nearly irreplaceable tool with a powerful symbolic significance which gives their demands visibility and intelligibility. This suggests that other rationalities operate beyond the links between neoliberalism and carcerality, which brings out the need to unearth the narratives that sustain penalty as a framework to demand justice rather than carcerality as an effect of feminist mobilisation. Beyond the “neoliberalisation” of women’s movements and other social actors as an overarching explanation of carcerality, it is then crucial to understand the ways in which penalty as a whole is activated and sustained by rights-based discourses that are for the most part presented as apolitical, to the point that they resist alternative approaches to justice at different ends of the political spectrum. Various political actors, who are not usually associated with conservative sectors are resorting to penalty widely, which suggests that there is more to these engagements than the pervasiveness of neoliberal ideologies. What do these narratives then have in common, what animates them and enables them? Why does penalty remain instrumental to emancipatory discourses?

This piece argues that penalty has come to be inextricably interwoven with the protection of rights, and such discursive construction has not been challenged through Ecuador’s post-neoliberal project. I develop mainly two propositions: that Ecuadorian post-neoliberal narratives are endorsing penalty explicitly or implicitly, and that said endorsement is related to the use of legal devices that have come to be regarded as apolitical, namely, rights. In other words, I suggest that the language of rights is key in masking penal continuity and its political implications. While the argument is not that human rights are inherently detrimental, the inseparable link between penalisation and the protection of rights does not do much to promote their strategic use as instruments of emancipation. It is the discursive dominance of penalty as a field of intelligibility in these particular implementations of rights-based discourses, which largely determines that the notions introduced by the Ecuadorian Constitution remain underexplored, whilst reinscribing social demands in the formations of criminal law. These findings expand current understandings of the relationship between penalty, neoliberal discourses and so-called carceral feminism, showing the complexity of rights-based discourses as channels through which emancipatory campaigns are mainstreamed, often adopting a penal logic outside neoliberal agendas and even in the absence of deliberate carcelar projects.

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