

**THE RIGHT OF THE STATE TO PUNISH: SOCIAL EXCLUSION AND
CRIMINALITY***O DIREITO DO ESTADO DE PUNIR: EXCLUSÃO SOCIAL E CRIMINALIDADE*

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RESUMO

Partindo da literatura criminológica crítica que aponta a estreita vinculação entre sistema penal e modelos econômico-políticos, e considerando a perenidade desse mesmo sistema diante de sucessivas e diferentes matrizes econômico-políticas, busca-se reconhecer a possibilidade de administrar os danos sociais e pessoais dos mecanismos punitivos mediante a absoluta conformação ao Estado de Direito e aos Direitos Fundamentais.

Palavras-Chave: Sistema Penal. Controle Social. Democracia.

ABSTRACT

Starting from the critical criminological literature that points out the close link between the criminal system and economic-political models, and considering the perenniality of this same system in the face of successive and different economic and political matrices, we seek to recognize the possibility of managing the social and personal damage of punitive mechanisms through absolute conformity to the Rule of Law and Fundamental Rights.

KEYWORDS: Criminal System. Social Control. Democracy.

The selectivity of the criminal justice system

The criminological literature incisively points out the selectivity of the so-called "penal system", here understood as "institutionalized punitive social control, which in practice ranges from the moment a suspicion of a crime is detected or assumed to be detected to the moment a sentence is imposed and executed, presupposing a normative activity that creates the law that institutionalizes the procedure, the actions of officials and defines the cases and conditions for this performance" (ZAFFARONI, 1989, p.70), especially in what is understood as "secondary criminalization", that is, in the "punitive action exercised on concrete people" (BATISTA, ZAFFARONI et alii, 2003, p.43), in order to differentiate it from the so-called "primary criminalization", understood as "the act and effect of sanctioning a material criminal law that incriminates or allows the punishment of certain people" (idem, p. 43).

This selectivity, in the way it is proclaimed by sectors of criminology, especially the so-called "critical" criminology, has emerged as a substitute for the so-called labeling approach, and which aims at "the construction of a materialist theory, that is, economic-political, of deviation, of the socially negative behaviors and criminalization, a work that takes into account conceptual instruments and hypotheses developed within the framework of Marxism", in the words of one of its greatest representatives, BARATTA (1999: p.159), puts into question the legitimation of the functioning and the own existence of the criminal system, not infrequently unfolding into theoretical configurations that seek to justify the own elimination (abolition) of the criminal system (by all, HULSMANN, 1997, passim).

The merit of "criticism"

This vision has the great merit of revealing the concrete face of reality to the criminal system. A reality that is plural in all its manifestations: economic, political, social and, in a broad sense, cultural.

In effect, even if initially taken with Marxist bases, as stated by BARATTA, the "materialist" focus unveils a penal system tending toward a selected group that

can be the target of a certain "penal model" due to its confrontation with the dominant political power, from which emerges a punishment apparatus that takes into account this motivation and acts according to a "State logic". When not, in situations of exception to the rule of law, this repressive apparatus motivates its action with ideological instruments of the "national security doctrine" type, of recent existence in a large part of South America, not so many years ago, even among us (SKIDMORE, 1998, passim)

This selectivity can also arise for economically disadvantaged groups or those displaced by economic policies, as WACQUANT points out when he affirms

A penalidade neoliberal apresenta o seguinte paradoxo: pretende remediar com um "mais Estado" policial e penitenciário o "menos Estado" econômico e social que é a própria causa da escalada generalizada da insegurança objetiva e subjetiva em todos os países, tanto do Primeiro como do Segundo Mundo. No entanto, e sobretudo, a penalidade neoliberal ainda é mais sedutora e mais funesta quando aplicada em países ao mesmo tempo atingidos por fortes desigualdades de condições e de oportunidades de vida e desprovidos de tradição democrática e de instituições capazes de amortecer os choques causados pela mutação do trabalho e do indivíduo(...) (2001, p. 70)

Still in this selecting function, the criminal system may target certain groups by virtue of the "culture" options they adopt, criminalizing "ways of being" and not "acts", in an arc of situations ranging from sexual options (v. g. with the operation of the criminal machine to punish sexual options) to criticism of work behavior in society, falling upon these people the primary and secondary criminalization.

As a consequence, the critical view tends to generate a theoretical discourse of "emancipation" as CASTRO (2005, p. 94) points out, for whom one must take into account "not only the way in which formal control is exercised, but the way in which ideologies are constituted and manipulated, without which we will understand very little of that formal control".

The reality unveiled and, why not, torn apart in its political and ideological motivations, presented repeatedly by conflicts and hegemonic domination (which is justified by Marxist roots as already pointed out), directs the need for a rupture with the "penal system" marked by all the insufficiencies already declined. However, paradoxically, it does not prevent, as we will see, that it comes accompanied by aggregate effects that may not be exactly useful in face of the verification of the perennality of a punitive system.

The insufficient apostasy of the penal system

Critical theories – having, or not, an explicit and deep-rooted Marxist attachment – are confronted with the acknowledgment of the perennality of a punitive system. Especially the positions of elimination of the criminal system through its abolition, even if they constitute an obstacle to the “the most radical way of dealing with the reality of criminal law, understood as the punitive power of the State exercised within the framework of a set of rules: in fact, in its most radical version, it rejects the existence of criminal law and proposes its substitution by other non-punitive forms of conflict resolution that we call “crimes”. , have “Its real capacity to solve the problem of criminality ends where the real core of criminal law begins.” (SILVA SÁNCHEZ, 1992, p. 18).

Not for another reason Roxin emphatically points out that “criminal law has a future”, and that alternative mechanisms, such as the expansion of surveillance over people, even if permitted, will not “succeed in making criminal law superfluous”. (2006, p. 28).

But what the apostate forms of discussion of the criminal system present as insufficient is not only their “real capacity to solve the problem of criminality”, as Silva Sánchez claims, but also the fact that they do not present concrete directions for what needs to be done in other areas, since the “function” of this type of criticism is purely and simply to argue that the “problem is not legitimately solved by the criminal system. Observed through this prism, the critical view initially pointed out can work with the side effect of paralyzing the very culture of the criminal system.

Criticism as a factor in “paralyzing” the culture of the penal system

If there is a loss of meaning in the discussion of the criminal system given its congenital vocation for selectivity, and if everything that is most important turns to the denouncement of this original deformation, whether it be by proclaiming its vices of formation from economic matrices (the criminal system aimed at the domination of disadvantaged economic classes by those who hold “power”), political (the criminal system as a source of perpetuity of a political faction in “power”), cultural (the criminal system as a reproducer of values of the “dominant” over the “dominated”), it is natural that there is the hypotrophy of the

discussion of the mechanisms of the functioning of the system itself, neglecting the technique, understood here as a set of knowledge and practices that put into operation any social mechanism.

In this way, given the conditions pointed out – and as paradoxical as they may be – there is a lowering of the quality of cultural production on the criminal justice system, especially in countries with emerging democracy or unstable consolidation, marked by social inequalities that make the need for reflection on the system more evident.

Conceptually, it is important at this point to remember the definition of Bosi for the term culture, pointing it as "the set of practices, techniques, symbols and values that must be transmitted to new generations to ensure the reproduction of a state of social coexistence" (1992, p. 16). However, this "reproduction of a state of social coexistence" cannot be seen in an evaluative way, because in totalitarian states, social coexistence is also reproduced through a set of practices.

Thus, to the idea of culture, one must, therefore, impregnate value content, understanding it as "everything that man adds to things, when he practices the acts designated by the verb cultivate. To cultivate means to proceed with the intention of obtaining the improvement of a thing" (TELLES JR, 1985, p. 313), remembering also that, "in the 18th century, "culture" is always used in the singular, which reflects the universalism and humanism of the philosophers: culture is proper to Man (with a capital letter), beyond any distinction of peoples or classes. "Culture" is then fully inscribed in the ideology of the Enlightenment: the word is associated with the ideas of progress, of education, of reason that are at the center of the thought of the time (CUCHE, 1999, p. 21).

What the "perfecting of a thing" – or progress – will constitute is what Bobbio teaches us, from Kant, when he states that, "from the standpoint of the philosophy of history, the current debate on the rights of man...can be interpreted as a 'premonitory sign' of the moral progress of humanity" (1992; p, 52). Thus, it can be concluded that the spread of the culture of the penal system requires an understanding of a sense of progress.

Criticism as a factor in the development of the culture of the penal system

Thus, we enter a critical sphere different from the one initially enunciated: the one that seeks to understand the limits of the criminal punitive system and conform it to certain standards of political coexistence, and not only of "criminal

policy", here understood as coexistence in the "polis", in order to see it as an irreplaceable – but improvable – mechanism of social control that works with minimal social (and why not, operational) costs.

At this point the observation of Hassemer deserves attention, when he states that

El derecho penal conforme al Estado de derecho y el derecho procesal penal constituyen hoy no solamente un medio de persecución o de cruda "lucha" contra el delito; constituyen también un medio de garantizar de la mejor forma posible el aseguramiento de los derechos fundamentales de aquellos que intervienen en un conflicto penal – esto es, en las peores lesiones producidas por la mano del hombre –: derechos fundamentales no solamente de la víctima, sino también de los testigos y, sobre todo, de los sospechosos del hecho. El derecho penal es también el derecho de protección frente a un "proceso abreviado", frente a una reacción desproporcionada y frente a un juicio apresurado frente a los circundantes. (1998, p. 20)

The legitimation of the criminal system is based on a political model (here in the strict sense) of democratic stamp, with a strong seat on fundamental rights that come to function as sources not only of norms, but also of decisions (and, therefore, of rationality) for the entire movement of the state machine.

In this sense, the culture of the penal system will develop when these bases are obeyed, and it is repeatedly recognized that the culture of the penal system is a "democratic achievement" that enables a calculated use of this system and that "The less developed the dogma, the more unpredictable will be the decisions of the Courts, the more conviction and acquittal will depend on chance and uncontrollable factors" (SILVA SÁNCHEZ, *op. citing* Munoz Conde, Ordeig and Von Liszt).

Such observations, although often made with an eye to substantive criminal law, undeniably serve the entire culture formed around the criminal justice system, since the premise is the same, namely the construction and building of a systemic knowledge based on fundamental values.

This, then, is the "critical" merit: to affirm the conformation of the criminal system to the democratic postulates and the defense of fundamental rights, the latter behaving as a rationality factor in the production of this system itself.

Furthermore: These bases tend to diminish the inevitable violence in the functioning of the criminal machine, reducing it to levels of tolerance that are socially acceptable when the characteristics naturally present in this way of conceiving the criminal mode are conjugated, namely, a diminished criminal

legislation, with the abandonment of the criminal law as a way to occasionally promote political tendencies or artificial pressures, preserving a criminal procedural model with the full fruition of guarantees and obedience to the unswerving principles of the democratic model of process.

With this, it is possible to produce an environment in which the penal culture is based on the idea of otherness, with all its inherent implications, until a stage of the human condition is reached in which all this discussion becomes unnecessary.

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