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Reflections on the formal social control: revisiting the grounds of the right of punishment

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> "Criminal law is not the entire social control, not even the most important part of it, it is only the visible surface of an iceberg, where the unseen is, perhaps, what matters the most."
>
> Muñoz Conde (2005, p. 6)

ABSTRACT

The objective with this work, it is to foment the discussion about the urgent need to search for advancements in theoretical arguments which intend to justify the right to punish of the State and therefore the exercise of formal social control developed by the competent bodies to exercise such a task – Penal System –, read: Police, Public Prosecution, Judiciary and organs of the Penal Execution System. This discussion goes through, inexorably, for the purposes assigned by the State and justifies their existence and the purposes assigned to the punishment, the main instruments used by the Criminal Justice System to exercise social discipline, perhaps the main factor in the justification of the modern State. Important to note that this reflection only intends to face the problem of justification of Criminal Law as a form of social control and not, as it invariably does, to discuss the means by which such control is exercised by the institutions and structure they have.

KEYWORDS: Formal social control; reasons, justification; legitimate; right to punish.

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Reflexões acerca do controle social formal: rediscutindo os fundamentos do direito de punir

RESUMO

Objetiva-se com o presente trabalho, fomentar a discussão acerca da necessidade premente de busca por avanços nos argumentos teóricos que tencionem justificar o direito de punir do Estado e, consequentemente, o exercício do controle social formal executado pelos órgãos com competência para exercer tal mister – Sistema Penal –, leiam-se: Polícias, Ministério Público, Poder Judiciário e órgãos da Execução Penal. A referida discussão passa, de forma inexorável, pelos fins atribuídos ao Estado e que justificam sua existência e pelos fins atribuídos às punições, principais instrumentos utilizados pelo sistema penal para o exercício da disciplina social, talvez o principal fator de justificação do Estado moderno. Importante frisar que a presente reflexão objetiva, tão somente, enfrentar a problemática da justificação do Direito Penal enquanto forma de controle social e não, como acontece invariavelmente, discutir os meios pelos quais tal controle é exercido pelas instituições e a estrutura de que dispõem.

PALAVRAS-CHAVE: Controle social formal; fundamentação; justificação; legitimação; direito de punir.

1. INTRODUCTION

Based on the understanding that means and ends are an interconnected but yet a different phenomenon, the present study aims to foster the discussion on the need to search for breakthroughs in theoretical arguments which intend to justify the State's right to punish and the exercise of formal social control performed by bodies with powers to perform such work – Criminal System – as follows: Police, Prosecutors, Judiciary and bodies of Criminal Enforcement.

It is understood that the theoretical step forward intended must break with the orthodoxy of the theoretical framework to be adopted, in other words, it will not be adopted any particular theoretical perspective, instead it will be adopted a dialogue between several thoughts, looking for complementary analysis rather than those which contradict each other. As when the

contradictions are inescapable to the discussion, it is important to reach for what is best in each of the theories for developing a more proficuous thought.

This discussion passes through the purposes assigned to the State – and that justifies its existence – and for those assigned to the punishments, the main instruments used by the criminal justice system for the exercise of social discipline, perhaps the main factor of justification on the modern State.

It is important to mention that this reflection aims to face the problem of justification of Criminal Law as a form of social control – if necessary or not in the current social structure – and not, as it invariably does, discuss the means by which such control is exercised by institutions and the structure at its disposal, sliding the discussion towards the field of criminal enforcement.

In line with the philosophy of the Pragmatic School, which advocates that the meaning of an idea must match the set of its practical consequences, it is understood that the study on the basis of justification of criminal law reflects in the field of criminal policy to be developed, contributing for it to be thought in a more realistic and, therefore, with more potential of achieving the proposed goals.

Once the object has been identified, the goal outlined and set the questioning to be faced in the present text, it was decided to develop the argument that confirm the hypothesis, developing it from a historical rescue of ideas that legitimated – and perhaps even legitimize – the formal social control, to then elaborate a theoretical update about such control in a Democratic State and, finally, present conclusions linked to the concept of democracy that may substantially promote the much needed theoretical debate.

2. THEORETICAL DEVELOPMENT OF STATE'S *JUS PUNIENDI*

The social discipline assumes that is a strong clash between the personal interests – depicting, above all, the pursuit of individual pleasure and selfish interests – and those of a collective nature, which requires individuals to limit such personal interests or selfish instincts to respect for the rules which others members of society understand that should govern interpersonal relations.

Thus, the social regulation presupposes an ongoing process of communication or social interaction delineated in mutual expectations of those who form the body of a community and this expectation is summed up on the belief of the abidance by the rules of social coexistence, whether or not regulated by law[2].

In the sphere of informal social control, the break of expectation can lead to diverse effects within the institutions of the group of informal social control, such as family, church, school, community, workplace, among others, with the consequence of a variety of responses to this breach of expectations, such as the prohibition of going to the movies, religious penances, the suspension of certain school activities, exclusion from the football team of the neighborhood and termination of employment, as examples.

In the space destined to the punitive formal social control, breaking expectations determined by law generates a peculiar effect to the application of criminal sanctions. These penalties result from the state authority, as a form of formal social control, and can be analyzed under the most varied interpretations, converging, however, to two crucial points: one distinctly practical, as a technique for crime control and other far more philosophical, and those who believe in such point try to justify, including under the moral aspect, the application of penalties[3].

With this aim, over time, several theories have been brought to explain the reasons why there is a need to punish individuals[4], including the termination of life of those who break the law. To a greater or lesser degree all make use of various concepts such as peace, social harmony, common good, legal certainty, social discipline, among others, and eventually through the justification of the existence of the state to confer legitimacy to the criminal justice system[5].On the opposite end, in the framework of critical theories, it is stated that all progress

[2] Particularly on the application of the Communication Theory of Jürgen Habermas and the Systems Theory of NiklasLuhmann under the social control, cf. Mussig (2001).
[3]On the matter, Garland (2007).

[4]On the matter in depth, Guimarães (2007b). A multidisciplinary approach on crime and punishment can be found in Newburn (2009).
[5] Andrade (2008) over the Penal System, explains that: "... the criminal justice system, mechanism of formal social control (Legislative – Criminal Law – Police –Prosecutor – Judiciary – Prison – criminal science – public security system, etc.) constructs crime and criminals in interaction with informal social control (family – school-university – media – religious-moral-labor market - hospitals asylums), functionally related to social structures."

made by mankind under the human dignity always got on the field of combating punitive power[6].

It can be affirmed that the existing theoretical confrontation in the vast field of ideas[7] that attempt to legitimize or delegitimize the punitive system are always intertwined, that is, there is no pure theoretical currents, since authors identified as belonging to the Classical School, at certain points, advocated positions which were later adopted by authors affiliated with the Positivist School; also, minimalists add value to the legally binding discourse and sometimesto the abolitionist speech and so on.

Thus, it is important to draw up a revision of this conflict of positions, with the wider scope of obtaining which of the best speeches portray the reality of today, as well as demystify the idea that there was or there is linearity within criminal discourses.

In this context, it is noteworthy that among the existing theoretical contributions, in chronological order, it can be mentioned the Classical School[8] as a set of ideas which main contribution was the determination of criminal liability in free will, in other words, even today is a strong understanding that punishment is based on the ample freedom which man has to act and may thus be as a rational being, conducting his actions by obeying legal commandments.

The offense for such current was the simple violation of a legal norm, the social pact that was the ground for a liberal political thought was a legal concept. Thus, penalty would ultimately dissuade, discourage the practice of offenses, serving as a defense of society against crime.

In opposition to those thoughts, another group of thinkers – Positive School – went on to defend the view that the offense is prior to the law, the so-called natural offenses, namely, those behaviors that went against the social conscience of good and bad, the good and evil. The positiveness of such behaviors in the law was only a matter of legal certainty.

There was a strict delinquential determinism, crime was pathological, the criminal a different and sick individual. Etiology of crimes, its true causes, was the greatest desideratum of the positivists. Lombroso[9] has gained visibility by mapping bioantropologically offenders who were arrested. In short, individuals were born with certain criminal propensities and thereby

[6]On the subject, cf. Zaffaroni*et al*, (2003). Zaffaroni (2007, p. 17) without further preamble states: "Never a conflict was finally resolved by violence unless the ultimate solution was confused with the final (genocide)".
[7] To understand the subject, it is imperative reading from Mészáros (2004). Cf also Bobbio (1999).
[8]About Schools Criminal by all, Aragão (1977) and Mantovani (2000).
[9]See Lombroso (2001).

should be investigated and treated. The penalty had an interventionist nature and its motto was: recover or eliminate.

As opposed to the ideas of the Classical School, the Positive School was created with completely adverse ideas regarding to the thought of free will proclaimed by the latest, directing its attention to Criminal Law from the perspective of the author to find out the symptoms[10] of the individual who committed crimes, not concerning to put into focus the offense itself and in which would upcome the essence of a "rational classification"[11].

Based on the two preceding schools, attempts were made to find a common point within the context of traditional criminological context assumed by these two currents and observed that despite defending different ideas regarding the picture of man and society, both realized the existence of an "ideology of social defense"[12] as knot and theoretical fundament of political andscientifical system.

Thus, rather than discussing currents that followed the Classical and Positive Schools, it is more prudent to set the subsequent criminal thinking as adept, to a greater or lesser extent, to the two major theoretical perspectives: the Ideology of Social Defense and Critical Theories.

Nowadays, a significant part of the doctrine affiliates[13] to the position defined above, understanding that discussions about social control are located on both theoretical fields outlined, bringing, however, a new designation for them: the right wing realism – the ideology of social defense – and left wing realism – linked to critical theories or conflict.

The ideology of social defense was consecrated by principles that served to build a methodology used in the attempt to explain criminality, in all its details. From the conception of the Principle of Legitimacy[14], which defends the State as an expression of society, as the entity legitimized to fight crime and, therefore, certain criminals through official authorities of social control, namely: Legislative Power, police, Prosecution, Magistrates and penitentiary

[10]Baratta (2002, p. 38) clarifies that: "The reaction to the abstract concept of individual leads to Positive School to assert the requirement for an understanding of the offense that does not rely on improvable theory of causation through a spontaneous act of free will, but seeks to find the entire complex of causes in all biological and psychological self, and the social totality that determines the individual's life."

[1110]On the matter, Olmo (2004).

[12]Baratta (2002, p. 41) states that "the ideology of social defense (or end) was born contemporaneously to the bourgeois revolution, while science and codification of criminal law is imposed as an essential element of the bourgeois legal system, that assumed the ideological dominance within the sector specific criminal."

[13]See Iturralde (2007), Giddens (2006)

[14]On the matter in greater depth, Baratta (2002).

institutions, other principles were strategically built as a way to definitively substantiate the criminal law enforcement[15].

As such, its followers divided society in a Manichaean manner through the Principle of Good and Evil, since the offense would be harmful to society and, by consequence, the offender a dysfunctional being for the system. Therefore the crime and the criminal represent evil and the harmonically constituted society represents good.

In addition, the importance of the Principle of Culpability has been reinforced, scoring that the offense would be the expression of an interior reprehensible attitude, contrary to the values and norms present in social conscious, existing even before the positivization carried out by the legislature.

With regard to penalty, it has been come to the eclectic position that beyond retribution, penalty should prevent crime through the secondary precept of criminal law serving as a demotivation to the practice of a criminal offense, as well as on the concrete level, perform the re-socialization of the offender. This, then, is the Principle of Purpose and Prevention.

Through the Principle of Social Interest and Natural Crime, theorists affiliated with the ideology of social defense defended the position according to which there would be a common prohibition of harmful behaviors to society in all legislations of civilized nations, which represent an offense to the universal interests (natural offenses), common to all citizens and that certain prohibitions, that did not represent such universal interests, would be created through political and economic interests in accordance with segmented interests (artificial offenses).

Finally, the dearest principle that orbit around the grounds and legitimacy of the right to punish, the Principle of Equality, which claim is the Herculean task of defending the idea that the law is equal for everyone, since the criminal response would be applied equally to offenders, regardless of social class or position they occupy in society.

In short, the ideology of social defense built a fact which passed through the acceptance of a status of complete peace and harmony in the social environment to be defended by the state, since this entity portray social expectations and defend the legal interests of common interest to the majority of the components of social body, fighting lawbreakers as a diverted and sickly

[15] An elaborate critique to the ideology of social defense can be found in Merolli (2010).

minority, using penalties to achieve this end, the purpose of which would be to repay, intimidate and re-socialize criminals, and north by culpability of each.

Imperative to point out that the Ideology of Social Defense conveys the idea of an ideal state in which everything seems to fit perfectly and its composed by characters that never deviate from what is desired, leaving only for a minority, the deviants, that type of violation.

Because of the absolute impossibility of addressing the major theories linked to the punitive social control[16] – either to the ideology of social defense or in the critical perspective – on this brief overview on the subject, for a better understanding of the matter, there were elected two particular theoretical perspectives, with acknowledged importance in academic circles that will be used as a way of demonstrating the possibility of aggregation of diverse understandings in favor of the construction of more adaptable theories to the current context.

Within the sphere that search for legitimacy of the right of punishing in a more philosophical and sociological bias, the theory of Emile Durkheim, which is structured on the concept of group conscience, must be brought to the debate. Durkheim (1995) believes in the concept of anomie to explain the criminal phenomenon, in simplified terms, anomie – failure to comply with, or even the absence of standards of social control – would produce the gap between individual aspirations of those who make up the social body and the means available for achieving these goals[17]. On the other hand, it recognizes the offense, provided that within acceptable levels, as something positive in the social environment, given that the social rejection of certain types of behavior would serve as a reaffirmation of the collective consciousness.

Another fruitful approach on the causes of crime was formulated by theorists of the Chicago School, represented, among others, by Robert Park and Ernest Burgess, who helped to develop what is known today as the Ecological Theory.

[16] To deepening on the theme, cf. Tonry (2011b).

[17] The phenomenon of anomie was also studied and, in our view, perfected by Merton (2009, p 167). Free Translation), as he positions on the theme: "Despite our persistent ideology of 'class mobility', the progress toward the goal of success is relatively rare and particularly difficult for those poorly educated, limited formal education and few economic resources. The dominant pressure goes toward a gradual attenuation of legitimate efforts to increase the use of illegitimate efforts, however, that constitute a more or less effective ways to reach the targets set. For those located in the lower strata of the social structure, the cultural requirements become incompatible. On the one hand, they are asked to guide their behavior with the prospect of wealth (prosperity) – 'Every man is a king' said Marden and Carnegie and Long - and conversely, they are denied the institutional means to achieve it. The consequence of this structural imbalance is high rate of deviant behavior. "In Brazil, over the work of Robert Merton, see Ferro (2004).

For the followers of the Chicago School[18], the crime is a product of urban disarray, in other words, is the interaction between individuals and socially disorganized environments such as urban areas abandoned, degraded or inordinately populated – that ultimately reflect the issues aroused by social inequalities – which develops the enabling environment for behavior deviations. There is certain dose of environmental determinism according to which there is an imposition of physical and social environment for the commitment of crimes[19].

It was within the abovementioned context, that new ideas about crime and criminality were developed. There was a break with the knowledge heretofore produced within the Criminal Sciences. New ideas have emerged in various fields, with the guiding critical reflection on the knowledge hitherto produced.

Such theories, hereinafter exposed, are affiliated to the group of theories of conflict, as was done for theories close to the ideology of social defense; we chose those that have deepened most the new knowledge produced.

From what has been prepared by the studies of ethnomethodology, as well as by symbolic interactionism[20], a new paradigm arises – the Labeling Theory approach – which influence was indispensable for a change of mind as to the representations made until then, ruled by the concepts of determinism, ontological crime, danger, abnormality, treatment and rehabilitation.[21]

So the issues will no longer be aired as: who is the criminal? How does one become a criminal? What are the causes of recurrence? How to control the commitment of crimes? How to achieve the functions objectified by the penalty?

The guideline is now another. The question is: who is defined as deviant? What are the conditions for this definition? What are the effects of such labeling on the individual? More importantly, who has the power to define this?

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[18]On the topic, see, Park (1967).

[19] In Brazil, an interesting piece on the Chicago School was written by Freitas (2002). On the Strain theory, see White, Haines and Asquith (2012).

[20] On the theories that preceded the Labeling Approach, see Baratta (2002).

[21] Andrade (2003b, p. 40-41) explains: "Modeled by symbolic interactionism and ethnomethodology as explanatory scheme of human conduct (social constructivism), the labeling parts on the concepts of "deviated conduct" and "social reaction" as terms reciprocally interdependent, to formulate its central thesis: that the diversion and crime are not an intrinsic quality of the conduct or an entity ontologically pre-established of social and criminal reaction, but a quality (label) assigned to certain individuals through complex processes social interaction, ie, formal and informal processes of definition and selection."

To address these questions, the Labeling Approachelaborates an alternative theoretical critique with the main focus on questioning postulates formulated based on the Ideology of Social Defense. It is stated that focusing on the study of variables linked to the power to define what behaviors should be criminalized, as well as the variables that indicate who should be criminalized, is a much more viable explanation for the criminal phenomenon than the theories of anthropological, psychological or biological nature[22].

In this context, for those who defend the Labeling Approach, crime is not an ontological reality, that is, individuals are not born with a predisposition to commit crimes but are selected through diverse and complex processes of social interaction, which are molded from legislative creation of criminal offenses to the activities of bodies making up the criminal justice system of social control, not to mention the stigmatizing view of the society over the phenomenon[23].

From the foregoing, the contribution of the paradigm above is undeniable, becoming a watershed between Traditional Criminology and Critical Criminology, however, Labeling Approach does not investigate the social structure in which the criminal phenomenon was discussed. No link between the socio-economic system and the power setting was made, a factor which restricted its scope[24].

The next step in the maturation of ideas that clashed with official positions, self-determined as scientific, based on naturalistic methods of doing science, was to situate the Labeling Approach perceptions within a society utterly antagonistic and, therefore, there was an approach with the historical materialism of Marxist origin.

With the replacement of the bio-psychosocial approach by the macro-sociological hypothesis it is emphasized that Criminal Law is an instrument of social control at the service of classes which hold political and economic power, so that only certain people of certain social strata are met by the Penal System. Criminal law, in fact, is the main tool for controlling the miserable masses generated by the capitalist system of production, in which the exacerbated concentration of income ends up generating excessive social exclusion.

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[22] For further deepening on the theme, see Baratta (2002) and Andrade (2003a).
[23] For all, see Becker (1971) and Young (2002).
[24]For a comprehensive understanding of the evolution of criminological thought, consulting, Olmo (1973, 1984), Aniyar Castro (1982, 1983, 1987, 2000).

However, it is important to stress that this change of position reached by the advance of critical theories – for the understanding of the phenomenon of criminalization reaches a reality ideologically constructed, with clearly defined purposes – does not mean that these theories believe that harmful behaviors to social life do not exist, it is clear that the critical Criminology, as usually pointed out by its critics, does not deny the existence of negative social behaviors, as well as the need for their control; does not dispute that rapes, robberies and murders are extremely harmful behaviors to social harmony[25].

Finally, the new criminology, Critical Criminology, is not proposing an illusory reality, impalpable, something that has utility only in endless academic debates, sometimes far removed from practical applicability of their conclusions, but draws attention to the urgent need of construction of an alternative criminal policy[26], aiming, mostly, to humanize the penal system, combating selectivity that permeates, as well as shifting the focus of the offense that affects the social outcasts for those committed by political and economic elites.

In other words, it is necessary to democratize the prison, make it known and frequented not only by the miserable classes, but also by socially and economically privileged, being necessary to re-discuss the fundamentals of Criminal Law.

At this step, met the proposal of brief explanation of some of the theoretical frameworks that represent the evolution of thought in the field of criminal *jus puniendi*, it is now possible to discuss the theories which support the concept of a democratic state and the limits to this as a way to reach the ultimate desideratum of this reflection, that is, as already said, inquire about theories that hold more closeness to the reality of the phenomenon, with the mission of advancing the discussion of justification and legitimation of power to punish the state.

3. FORMAL SOCIAL CONTROL IN THE DEMOCRATIC STATE LAW

After drawing the theoretical lines on the general right to punish, its possibilities, limits, and especially reasons of existence, it is necessary to reflect on such grounds by taking the political and economic context which permeates the state, currently called the democratic and

[25]On the topic, in short, Christie (2009).
[26]On the topic, Ashworth (2009), Ferrajoli (2006).

governed by law. In other words, it is essential to discuss the fundamentals of *jus puniendi* from a committed perspective to the democratic rule of law and investigating whether this function of the state is legitimate or not, whether if the speech presented with the scope to justify and legitimize this right is consistent or not[27].

To reach this aim, it is important to make a semantic arrangement, in order to avoid confusion between the spheres of application of recurrent terms to be used in the discussion of this matter. Thus, it will be used the term reasoning as an inherent substrate to either justify or legitimize, in other words, there is no possibility of justification or legitimacy of whatever point discussed without adequate reasoning for that.

The reasoning in the political arena, for example, seek to justify and/or legitimize what is by them proposed, since reasoning is the motivation presented to justify certain acts of power which, if well founded, turn out to grant legitimacy to those attitudes. So if motivation is sufficient and the attitudes to be adopted suit society – or at least a great part of it – expectation, is, at first, justified/legitimized for that which was proposed, considering that it was accepted or comprehended.

This is the path to be followed by Criminal Law to confer legitimacy to the monopoly of state power to punish, in other words, the issue of legitimacy of Criminal Law involves the social acceptance that the norm will have and its justification is done through the ends prosecuted[28]. Therefore, the ends must justify the use of legitimate means of legal violence by the state. It comes to the critical point of the whole discussion about means and ends of the right to punish – problems of justification and legitimation – which presents itself as the most difficult problem to be faced by the doctrine, since such categories end up mixed.

The solution of this problem does not seem so complex. It is understood that the question of Criminal Law justification should take place exclusively within the purposes for which it proposes social control – solely to social discipline – and the question of legitimacy only in the sphere of the means employed to achieve such task, having each of these spheres its own reasoning.

[27] On the topic, see Guimarães (2010).
[28] On the historiography of legitimacy of punishment, cf. Rivera Beiras (2003), Garland (1999).

Better explaining, justifying the existence of formal and social control, consequently the Criminal Law and the Criminal Justice System is a clear need of all societies to discipline its interpersonal relations[29] – nowadays, with the trend of criminalization of the legal entity such relationships are no longer seen as intersubjective. On the other hand, so that such discipline is exercised, it is necessary to seek means for achieving this purpose immanent to the very existence of the state.

It follows from the foregoing that the whole issue regards the legitimacy of criminal law, not in the realm of ends pursued by this – only for social control – but in the context of drafting the criminal law[30], and by consequence, the methods used to reach these purposes, namely: positivization of criminal procedure, the characterization of behavior, the application of penalties and the proposed ends of it – to intimidate, to reaffirm the value of the standard, neutralize and/or re-socialize the offender.

As inference than what has been developed, it can be formulated the understanding that nowadays Criminal Law is presented as essential to the existence of organized societies, hence justified its existence, however, it faces serious problems regarding the legitimacy within its sphere of preparation and action in the realm of feasibility of social control, given the indisputable characteristics that permeate the work of Penal System – selectivity, stigmatization, symbolic character, invulnerability of economic and political elites, segmentation of interests in legislative drafting, among other issues.

Despite the undeniable existence of such issues, in a context that takes as its starting point the legitimacy of social contract, on the grounds of existence of a democratic state of law, it should be sought the correction of such problems, understanding from the first time that both the

[29] According to Muñoz Conde (2005, p. 8, 11), "To regulate the coexistence among men, it is established binding rules that must be respected by people as members of the community. The observance of these standards is a prerequisite for living in society. The law and the state are not, therefore, more than a reflection or superstructure of a particular social order incapable, by itself, to regulate the coexistence of an organized and peaceful. To the extent that social order is self-sufficient, we cannot prescind from the law and the state."

[30] The German doctrine, realizing the problem that orbits around the legitimacy of criminal law, has made strenuous efforts for the development of theories that enable progress in solving this problem. Currently, it is proposed, from the Communication Theories of Habermas and Luhmann's Systems, a review of the concept of legal good. In the words of Mussig (2001, p.14-15, free translation): "The change sought subsequently attempts to sketch the outlines of an Institutional Theory of Law, a theory which is based on the perspective of the Theory of Society, and that especially, could also form the basis for further reflection around the model of legal protection of property. Well, from the perspective of this Law Theory, Theory of Good Counsel in its current configuration seems hardly tenable: the problem of the legitimacy of criminal law - what is the social meaning, what is the object of every individual criminal type - appears as issue directly related to the configuration of society, and not as a matter concerning certain legal interests: Criminal Law is the law guarantee while the structure of society. Therefore, the criteria of legitimacy and benchmarks should be determined from a new perspective. Here proposes to take as a criteria of the social function of legitimating standard behavioral legally-guaranteed, the standard reference to the question of legitimacy is, then, the identity criteria of self-description of society."

reasons and the legitimacy of the right to punish must transcend the criteria of legality, expanding towards the axiological criteria that underlies the existence of a system of democratic governance.

Thus, given the wide range of the reasoning – that can be used in favor of the dictatorship of the majority, as well as authoritarian regimes – all the analysis of justification and legitimization of *jus puniendi* have as a common thread the ideals of freedom and human equality because of the use of such reasoning for most of the thinking that formulated and formulates the doctrine of democracy. To do so, it is important to define the scope and variations of such disputed term, given that often used in a uniform manner by the doctrine, being thus necessary to define the meaning adopted in the present work[31].

Yacobucci (2000) argues that the rules and purposes are the two basic justification aspects of political power, so the primary reasoning of such power and its exercise requires adequate provision between common purposes desired by society and the standards established for its protection. To achieve the common purpose, primarily tranquility, security and peace, may the state make use of criminal coercion, provided that does not admit random or contingent decisions but produces predictability, meeting expectations with certainty and security.

Consequently, no factual consideration can overlap considerations of an axiological character and should therefore instruct the values that the existence of a democratic state overlap, including the pressure of public opinion whether the correct application of law or its development.

Ferrajoli (2002) draws attention to the general understanding that prevails in the legal environment. He advocates that, what is valid under domestic law, that is, the right elaborated according to the rules that govern their production, is legitimate. It is understood that for the purposes herein pursued this concept becomes insufficient and it is necessary to use the position taken by the author concerning the external legitimacy of the right, as the right is legitimate when considered fair, based on moral, political, rational or natural criteria[32].

[3130]Ferrajoli (2002, p. 34) makes a warning about the legitimacy of criminal justice, adding that "Twenty years of emergency legislation, criminal inflation and progressive restriction on the system of guarantees produced the loss of legitimacy of criminal justice, which is only contingently covered by legitimation addicted and also improper, the popular consensus in the clash of great investigations. Hence, in particular, the urgent need to open up, finally - after years of exception, conflicts and political tensions, institutional crises, misunderstandings in the world of justice - a period of reform reputable refounding on a rational and the right criminal basis ".

[32]Ferrajoli (1997, p. 95), in respect to the validity as a criteria of legitimacy of laws explains: "This purely formal conception of validity is, in my view, the result of a simplification, which, in turn, derives from a misunderstanding of the complexity of legality in State Constitutional Law to

It can be understood from the foregoing that the legitimizing binomial guided by the purposes and goals to be achieved by political power through criminal law, as well as its origin, structure and mode of exercise, is the one that prevails in contemporary doctrine. Thus, the present writing shall combine understandings merging it into one, which genesis is based upon the assumption of a non-negotiable respect for human dignity, there is a legitimate right that has as an inexorable respect for the person, bringing dignity to the status of a sacred dogma, considering the dignity inherent in every human being from his birth and accompanying him to the grave.

Dignity is not earned or lost, neither increases nor decreases, is like life, begins and only with it is terminated[33], making it impossible, in the democratic tradition, any justifications that can obliterate such understanding in favor of the social control State[34].

Thus, there is a legitimate right – within its development and in the application scope – ruled on the constitutional principles that place the inherent rights above any negotiation, emphasizing the values that meet the achievement of a dignified existence[35].

Democracy and *juspuniendi*are the core of the matter. In the current global moment how to be consistent with theories that underlie the right to punish with the possibilities of access to the democratic promises, which, ultimately, ensure the enjoyment of rights inherent to human dignity?

Criminal Law is justified, as stated, for the present purposes to guarantee peace, security and the possibility of harmonious social life and constitute an obstacle against arbitrariness and violence that unfailingly would arise within the community if there were state interference in the form of punitive power, for solving the most serious conflicts[36].

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which we refer. The system of rules on the production of standards - generally established in our legal systems, at the constitutional level - effectively does not consist only of formal rules on competence or the procedure for creating laws. This system also includes substantive norms, such as the principle of equality and fundamental rights, which in many ways limit and bind the legislature, prohibiting him or imposing on him certain content. Therefore a standard - for example, a law that violates the constitutional principle of equality - although formally existing or current, may be invalid and as such susceptible to cancellation because it contradicts a standard substantially on their production. "

[33] According to Rabenhorst (2001, p. 14) "The term dignity, from Latin *dignitas*, designates all that deserves respect, consideration, merit or worth. Although Portuguese allow the use of both the noun and the adjective dignity worthy to speak of things (for example when we say that a house is worthy), dignity is above all a moral category that relates to the representation itself we do the human condition, ie, it is the quality and value we attach particular to humans depending on the position they occupy in the scale of beings."

[34] In the opposite sense, refer to the doctrine of the criminal law of the enemy. For all CancioMeliá and Gómez-JaraDiez (2006).

[35]On the topic Canotilho (2003), Dias (2001), Andrade and Costa Dias (1997).

[36] In this line of reasoning, Ferrajoli (2002a, p. 268) argues that "[...] This is other evil most reaction - informal, wild, spontaneous, arbitrary, punitive but not criminal - that in the absence of penalties, could come from the part of the victim or from social or institutional forces sympathetic to him. It is preventing this evil, which would be the victim the defendant, or, even worse, people sympathetic to it, which is, I believe, the second and fundamental objective for justifying criminal law. I mean that the penalty is not only to prevent crime unrighteous but also unjust punishments. "Yacobucci (2000, p. 318, our translation), for its part, believes that "The conflict thus disrupts not only the involved in

Manifests itself as in the sphere of development and implementation of Criminal Law a clear dialectical relationship – which search for balance is perhaps the most important mission of the State exercising the *jus puniendi* – between the interest in eliminating violence and criminal interests in decreasing the violence itself, structural violence cannot be overlooked, as it is pointed out by the Critical Criminology, as main breeding ground for the emergence of deviant behavior[37].

Thus, the democratic rule of law, in order to realize the grounds needed to achieve justification – possibility of harmonious collective coexistence by means of the discipline of interpersonal relations – and legitimacy in the exercise of punitive power – law enforcement in criminal system guided by legality and equality – must necessarily have as main objective to reduce structural violence that presents itself as the inevitable product of the capitalist production model, elaborate criminal laws that have effectiveness for the exercise of social control and fight vehemently all violence that currently pervades both the drafting of criminal law – case by case emergency, segmented, disorganized, among many other adjectives discredited – and, importantly, its implementation[38].

At that point, interconnect, clearly, several theories used in the first item of this exposure: either GTA (General Theory of Anomie) and the Chicago School, as well as the Critical Criminology, understand, although under different nomenclature and greater or lesser extent in the approach, that the main cause for the commitment of harmful or diverted behaviors are the stress factors[39] that plague society.

Such stress factors, called by the Chicago School as urban disorganization and by the Critical Criminology as structural violence, should be prioritized in a democratic state. Under the justification of the right to punish, the attenuation of factors for the development of social inclusive policies is an unremovable requirement for achieving this aim, since under the

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the problem but according to their level of importance and transcendence, puts a strain on the same assumptions of coexistence. Then again, they are the two reasons for an instance supra-individual who is interested and takes the issue of conflict that is realized in discord, disorder or aggression. On one hand the allocation of some particular good or socially relevant or standards based on them, the other to break the regulatory framework required by cohabitationand that includes the need to reaffirm its importance and prevent private response which is subject primarily to instances of emotional and affected an infinite violence. "

[37]See Silva Sánchez (1992).

[38]On the topic, Guimarães and Rego (2009).

[39] According to Agnew (2009, p. 171-172, free translation): Factors of tension are, by definition, disruptive events and conditions. Not surprisingly, therefore, experiencing stress factors causes people bad feelings. That is, stress factors contribute to one or more negative emotions such as anger, frustration, depression, hopelessness. These negative emotions create in the individual the need for corrective measures. Individuals feel shaken and want to do something about it. As indicated earlier, the crime is one of the ways to deal with stressors.

legitimacy, the formal social control should be exercised taking into account the existence of these stress factors as a way to mitigate the unequal application of criminal law[40].

In short, the securing of peace, security and the possibility of harmonious social coexistence conditions would be necessary to justify the existence, but not enough to justify the application of criminal law.

These objectives were already proposed by the Absolutist State and what existed then was a terror Criminal Law, that is, despite the purposes continue to be, in a final analysis, the same, the means being configured as legitimate, must necessarily be far less grotesque – torture, cruel judgments of exception, uneven application of the law, among other atrocities – which were usually practiced at that time, and unfortunately, even today. Therefore, only the sphere is not justifying enough, since the ends cannot justify the means; it is fundamental, as to the construction of suitable means, for achieving legitimate purposes justified in advance.

Thus, in a final analysis, which justifies the existence of the State and, as a consequence, the ends pursued by the Criminal Law is the ongoing construction of a system of social control that ensures the enjoyment of democratic freedoms, namely the possibility of living together for the discipline of intersubjective relations. The means for achieving this end will say if it is legitimate or not to exercise such social control, it will say exactly if the way applied through the punishment is inconsistent with the underlying principles of a democratic state.

Thus, underlined what is the right to punish of the state, made the necessary approaches between it and the Democratic State and Law and being it an unremovable presupposition that only those who can ensure consistent criminal legislative drafting and fair application, safe and equalitarian *jus puniendi* concreteness is democratic, through a rational demographic composition[41] it will be developed in the last topic, the guidelines for a theoretical approach between the right to punish and democracy.

4. DEMOCRACY AND *JUS PUNIENDI*: A NECESSARY APPROACH

[40] On the theory of culpability shared between the offender and the state agent, cf. Guimarães (2009).
[41] Term coined by Gramsci.

Regardless of the understanding of the sociological theories which claim that the state and the social control belong to different[42] intellectual traditions located as historical concepts in different historical situations, as well as that democracy as a form government presents paradoxes and difficulties that are inherent to its nature – one of the major problems of democracy would be the manipulation of the masses in favor of targeted interest of maintenance and/or extent of power – ratifying, as a starting point for final reflection in this work, the hypothesis that is under the rule of Democratic State of Law that gives the unique ambience to the exercise of formal social control suited the demands inherent to the dignity of the human person.

The choice is neither random nor capricious since the important distinctions which society, throughout history, makes of good and evil, justice and injustice, right and wrong, connected to issues of selecting the best political system, the legitimacy of sovereign power, the boundaries between public and private, can and should take certain stances. It is understood, that there should be a starting point to serve as a reference for the construction of any theory in the political sphere and the point of departure must be provided by deep critical reflection on the thinking that shaped and still shapes the grounds of existence of the modern state.

It is undisputed that since Machiavelli[43] and his understanding of the character of a sovereign power that would provide security and protection from political and non-religious relations through Hobbes[44] and his perception of the need to build a social order on rational bases anchored in the free will of men – which would transform them from individuals belonging to a state of nature, where everything was allowed and anarchy reigned, in legal subjects with rights and obligations – the entire political thought has been built with the reference in the concepts abovementioned about what is right or wrong, belonging to common perceptions which have survived throughout the times – some call natural law – as well as on the premise of the existence of a necessary being that disciplined society, that is, the state .

Importantly, the structuring of this thought occurred and still occurs since Locke[45] himself, taken as disciple of Hobbes, eventually curb the powers of Leviathan, limiting state action just to

[42]On the subject, Melossi (1992)
[43]See Machiavelli (1979).
[44]See Hobbes (2006).
[45]See Locke (1994).

realize the importance of the recognition of human rights in relation to the subjects with the state entity, through the co-social pact.

Since the 16th century a thought that justifies the existence of the modern state has been continuously shaped – be it capitalist, socialist, communist or otherwise less widespread – as well as theories that legitimize its actions within the social control, and is this source that should foment the current discussions on the topic[46].

Notwithstanding the foregoing, it is accepted as coming all the criticisms that are made for today's use of criminal law, including more intense, as formulated by the theories of conflict, especially the symbolic character, selective and stigmatizing which pervades the application of state *jus puniendi* and the absolute ineffectiveness in enforcing sentences, especially the deprivation of liberty[47]. On the other hand, it is necessary to move forward, finding solutions within what is feasible and, unfortunately, it is not believed to be feasible in the current social, political and economic order that permeates the world in general and the Brazilian state, in a more particularized way, the adoption of abolitionists theories[48], for example.

As from this aim, therefore, the first point to be faced lies in theoretical ideas and go through the discussion of the purposes assigned to penalties. It is necessary to rescue the coherence of the speech that aims to legitimize the imposition of penalties in the social environment.

Assuming that the state is composed of various bodies with the most different purposes, all linked to the public policy of human development, such as the National Health System, the public schools, the National Social Security Institute – INSS, in Portuguese -, among many others, it is necessary to understand that each segment is geared toward a specific purpose.

In this sense, it will not be in the Social Security Service that people will seek for medical attention and an individual will not go to public schools in order to apply for retirement, for example. What is inferred from this argument is the difficulty to understand the reasons why the doctrine indicate how formal social control purposes something that, at least in a logical order, is not in the exercise of its authority.

[46]Important to emphasize the importance of Marx (1980) in the context of social control.
[47]On the subject, Guimarães and Rego (2009).
[48]See Hulsman (1989).

In short, the aim of formal social control through the implementation of policies on crime and public security – development and application of criminal law, as well as other activities that aim to keep the minimum possibilities of social life – should direct its logic to the sole discipline of society, maintaining the possibilities of coexistence between the several groups and interests that comprise interpersonal relationships in the social environment.

Accordingly, issues of education, rehabilitation or neutralization of offenders, intimidation or reaffirmation of the value of the norm for social actors, satisfaction for the victim and/or their families are not able to justify the application of penalties considering that all these factors are outside the domain of society discipline by means of formal social control. The effects of imprisonment may be desired and, in punctual situations, concretized as possible consequences, but not as legitimating factors, because even for certain theories there is a clear inconsistency between the semantics terms, since it is not possible to reconcile the punishment, which is something that carries a bad education or (re) socialization, which is something that represents something positive.

The application of the penalty is justified, and can only be justified by the purpose of which the formal social control was designed and created: only the discipline of the citizens as a precondition for the existence of society itself organized through the protection and maintenance of the legal order. Thus, education is the responsibility of the public school system, health is under the responsibility of public hospitals and social security guaranteed by Social Security Institute while the protection against acts that threaten the very existence of organized society is the responsibility of the Formal System of Social Control or Penal System.

From these pleas, there is no way to attack the use of penalties for not educating, intimidating, for neutralizing the offender only partially, for not being certified to reaffirm the value of the standard, or that the victim and/or family did not feel compensated with the application of the criminal reprimand. The measuring factor to the legitimacy of penalties will happen in the scope of public safety: if the application of penalties is reaching the purpose of disciplining society.

In this sense, the neo-retribucionist speech seems consistent by appropriating Durkheim's category of "collective consciousness" it sees the application of penalties the satisfaction and

consolidation of collective feelings related to the values that should govern society, namely: ethical awareness, justice, abidance to the law, authority of the state and security of law[49].

Far from being assigned the satisfaction of emotional needs of punishment to the penalty or, in other words, social needs of revenge, neo-retribucionism understand that the effective application of the penalty removes the effects of the disruption of the intrapsychic collective balance, the social alarm caused by criminal offense, the penalty functions as an agent of re-integrative fundamental social values of common life that have been troubled by crime, that is, what legitimizes the application of penalties is the instrument functioning as a maintainer of law and the social order.

As logical understanding, it can be stated that the neo-retribucionism finds its origins in Hegel, which at the beginning of the 19th century advocated the idea that "the punishment is the negation of the negation of the right", that is, the crime is the negation of the law, the penalty to be applied to deny the crime and therefore reaffirms the law[50]. Thus, it is clear that since Hegel, sentencing consolidates and strengthens the deep collective sense of justice and, inexorably, the feelings of respect and fidelity to the law and to the established order.

Moreover, it is important to point out that only in the context of retribucionists theories the idea of proportionality in the application of the penalty due to the guilt of the offender agent finds shelter, since that in the sphere of retribution no reason of state – whether criminal policy or public security – authorizes the imposition of sentences outside the narrow field of proportion between the evil committed and the punishment imposed[51].

Notwithstanding, it is important to recognize the obstinate criticism which is made to the neo-retribucionist positioning on the question of the nature and content of the legal order to be protected by the criminal law. This criticism makes up the second problem to be faced in this text, given that it has been surpassed the level of ideas, the theoretical-abstract, it is necessary to face the reality of things.

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[49]For all Morselli (1997).On the prospects of retributivismo, Tonry (2011a).

[50] See Hegel (1997). The current theory of positive general prevention, assigned to the functionalist aspects of criminal law, is nothing more than the application of the canons of retribucionists or neo-retribucionists to the systemic foundations of the state, not representing, therefore, nothing new.

[51] All other criminal theories that purport to justify the application of penalties, except better judgment, ultimately end up privileging the scope of criminal policy proposals without major concerns in safeguarding one of the foundations of the basilar Criminal Law which is the *ratio* between the degree of harmfulness criminal practice and sanction of the same, ie, there is no inherent limits to theories neutralizing and intimidating. It is no harm to remember the warnings of Kant (1989), for whom "man cannot be half for any purpose, since man is an end in itself."

In a more concrete and practical thought, this second problem is related to poor drafting and implementation of the Criminal Law, which is reflected in the high impunity rates – in white-collar crimes is greater than the crimes committed by the economically disadvantaged classes, however, it is high in both spheres – in the targeted preparation of the law in defense of certain interests in police brutality, the indifference prosecutors and the judiciary towards the selected by the system for the effective enforcement of criminal law – formularization of justice: all the procedure documents are already ready for immediate application, it is only a matter of changing the name of the defendant and, if necessary, adjusting the report – the ruthless application of deprivation of liberty, among many other ailments.

It is advocated that idea that the mishaps arising from the structures of power and its exercise can only be addressed and solved in this sphere itself, that is, problems related to poor exercise of the self-proclaimed democratic governments should be corrected during the development of democracy.

Common problems to politically organized societies such as class privileges, inequalities of opportunity, social injustice, among others, if fair or not to the social context in which they operate, is a problem regards the realization of the ideals of democracy and not a problem that can attain the grounds of legitimacy of social control, as the misuse of resources available for social discipline cannot invalidate the theoretical foundations which reinforce the need of it.

The logical consequence of this position is to defend the popular struggle for the realization of a rational demographic composition, which involves the enhancement of citizenship as a category that is explained by the political inclusion of members of society, that is, the responsible choice of political representatives and collection of these representatives as pertains to platforms outlined in campaigns[52] and party programs.

The Democratic States should excel at active social control, which means fostering behaviors more than prohibiting them, one of the major characteristic of public policies for social inclusion. In states where the structural violence prevails, the main characteristic of social control is the absolute reactivity, namely, to prohibit behaviors that are a necessary consequence of this type of management, ultimately, to criminalize poverty.

[52]See Andrade (1993).

Good choices in the context of political representation will lead, in medium term, to a configuration of formal social control with reference to the understanding that the decisions on the general outlines of criminal policy should be taken before specific combating of a particular type of crime, that is, the basis of the criminal policy must be the principle that guide the democratic state, in an inflexible manner, and specificities in combating maladaptive behaviors has to be the agenda of discussion about the best way to address them[53].

This is the starting point for the implementation of criminal microsystems[54], which means that the criminal practices have their specificities and from it should be built a program of specific criminal policy, having as reference the largest individual rights and guarantees set out in the Federal Constitution.

Thus, in a substantial democratic regime, criminal policies to be developed must necessarily be configured as instruments of inclusive social transformation and not, as is currently the case in Brazil, as an instrument of aggression, oppression and stigmatization of the poor, which aims to maintain the *status quo*, in other words, democracy is not consistent with the Criminal Law working as guarantor of privileges and shielding of political and economic elites.

In short, it is not by relinquishing the formal social control or trying to delegitimize the state action[55] and the application of criminal law that the problems of structural violence will be resolved. All issues related to politics will only be solved in the very context of it, which means: it is necessary to move forward in the orbit of implementing a substantive democracy, in which, in an ideal context, all members of the social body can make responsible choices, rationally. It is imperative that the members of society learn to control the power provided to their legal representatives.

Finally, it is understood from such beliefs that criminal law will be applied gradually in a less selective manner since that with the development of democracy there will necessarily be an opening for the punishment of offenses which threaten against the order, which are essentially the offenses committed in the exercise of politics and economics, and selectivity will sound like something incompatible with these new times.

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[53] On the topic, see, RipollésDiez (2012).

[54] Criminal microsystems instruments would be different, since the criminal behavior would be addressed in a specific way, from its peculiarities, ie a specific criminal policy for traffic offenses, one for domestic violence, one for offenses against tax and economics, and so on, with the main objective to balance the demands collective and individual rights, but mainly combat criminal selectivity.

[55] Studies on the legitimacy of the criminal law from new perspectives of the legal interpretation can be found in Mussig (2001).

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