CRIMINAL LAW AND SOCIOLOGICAL CRIMINOLOGY: INTEGRATION AND DISINTEGRATION[1]

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Criminal Science as a legal anomaly.

In general, each branch of Law recognizes the functions of their respective sanctions, without major disagreements amonf their practitioners, who may differ about their good or bad use, but not about their *nature* and *function*.

But among the penalists there is no agreement on it. No other legal subjects boasts such a range of opinions about the function of its sanction as our table of theories of punishement[3]; so it is time to recognize that this is a legal anomaly.

We know that the exercise of punitive power serves a purpose, and if we leave the books aside, we will feel its very different and multiple consequences, imposible to recognize in their entirety. Sometimes it is possible to perceive that, in certain conflicts, it performs some of the functions theorized in the table of theories of punishement, but in others it would be absurd to attribute the same task to it.

Each penalist starts from what he or she believes should be the function and the object or purpose of punishment, and according to this subjective choice, justifies and legitimizes a certain measure of the exercise of punitive power. Each penalist says: *the penalty should fulfill this function; therefore, I legitimize it as it is done, and I build my legal theory (system) from this premise.*

Thus, depending on what it is believed in this regard, it can elaborate a penal doctrine that legitimizes the punitive power almost unlimitedly (*horrifying penalists*), that limits it to a great measure (*guaranteeing penalists*), or that wanders in the middle (*undecided penalists*). Anyone who dares to enter this jungle will be perplexed by an eternal discussion among the three, often vehement and aggressive.

The *drama of the legal-penal science* is that its interpretative systems of the law are not an *art poul'art*, since they are addressed to legal operators, aspiring to transform them into sentences that enable the punitive power, which is not exercised in society in the way that the social data show, fulfilling functions that many times we do not even suspect. In any case, the legal-penal science does not fail to fulfill its *practical function*, it has effects on legal operators and, among them, those in good faith are perplexed, while those in bad faith choose the most convenient system to manipulate the empowerment of the punitive power in an arbitrary way.

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[3] O quadro, reiterado com ligeiras variações até o presente, foi exposto, em 1830, por Anton Bauer, La teoría de la advertencia y una exposición y evaluación de todas las teorías del Derecho Penal, EDIAR, Buenos Aires, 2019.

To make matters worse, the *media criminology*[4], through its creation of a *false but unique reality*[5], unusually expands a function that in some cases fulfills the punitive power: *the channeling of revenge*[6].

According to the linear idea of time of our civilization, it is impossible to eliminate revenge[7]. But this vengeful impulse that the punitive power *channels* – and that is civilizationally normal in cases of aberrant crimes – media criminology, by *inventing a nebulous idea of the offender as always a murderer and rapist*, creates a category applicable to all those subject to the punitive power. According to this media reality, in prison there would only be murderers and rapists; moreover, all those victimized by the Latin American police (executions without trial) would also only be those psychopaths.

Since revenge is irrational, admitting it in a civilization that *presumes* to be *rational*[8] is *shameful*. That is why the theories ordered by Bauer in 1830, also from this perspective, are all *attempts to hide* revenge by means of supposedly rational ends. This is a *civilizing neurosis* that provokes a reaction analogous to the rejection of the Freudian unconscious: *we are rational*, even though we know we are not.

Media criminology, by spreading the *fakenews* of the punitive power reserved for murderers and rapists, also tries to hide revenge, although its ambivalence is as neurotic as that of a shy exhibitionist. To hide its excessive appeal to revenge, I have attributed to the punitive power a *supposedly naked dissuasive effect* unlike all other legal coercions.

It is obvious that every legal coercion fulfills a dissuasive function in the formation of society, but always by means of the specific objectives of its sanctions; thus, civil coercion dissuades us from violating a contract, but by a sanction common to the restorative function, in contrast the dissuasion of the punitive power, which is intended to be *dismissed* of any other function.

The *völkisch–populachera* media version, in order to modestly hide its shameless appeal for revenge, takes for granted the dissuasive effect of penalties on very serious crimes, when it is clear that precisely in these cases it does not have it, because the most horrifying crimes are those closest to psychopathic behavior and, therefore, are those on which there is less possibility of dissuasion by legal coercion[9].

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[4] Sobre este conceito, nosso livro. La palabra de los muertos, EDIAR, Bs. As., 2011, pp.365 y ss.

[5] Em toda a região, a cidadania é manipulada pelos monopólios da mídia, de acordo com o atual totalitarismo financeiro transnacional, que funcionalmente suplanta os partidos políticos, atuando como partidos únicos.

[6] Sobre esta função, é importante o desenvolvimento em René Girard, La violence et le sacré, Grasset, París, 1972.

[7] Em civilizações com tempo circular, ondulante ou pontual, seria possível, mas na nossa é impossível conceber que o que ocorreu não tenha acontecido. Nietzsche em Also sprach Zarathustra diz muito claramente: quando Zarathustra se liberta, ele o faz a partir do tempo linear e, portanto, da vingança, que é contra o tempo. Esta é a grande dificuldade que o abolicionismo normalmente não leva em conta.

[8] Na realidade, nossa civilização tende a lidar com um conceito meramente funcional de razão, que tem pouco em comum com as concepções mais metafísicas.

[9] O suposto efeito dissuasor sobre delitos muito graves é inventado de acordo comum à antropologia aberrante, a qual fantasia que um assassino em série ou qualquer outro próximo da psicopatia, antes de extrema do homo economicus, que faz fronteira com o ridículo.

Legitimizations according to the penalist social imaginary.

The *penalist fantasy*, engaged in imagining how punitive power should be, translates into a very rich *social imaginary*, which has existed for almost a millennium of effort that, like everything human, has limits and, therefore, cannot avoid falling into repetitions.

The creativity of the penalists was divided into two main currents, through which they imagined how the punitive power should be, and therefore its respective limits: (a) some imagined it should fall on *more or less equal and free* beings, as *retribution* for the harm caused by the misuse of their freedom; (b) while for others, it would fall on inferior and evil-determined human beings, to neutralize possible future evils.

The first imaginative current was subdivided between those who ended up imagining that the punitive power *should be the compensation* for the violation of a *metaphorical social contract* and those who, knowing that free beings are *determinable*, imagined that the punitive power should have this function. Of course, all sorts of combinations arose between the two[10].

The former imagined the *ought-being of the punitive power* on metaphysical bases. They began by believing that it should be a *retribution* for the *atonement* of sin, to move into the secular field as *reparation* for the violation of the metaphorical social contract. This line began with the *glossators* and *post-glossators*[11], and reached its highest point with the Kantian critique[12].

The latter started from the empiricism and imagined a punitive power with the practical function of *determining determinable beings*, according to *punishments* and *rewards*, in search of the greatest happiness for all. Its purest expression was the *pragmatism of Bentham*[13].

The second main current (b), which imagines a punitive power intended to be exercised over inferior beings, recognizes *romantic bases*[14], subdividing itself into *idealists* and *false empiricists*.

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[10] Isso se deve ao fato de que no Iluminismo convergiram ambas as correntes, quais sejam, a metafísica e a empírica.

[11] Isto é o que se conhece como recepção do direito romano. Esses primeiros penalistas trabalharam a partir dos Libris terribilis do Digesto, mas também foram influenciados pela filosofia grega.

[12] Dentro do criticismo, Feuerbach se afastou de Kant com sua teoria da coerção psíquica ou psicológica, resultado de seu diferente fundamento da separação entre moral e direito.

[13] Influenciou o pensamento pós-revolucionário francês e o código de Napoleão.

[14] Entendemos por tal o pensamento que, a partir de certa intuição ou visão geral, busca princípios infinitos.

Idealists classified human beings into *free* and *unfree*, reserving the punishment for the latters, like Hegel[15], or imagined that the punitive power should fulfill a function of moral improvement with respect to those who were lagging behind in the universal process of cosmic brotherhood, like the Krausists[16].

The so-called *empiricists*[17] invented a *criminal etiology due to the biological inferiority* and focused on the *danger*[18] of future evils caused by the inferiors, which the punitive power should neutralize or eliminate, to avoid the contamination of sin (structurally inferior women for the *demonologists*[19]); to eliminate the unevolved infectious cells of the social organism (born and colonized criminals for the positivists of the 19th century)[20] or to preserve the purity of the superior Aryan race, avoiding its involution (degenerated Aryans[21] for the Nazis)[22].

What is at issue when discussing the legitimacy of the punitive power?

What are all these imaginary creations of the penalist fantasy that lead everyone to believe that the exercise of the punitive power should serve different ends? Each of these products of the imagination takes the form of an image of society (social imaginary) that, if it is coherent, requires a State project to configure it, in other words, ultimately, penalists are discussing models of the State.

Depending on whether the penalist assumes the *subjective attitude* of being *horrifying* or a *garantist*, he will legitimize more or less the exercise of the punitive power and, therefore, also the society and the State model that configures it compatible with the greater or lesser scope of the exercise of this power. It is clear that this discussion corresponds to the *most central core of any political discussion*, a subject on which it is *impossible to reach a general consensus*.

But in addition, the legitimating discourses of the punitive power seem to be based on hallucinations or daydreams, because, at least in the case of the *garantist* penalists, they tend to imagine a model of State from which they deduce the function of the punishment, but they take the imagined State as existing, in other words, the legitimation is based on a *hallucination*. In the case of *horrifying* penalists, they

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[15] O hegelianismo penal limita a pena àqueles que atingem a autoconsciência; aos demais, nega a capacidade de agir com relevância jurídica (colonizados, inimputáveis, multirreincidentes etc.).

[16] Dá lugar à teoria *correccionalista* ou de *melhoramento* (*Besserungstheorie*) de Röder, que foi acolhida na Espanha (por exemplo, Concepción Aremal) e com a qual debateu Carrara, que por motivos cronológicos nunca discutiu com os positivistas.

[17] O empirismo dos positivistas era falso, pois ninguém pode probar o organismo social, muito menos as ridículas afirmações de Spencer e seu racismo antropológico.

[18] Devido à periculosidade, são punidos possíveis crimes futuros, não cometidos ou mesmo pensados, enquanto que o crime realmente cometido tem apenas valor sintomático.

[19] A bruxaria implicava um pacto com Satanás, que só poderia ser consagrado por seres humanos inferiores em fé, moral e inteligência, que seriam as mulheres.

[20] Os criminosos natos tinham para Lombroso características mongoloides ou africanoides.

[21] O poder punitivo nazista foi reservado para os arianos. Judeus e ciganos foram eliminados sob a lei da polícia administrativa.

[22] A degeneração foi um conceito proveniente da psiquiatria de Morel, aplicado – entre outros– aos mestiços, o qual foi mantido até o início do século 20 pela escola psiquiátrica de Argel. Na América Latina, a degeneração de mulatos e mestiços foi apoiada na criminologia biológica, expressamente por Raimundo Nina Rodrigues, considerado o fundador da criminología brasileira.

generally choose to recognize that the existing or postulated State is not the ideal, but transitory, which would allow passage to the ideal future State, in other words, a *daydream*[23].

Although this whole discussion is part of the core of the political question, the legal-penal science does not seem to be aware of its nature. The *indecisive* contribute of hiding it, which tend to choose various ends from the range of theories punishment, to combine them – or stack them –, as if from the accumulation of mistakes could emerge the truth[24], as do the incoherent, of short imaginative capacity, which prevents them from carrying it through to the end. These and other contradictions end up creating a *deafening ideological noise*.

Certainly, there is no doubt that constitutional and political legal scholars are on the same level, but the *difference lies in the fact that they know it* and therefore take charge of the material they handle, but those who look at the criminal science and show themselves with the *framework of theories of punishment* as something limited to it conceal themselves *being immersed in the central theme of the political discussion* and therefore, while the *ideological noise* stuns them, they do not understand the nature of the issue they are experiencing.

Etiological Criminology and Criminal Science.

The variable of the second great current of the penalist social imaginary (b), that is, the empirical claims that legitimized the punitive power in the supposed need to *neutralize* the future evils of the inferiors (*periculosity*), was inaugurated by the *misogynist demonologists* (*first etiological criminology*)[25], but in its evolutionary variable (inferiors for not evolving) it was reborn, in the second half of the 19th century, not against women[26], but against the marginalized Europeans of the productive system[27] and the colonized[28].

This *second demonology* was admitted in the academies, at first with the name of *criminal anthropology*, because it was framed in the racist colonialist anthropology

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[23] Seja a Cidade de Deus, uma vez derrotados os associados de Satanás, o estado racial puro dos arianos germânicos, uma vez eliminados os degenerados, o comunismo após a ditadura do proletariado, o derramamento de riqueza após a concentração etc.

[24] Esta observação sobre as chamadas teorias mistas ou combinatórias é formulada por Anton Bauer em op. cit. Deve-se notar também que a combinação de teorias permite a arbitrariedade, já que permite aos juízes colherem a mais conveniente para uma pena maior ou menor.

[25] A explicação para a inferioridade genética da mulher era absurda e inusitada: ela seria inferior porque vinha de uma costela curva no peito do homem, e assim contrastava com a retidão do peito dele.

[26] Cabe esclarecer que Lombroso ainda considerava as mulheres inferiores, cuja baixa incidencia no aprisionamento ele atribuía à prostituição, considerada por ele um equivalente feminino do delito.

[27] O processo de acumulação original foi precedido por um deslocamento maciço da população para as cidades, em que o incipiente capital produtivo ainda não estava em condições de incorporar toda aquela massa que permanecia como marginal nas cidades europeias.

[28] Os demonólogos não tinham de justificar o colonialismo, porque o colonialismo originário era legitimado com argumentos teocráticos, mas o neocolonialismo o fazia com racismo, ou seja, com falsos argumentos científicos.

(Spencer)[29] that, with pretensions of a natural science, empirical and *evolutionist*, wanted to explain crime as the *manifestation of biologically inferior and dangerous human beings*, similar to the colonized *savages.* Later it was renamed as *criminology* and finally *criminology*[30], being as such academically recognized and cultivated by *doctors* in a close link with the *police*[31], who repaired it in the most serious and pathological cases of pathibular criminals (*the born criminal*)[32], which until now facilitates the media *fakenews* of prisons full of murderers and rapists. Faced with the evidence that not all prisoners were *born criminals*, they then incorporated the category of occasional and some isolated social data as the *causes of the crime*[33].

This new demonology was *integrated* with the so-called *positivist* version of the *periculosic* legal-penal science and legitimized the police punitive power in highly stratified societies, both metropolitan[34] and *neo-colonized*[35], under the label of *social defense*[36], an expression that evokes *war and enemy*[37].

The *leucocytic* function of *social defense* attributed to the punitive power would consist in neutralizing the pathogenic *germs* of the *social organism*[38] and in legitimizing

[29] Como esses discursos foram baseados na teoria da evolução das espécies, este racismo é conhecido como darwinismo social, mas Darwin não chegou a estes extremos, seu teórico era o engenheiro ferroviário britânico Herbert Spencer.

[30] Este é o título do livro de Rafael Garofalo, que sintetiza os argumentos mais racistas e degradantes da dignidade humana de toda a criminologia etiológica, já que ele considerava que a luta contra o crime é uma guerra, e que os povos colonizados são equivalentes aos criminosos natos.

[31] A corporação médica, desde o século XVI com Wier, tentou hegemonizar o discurso penal, mas foi no século XIX, quando o controle policial, importado das colônias para as metrópoles, adquiriu poder. À polícia faltava o discurso que os médicos detinham, embora estes não tivessem poder. Formou-se então um acordo entre ambas as corporações, e os médicos forenses assumiram o discurso criminológico.

[32] Uma vez chamados de loucos morais (moral insanity) por Pritchard, hoje seriam chamados de psicopatas.

[33] Sob a influência de Ferri, Lombroso publicou um livro sobre as causas sociais do delito, com algumas afirmações absurdas sobre nossa região.

[34] As sociedades europeias estavam há muito preocupadas com as classes perigosas, tanto que, em 1838, o Colegio de Francia realizou uma competição sob esse nome, dez anos antes de Marx e Engels se referirem às classes no Manifesto. A competição foi vencida por um comisariado de Paris: Frégier.

[35] Em nossas sociedades, o positivismo no final do século XIX serviu não apenas para legitimar o poder policial, mas também o próprio regime de nossas repúblicas oligárquicas que o adotaram como ideologia oficial e o difundiram por meio de nossas universidades, em que foi dominante por muito tempo até meados do século passado. Assim, foi a filosofia oficial do porfiriato mexicano, do patriciado peruano, da República Velha brasileira, da oligarquia das vacas argentina etc.

[36] A ideia de defesa social teve origem em Romagnosi e foi seguida por Carmignani, mas foi retomada por Ferri. Após seu declínio, foi promovida uma nova defesa social como uma política criminal, bastante confusa.

[37] Há alguns anos, um artigo de Günther Jakobs, referindo-se ao direito penal do inimigo, provocou um escândalo e deu origem a uma extensa bibliografia, quando, de fato, no direito penal sempre houve inimigos, apenas esta terminología não foi usada, de modo que, se o professor de Bonn tivesse usado outros termos para dizer a mesma coisa, provavelmente não teria provocado nenhuma controvérsia.

[38] Os excepcionalmente inferiores criminosos natos metropolitanos (atávicos parecidos com os colonizados) foram confinados em prisões, o que faz pensar que as colônias, por conterem seres igualmente inferiores, eran na realidade prisões imensas.

neocolonialism[39]. In claiming an empirical foundation, he considered the *political discussion* of the previous penalists[40] as a *pre-scientific* stage that had been *surpassed*[41].

The demonologists had integrated penal knowledge with biological criminology as the *etiology of evil* (inferiority of women) in a *system* that included the *manifestations* (pact with Satan, witchcraft), the *method* to investigate it (torture), the criminal policy (chastity) and the neutralizing solution (purification by fire[42]). The positivists of the century 19th and much of the 20th century also integrated their *criminological etiology of crime* (stereotype inferiority) into a system that encompassed the signs of danger to biological inferiority (crime and *bad life*[43]), the *method* to detect it (police vigilance), criminal policy (public morality) and neutralization (*resocialization* [44] ou elimination[45]).

In the integrated positivist model, etiological criminology was dominated by doctors, and the legal science was tributary to their teachings (*dangerousness* was diagnosed by doctors)[46], the latter science was subordinated to medical knowledge; etiological criminology threatened to *swallow* the criminal law [47].

An *integrated but more moderate positivist model* attributed to the legal-penal science the function of containing police power, as a limit to the criminal policy of eradicating crime at any price, which would have led to a police state[48]. In any case, the

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[39] As colônias eran territórios estrangeiros ocupados pela polícia, ou seja, imensos campos de concentração e de trabalho forçado para inferiores biológicos não evoluídos, enquanto os criminosos natos europeus eram atávicos, ou seja, regressivos, voltando à condição racial dos colonizados.

[40] A discussão política iniciada no século XVIII era um discurso funcional para a burguesia em sua luta contra a nobreza, mas quando a burguesia se instalou no poder e começou a exercer a repressão, este discurso tornou-se disfuncional e, por essa razão, abraçou o controle e a vigilância policial dos marginalizados, trazendo das colônias a técnica de ocupação policial do território.

[41] Ferri considerou que todos eles correspondiam a uma etapa metafísica que, segundo Comte, era anterior à científica positivista representada por ele, razão pela qual inventou uma escola clássica que nunca existiu e à qual relegou na mesma bolsa todos os penalistas anteriores, ignorando suas diferentes ideologias (aristotélicos, contratualistas, críticos, hegelianos, krausistas, pragmáticos etc.).

[42] A articulação mais completa desse sistema integrado de criminologia etiológica e ciência penal inquisitorial foi exposta em um livro tardio, mas que reúne toda a experiência anterior, que é o Malleus Maleficarum o Martillo de las brujas, de Sprenger y Krämer, embora na realidade pareça que Krämer o escreveu quase na suatotalidade.

[43] Como o crime cometido tinha apenas valor sintomático, ao seu lado poderia haver outros sintomas de periculosidade pré-delitual (periculosidade sem delito), incluindo a vida ruim, uma espécie de acumulação de tudo o que a policía considerava perigoso. Por isso, apareceram as leis de periculosidade sem delito e, no final, foi projetado um código penal sem parte especial (projeto Krylenko para a Rússia soviética).

[44] Isso foi reservado aos delinquentes que eles consideravam como ocasionais.

[45] Em todos os tempos, os crimes graves foram puníveis com a morte, mas o problema eram os multirreincidentes e reincidentes, chamados de habituais, que nunca cometeram um delito grave. Países colonialistas, como a Grã-Bretanha e a França, enviaram-nos para as colônias como punição de relegação na forma de prevenção especial negativa (Austrália, Ilha do Diabo), entre nós foi praticada a incorporação forçada ao exército (o poema acional argentino Martin Fierro), ambas racionalizadas posteriormente pelo positivismo policial como medidas de segurança para delinquentes habituais.

[46] Os *diagnósticos criminológicos* estavam a cargo de *gabinetes* dirigidos por médicos.

[47] Foi a tese sustentada por Pedro García Dorado Montero, professor de Salamanca, com seu *direito protetor dos criminosos*.

[48] Era a variável alemã do positivismo, encabeçada por Franz Von Liszt.

real science remained etiological criminology, since the penal doctrine was a *practical knowledge*[49], intended only to prevent the overflow of the police power [50].

An independent and useful Penal Science for any State model?

Given that at the end of the nineteenth century the legal-penal science was divided between the open *political discussion*, imagining models of State (eighteenth-century metaphysical rationalism), and the denial of its scientific character, subordinating it to a medical knowledge (nineteenth-century *pernicious positivism),* it set out to escape this option. To escape the first alternative, it proclaimed itself a *politically aseptic* science; to escape the second, it identified itself as a *science of culture*, *impervious to any contaminating data coming from any natural science*.

This construction was the work of *legal-penal neokantism* [51], based on a theory of knowledge that radically separates the *natural* sciences from the *cultural* sciences[52]. The *natural* sciences

The *natural* sciences would be empirical and governed by verification; the *cultural or spiritual* sciences, on the contrary, would deal with the world of freedom, and it would not be possible to know their objects without a prior ordering.

Law belongs to the latter and what would put order in its objects would be *values*, without which, although other entities can exist, because they are not ordered by *values*, knowledge cannot access them[53], so that *value* would determine the epistemological limits of the legal science.

This theory of knowledge has two important consequences: on the one hand, social data *not ordered by values* have no place in the legal criminal science, therefore, it also has no place in legal criminal science; on the other, the question of *who imposes values* is not relevant, since the answer would be a *verifiable data*, proper of a natural science, therefore, it also has no place in a *cultural science* such as the legal criminal cience.

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[49]Contrastava com Karl Binding, que sustentava uma teoria dos imperativos, legitimando as normas pelo simples fato de emanar do Estado.

[50]Respondia aos tempos de Guilherme II, quando o império interveio economicamente e concedeu alguns benefícios à clase trabalhadora, a fim de deter o avanço do socialismo e não cair no estado policial. O confronto com Binding se deu porque este último teorizava nos tempos de Bismarck, ou seja, da unidade alemã. Este confronto era – em suma – de modelos estatais na Alemanha. Embora muitas vezes seja considerado análogo ao *classicismo* e *positivismo* inventado por Ferri na Itália, era completamente diferente.

[51]É o chamado *neokantismo sudoeste* ou de Baden, de Windelband e Rickert, que, dos dois caminhos deixados em aberto pela crítica de Kant (*razão pura e razão prática*), optou pelo segundo.

[52]Essa separação das ciências veio de Wilhelm Dilthey.

[53]Argumenta-se que não se trata de um idealismo porque não nega a realidade dos entes, mas naquela seleção que determina a possibilidade do conhecimento, embora o conhecimento não crie o objeto, não pode esconder certo grau de *criação* ou, pelo menos de negação, deixando-o fora do conhecimento; seria sempre uma criação da realidade, se não por ação, pelo menos por supressão.

Since the *values* can correspond to any form of state [54], the criminal science would be a *normative logic* aimed at giving *completeness (not an internal contradiction)* to a system of interpretation of the entities that value had ordered, leaving outside its projection horizon all social data *not ordered* by values.

Although this methodology *disintegrates* the system in which positivism integrated the etiological criminology, it still integrates it in a different way, since this criminology is *subordinated* to the legal-penal science, as auxiliary knowledge[55].

In effect: for the neokantism, the legal-penal science indicates to etiological criminology which are the conducts whose causes the latter should explain [56]. Thus, etiological criminology goes from hegemonic to subordinate, but without major changes, except for some *multifactorial matrix* [57].

The advance of Sociology.

While *criminal sociology* was the name given to the few social data that comprised the supposed *social causes of crime* with which positivism had sprinkled its biological criminology, integrated as a guiding principle of the legal-penal science, *general sociology* developed in the last decades of the nineteenth century independently of the latter. Moreover, the *functionalist* version of general sociology disproved the idea of absolute *social harmfulness* of the offense of the positivist criminology[58].

The contributions of the founding fathers of general sociology (Weber, Durkheim, Simmel, Tarde) had an impact on judicial science in general, locked in *dogmatic formalism,* including Jhering himself, the architect of the modern formulation of the dogmatic method[59]. In this way, general sociology gave rise to *legal sociology*, preferably cultivated by privatists or publicists[60] and centered on law as a *social phenomenon*, being methodologically received by legal science, until it generated the so-called *free law school* [61] and American legal realism [62].

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[54]O neokantismo penal deu origem a construções liberais, como as de Gustav Radbruch e Max Ernst Mayer, mas também a um desenvolvimento adequado à legislação nazista, como as de Edmund Mezger e Wilhelm Sauer, entre muitas outras de seu tempo (a este respeito, nossa *Doutrina Penal Nazista. A dogmática penal alemã entre 1933 y 1945*, Tirant lo Blanch, Petrópolis, 2019).

[55]Esta foi a forma pela qual por muitos anos foi ensinada a criminologia na América Latina.

[56]Tratava-se de uma criminologia etiológica que continuou a ser ensinada nas faculdades de direito; podemos dizer que foi a *criminologia de esquina da faculdade de direito*. De acordo com suposições neokantianas, há uma contradição nesta nova integração, já que uma ciência *cultural* define os limites epistemológicos de uma ciência *natural*.

[57]Foram acrescentados novos conceitos biológicos, como os decorrentes dos primeiros tempos da endocrinologia, com as biotipologias de Ernst Kretschmer, Nicola Pende e outros.

[58]Émile Durkheim defendeu a *normalidade* do delito, afirmando que em qualquer sociedade é necessária uma quantidade *normal* de crime, que serviria à função de reforçar a coesão social, cujo declínio excessivo não seria um sinal social positivo.

[59]Rudolf Von Jhering sistematizou as regras da moderna dogmática jurídica em analogia com o método da química e distinguiu a antijuridicidade da culpabilidade no campo do direito privado. O ponto de virada veio em seus trabalhos sobre o *fim do direito* e o *direito como luta*.

[60]Seus antecedentes podem remontar-se ao romantismo jurídico de Savigny e, posteriormente, de Kirchmann.

[61]É a escola de H. Kantorowicz.

[62]Especialmente o realismo jurídico norte-americano, com Holmes e Pound.

But without reaching such radical positions, between methodology and legal sociology there was a growing exchange of contributions[63].

In this process, the *anomaly of the legal-penal science* is again detected, since legal sociologists have not focused much on punitive power or criminal law.

Both legal sociology and general theories of Law have always perceived a certain *anomaly* in the criminal question, which often manifested itself, even pointing out that some expressly excluded it from their theorizations[64].

When, at the end of the World War I, the primacy of general sociology passed to the United States [65], urban sociology and concern with crime were encouraged at the University of Chicago, though always in an etiological sense, but totally free of the biological ballast of racist positivism [66].

Whenever the supposed etiology ceases to be biological and becomes *sociological*, it is soon revealed that, by excluding the exercise of the punitive power from *social causes*, it falls into a *false social etiology*, which becomes indeniable when its notorious selective arbitrariness is highlighted.

Thus, the first etiological criminology (*demonology*) was discursively scrutinized [67] by Friedrich Spee, when he turned away from the discussion about the existence of witches to analyze the way in which inquisitorial the punitive power was exercised, revealing who exercised it and the serious crimes they committed[68]. For the first time it becomes clear that those in charge of suppressing crime were the biggest criminals.

The process was reiterated in the 20th century, when *etiological criminology* became *sociological*, making it increasingly notorious that, from the epistemological exclusion of the punitive power, a *false etiology* resulted, until its incidence was

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[63]O confronto entre *formalismo* e *antiformalismo* foi o grande debate jurídico e sociológico do século XX, com Kantorowicz, Ehrlich, Gierrke, Holmes, Pound, Geny, Hauriou, Duguit, Gurvitch e outros do lado *antiformalista*; Kelsen do lado jurídico e Max Weber do lado sociológico, do outro.

[64]Assim, os teóricos do *trialismo* normalmente não se referem ao direito penal e alguns dizem expressamente que ele não pode ser usado nessa área.

[65]No final da primeira guerra (1914-1918), a Europa foi devastada, e com um sentimento geral de pessimismo e decadência, seus grandes mestres fundadores haviam morrido, a sociologia começou a se desenvolver principalmente nos Estados Unidos, e haviam emergido incólumes da guerra, vivido os *loucos anos 20* e recebido fluxos migratórios que foram selecionados por cotas com critérios racistas. O crescimento acelerado das cidades incentivou o interesse sociológico.

[66]Nessa linha, destacaram-se as contribuições de William I. Thomas e, sobretudo, a *ecologia urbana* de Robert Ezra Park e Ernest W. Burgess, na chamada primeira escola de Chicago.

[67]Embora o trabalho de Spee (*Cautio criminalis*) não tenha demolido o poder acadêmico dos demonólogos, foi o predecesor mais forte de Christian Thomasius, que finalmente o anulou setenta anos depois, inaugurando o iluminismo alemão.

[68]Spee demonstra a responsabilidade dos teóricos da teologia, dos príncipes, a corrupção dos inquisidores, a perversão sexual dos verdugos, o objetivo reprodutor da tortura, a crueldade sádica dos juízes, a *alquimia valorativa*, a cumplicidade dos confessores embriagados, para concluir que com essa seleção qualquer um seria considerado bruxo e comparando esse exercício de poder punitivo com os crimes de Nero queimando cristãos.

undeniable[69], what ended up causing a *paradigm change*, in which the main object was no longer the *causes of crime centered on the delinquent* – who was no longer considered an inferior and different being -, to focus on the punitive power, with the so-called *social reaction criminology*[70].

This criminology was divided between a so-called *liberal* and a *radical* current. The first was fed by *symbolic interactionism* [71] and by *phenomenology*[72], and it was necessarily critical of the punitive power, especially with the *labeling approach*[73], which highlighted - among other things - its *structural selectivity* according to stereotypes and the reproductive function of prisons[74].

The second - *radical* - was preferentially guided by non-institutionalized Marxism *(Frankfurt School)*[75], opposing the *liberal* call for not extending to the social power to which the punitive power is functional, so that from a *criminological critique*, it moved to a *macrosocial critique*. The result was a great impotence to propose reforms, since little could be done before a profound *macrosocial* change.

In any case, non-Marxist general sociology, including traditional sociology[76] and, furthermore, *liberal* critique and *labelling* demolished the foundations of the ideology that was the basis of legal-penal dogmatics and completely disproved the principles of equality and legality, the idea of the criminal law of the act, the alleged egalitarian protection of legal goods, etc.

Thus, four or five decades ago, both legal-penal science and critical criminology found themselves at a dead end. The former was incompatible with sociological knowledge - even the most traditional - and, feeling threatened, took refuge in neokantism that, by arbitrarily excluding social data, preserved its false ideological foundations and only perfected its logical completeness (without internal contradiction). On the opposite sidewalk circulated a sociology that had moved from the etiological to the social reaction and, within it, from the liberal to the radical version, but that, having reached this limit, dedicated itself to fight the capitalism of consumer societies, without the possibility of influencing the punitive power as long as it survived. At such a

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[69]Por exemplo, a sinalização da intervenção punitiva como geradora de desvios secundários de conduta, condicionando futuras *carreiras criminosas*, de Edwin L. Lemert

[70]É uma denominação genérica que não reflete corretamente o alcance dessa criminologia, pois não se trata de uma reação, mas uma interação permanente. Essa criminologia se difundiu na América Latina por meio da obra de dois criminólogas venezuelanas, Rosa del Olmo e Lola Aniyar de Castro, entre outros autores (Roberto Bergalli, Juarez Cirino dos Santos etc.).

[71]Essa corrente também é chamada de behaviorismo social, enunciada por George Herbert Mead, posteriormente desenvolvida como *dramaturgia social* por Erwin Goffman. Na criminologia destacam-se as obras de Howard S. Becker e outros.

[72]Especialmente a chamada etnometodologia, mas muito importante é o trabalho da sociologia fenomenológica de Berger e Luckmann.

[73]É o resultado da teoria dos papéis na dramaturgia social interacionista, segundo a qual cada um de nós acaba sendo, em certa medida, como outros nos veem, e de acordó com os papéis que eles exigem de nós.

[74]A crítica de Erwin Goffman ao total das instituições foi um marco para as prisões e os asilos.

[75]Adorno, Horkheimer, Marcuse etc. Em criminologia, destaca-se a obra pioneira de Rusche e Kirchheimer, *Pena y estructura social*.

[76]Como Robert Merton, a teoria das subculturas etc.

crossroads, it was impossible to conceive a new integrated model of criminal law and criminology[77].

The disintegration becomes unsustainable.

In the following decades, deep changes in the world and regional power occurred: the bipolar world has come to an end; the economy has been *financialized*; financial totalitarianism has imposed itself on the political power, taking on *macrocriminal* forms; *mass incarceration* has been produced in both hemispheres; teenagers from precarious neighborhoods and immigrants are the new stereotypes in our region and migrants in the North; *late colonialism* is exercised in Latin America through astronomical indebtedness; the *welfare State* tends to disappear; world wealth is concentrated in 1% of humanity; environmental deterioration is accelerating, causing viral mutations that paralyze the global economy.

Financial totalitarianism is legitimized with a new *reductionist (economicist) discourse*, based on the aberrant anthropology of *homo economicus* and *meritocracy*, which spreads through academia - even the Nobel Prize - as an ideology that radically clashes with Human Rights[78], trying to bar all behavioral sciences.

In our region, with the highest Gini coefficients in the world, *late colonialism* intensifies social stratification, makes welfare states disappear and aims to *chronicle* our underdevelopment, common high cost of lives[79].

The punitive power of our societies becomes more violent, lethal and selective, under the *völkisch slogan* of *zero tolerance*, driven by the media criminology of monopolies that functionally replace the political parties in the form of single parties. The *lawfare*[80] against popular and dissident opponents would be the envy of Göbbels and Vichinsky. There is no denying the degradation of the States[81], and the media

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[77]Essa impossibilidade foi afirmada nesse artigo fundacional por Alessandro Baratta.

[78]É notória a negação dos direitos humanos por parte de Ludwig von Mises, um dos evangelistas dessa ideologia, que afirma que ninguém tem direitos só porque nasceu. A participação de outro evangelista, Milton Friedman, na programação econômica da ditadura chilena, revela que o autodenominado *neoliberalismo* não tem nada de liberal.

[79]Se somássemos as mortes causadas pelos altos índices de homicídio em alguns países da região, os suicídios (especialmente de idosos), a privatização dos serviços de saúde, a falta de campanhas de saúde e vacinação, cuidados de saúde seletivos, insegurança no emprego, a inadequação da rede viária aos veículos etc., veríamos que o número anual é equivalente a uma cidade de proporções regulares. Todas esas mortes são causadas pelo subdesenvolvimento, e nós as consideramos como um *genocídio por gotejamento*.

[80]Essa denominação significa *guerra de direito*, mas não tem nada a ver com direito, já que é o resultado de gangues criminosas formadas por juízes prevaricadores em coautoría com agentes de inteligência, funcionários extorcionistas, testemunhas compradas, polícia corrupta e difamadores disfarçados de jornalistas, instigados por altos funcionários do governo e gerentes de empresas monopolistas da mídia.

[81]Os estados de direito na região estão se deteriorando, mas geralmente não estão caminhando para estados policiais, mas para um enfraquecimento do próprio estado, já que a autonomia policial, a letalidade policial, a concentração do crime de subsistência em organizações, o surgimento de grupos de autodefesa e parapoliciais e milicias, até mesmo a intervenção das forças armadas em funções policiais significam que o estado perde seu monopólio na

discourse is degraded to pure advertising: the media monopolies, by creating reality, *end up dismantling it*.

Because of these changes, the *sociological criticism* of four decades ago has lost much of its validity, since it is of Anglo-Saxon origin and originated in the face of the punitive power of capitalist societies of production and consumption[82]. In turn, our legal-penal science continues to import renewed versions of neo-Kantianism[83] and neo-Hegelianism[84], reinforcing the infeasibility of incorporating social data in legal constructions.

Neste momento, ao entrarmos decididamente nesse perturbador século XXI, torna-se mais premente a necessidade, por um lado, de reorientar a crítica sociológica para o atual quadro de poder; por outro, de integrá-la com a ciência jurídico-penal, uma vez que na nossa região, entre o *imaginário do penalismo* e a *realidade*, já não existe uma simples *disparidade*, mas um crescente *disparate*.

At this moment, as we decisively enter this disturbing 21st century, the need becomes more pressing, on the one hand, to reguide sociological criticism to the current power framework; and on the other, to integrate it with legal-penal science, since in our region, between the *imaginary of penalism and reality*, there is no longer a simple *disparity*, but a growing *nonsense*.

The *progressive unreality of legal and criminal science* demands, with parallel *urgency*, its overcoming, since its *anomaly* is no longer an *academic drama*, but a growing and very serious social and political danger. Despite the strong *creation of reality* by the single media parties, the *absurd* is becoming undeniable for our populations, with the risk of leading them to ignore law as a social tool[85].

The first target of all violent changes has always been the symbol of the punitive power: The French revolutionaries took the Bastille; however, because it was empty, they did not free any prisoners, they only destroyed the symbol, but finally everything ended *in terror*.

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arrecadação de impostos e no exercício do poder punitivo, ou seja, perde o monopólio da coerção e também da defesa nacional, tudo isso funcional ao colonialismo tardio financeiro.

[82]Isso exige uma renovação da própria criminologia crítica, que devemos necessariamente realizar na região, incorporando a experiência de nossa longa luta contra o colonialismo e reorientando-a para a forma atual assumida pelo poder punitivo do colonialismo tardio.

[83]É a dogmática jurídico-penal dominante na Alemanha neste momento, cujo autor mais difundido é Roxin.

[84]Até certo ponto, pode ser considerado dessa forma o funcionalismo de G. Jakobs, que não é muito popular na Alemanha.

[85]A violência política sempre deixa cicatrizes; além disso, mesmo que os mais desfavorecidos triunfem, invariavelmente causa o maior número de vítimas.

Building a new Integrated system is not impossible.

Thirty years ago we thought that this crossroads had to be overcome [86], and now we insist on it, only with the greater urgency imposed by the changes of the last decades.

The path to overcome the judicial anomaly of penal science was synthetically enunciated by Tobias Barreto, the visionary Brazilian jurist who directed the so-called Recife school [87], whose brief signs remained in oblivion, without anyone developing them, that is, they passed almost unnoticed by Latin American penal science, first subordinated to Spencerian racist positivism and then amazed by the uncritical importation of German penal science constructions.

In 1886, reflecting on the reading of Fröbel [88], Barreto found the key to the principles that would allow the legal-penal science to take the turn of resistance: *Whoever seeks the legal foundation of punishment must also seek, if he has not found It yet, the legal foundation of war*[89].

Earlier, he had stated - quite accurately - that *punishment is not a legal concept, but a political one*[90]. His brilliant insights in this regard are complemented by the statement that there is no a natural law, but rather a natural law of law[91].

From these keys, it is possible to understand and cancel the exceptional abnormality of legal-penal science in relation to the rest of legal science.

Since the time of Barreto, international law has changed course, but criminal science has not followed the example. The internationalists abandoned the old right to war, because they realized that wars were not waged in accordance with what they had programmed in their books; they decided, therefore, to resign themselves to project the limitation of the extremes of cruelty. In this way, the right to war became *stunted*[92] and *international humanitarian law* was developed [93], who, instead of theorizing war in order to limit it, partially legitimizing it (with the concept of fair war), sought to set limits to it.

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[86]Nós o delineamos em nosso ensaio *En busca de las penas perdidas. Deslegitimación y dogmática jurídico penal*, EDIAR, Bs. As., 1989.

[87]Tobias Barreto (1839-1889) foi um jurista bastante autodidata, o primeiro a ser alimentado pela literatura jurídico-penal alemã em nossa região, composições por vezes contraditórias, mas inegavelmente pensador independente, que trabalhava no Brasil profundo de um nordeste economicamente desarticulado pela ruptura da economia açucareira e pela transição para a economia cafeeira do sul.

[88]Julius Fröbel, *Theorie der Politik, als Ergebniss einer Erneuerten Prüfung Demokratischer Lehrmeinungen,* Vol. 1*: Die Forderungen der Gerechtigkeit und Freiheit im State*, 1861 (cfr. Deutsche Biograpihische Enzyklopädie, (herausgegeben Walter Killy), K.G. Saur, 2001, 3, p. 501).

[89]Tobias Barreto, *Obras Completas*, V, *Direito, Menores e loucos e Fundamento do direito de punir*, Ed. do Estado de Sergipe, 1926, p. 151.

[90]Idem, p. 149.

[91]Tobias Barreto, *Obras Completas*, VII, *Estudos de Direito* (vol. II), Ed. do Estado de Sergipe, 1926, p. 38.

[92]Poderia considerar-se como baseada na Carta da ONU.

[93]As bases legais do direito internacional humanitário são as Convenções de Genebra e seus protocolos adicionais.

Internationalists have minimized discussions on fair war (the *fair* punitive power of criminal law) in order to focus on neutralizing its excesses (equivalent in criminal law to the limitation of the *punitive power*). This, by the way, is a sign of realism and human humility of legal internationalism, which no longer intends to dictate rules to war power, telling it when to release it, but concentrates on avoiding its lethal consequences as much as possible. *Penalist arrogance* still prevents us from stopping trying to indicate to the political power how far it can use the punitive power, defining models of states, to focus on the limitations to its also lethal consequences.

We would consider it absurd that international law today presents a table of *theories legitimizing war*, but it still seems normal to us that legal-penal science, in order to legitimize itself, wants to legalize a *political factum* by losing itself in the range of Bauer of *theories of punishment*, even without being aware that it is discussing state models that it dreams of, as a product of the *penalist imagination*. International law has managed to eradicate the *normalizing habit* of legitimizing *fair war*, which still weighs heavy on criminal law today, the legitimization of the *fair punitive power*.

It is not possible to know all the functions of the punitive power.

Given that the punitive power is a *political fact* - and as such it is extremely *multifunctional* - it is not possible for it to have a single function, just as wars do not. Otherwise, given the extreme variety of conflicts in which it intervenes, it is also impossible to know all its functions, dysfunctions and consequences in social reality, some of which we do not even suspect[94].

However, penalists, Judges and politicians seem to internalize a self-censure imposed by the academic tradition and reinforced by the alienating criminology of our one-party media, which spreads an *idolatry* of the punitive power, because it turns it into a *false god*, endowed with a blasphemous and *omnipotent* character. For the fanatics of this idol - which is not made of gold - it is a *matter of faith*[95], there is nothing that cannot be solved by its exercise.

For this reason, in the face of *theories of punishment* and punitivist idolatry, there is space for an *agnostic* position, which does not deny its power, but knowing that it is not omnipotent and that we do not know - nor can we know and may never know - all its functions and consequences. Nor is it possible to ignore that it can have positive effects, for which it is not necessary to adhere to the functionalism of Durkheim or others like him, just knowing that if absolute good is not of this world, neither is absolute evil.

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[94]É claro que a função da pena ou de sua ameaça em um crime tributário não é a mesma de um homicidio qualificado, ou a de um crime de passar um cheque sem provisão de fundos, nem é a mesma de um crime de estupro. Além disso, o poder punitivo pode ter consequências que ninguém previu: influenciar os prêmios de seguros, favorecer a preferência por um modelo de veículo, determinar oscilações no preço dos imóveis numa definida área, disseminar o uso de armas de fogo, impedir reuniões, afetar os modos de vida, etc.

[95]Este caráter de *questão de fé* foi apontado anos atrás pela criminóloga canadense Ruth Morris.

We can never ignore its power, because it is unquestionable and well proven that when the punitive power expands and the limiting legal power is reduced, the State moves away from the ideal model of law, to approach that of police or to weaken, dissolved in parallel and underground exercises[96]. In the first case, there is a certain tendency toward totalitarianism; in the second, a certain weakening and degradation of the State, which loses the hegemony of power of coercion and tax collection[97].

É interessante e curioso notar que todos os penalistas que enquadram seus conhecimentos jurídicos no quadro de um Estado que aspira a se aproximar do modelo de direito, afirmam ser continuadores do Iluminismo. Não há nenhum penalista no mundo que finja levantar monumentos ou batizar institutos e academias com o nome de Torquemada ou dos demonologistas, que são até negados e mesmo escondidos como precursores.

It is interesting and curious to note that all penalists who frame their legal knowledge within the framework of a state that aspires to approach the model of law, claim to be continuators of the Enlightenment. There is no penalist in the world who pretends to raise monuments or baptize institutes and academies with the name of Torquemada or the demonologists, who are even denied and even hidden as precursors.

It is impressive that the programming of *prudent* jurisprudence[98] of the penalists who claim the positive historical value of the function of restraint and theorize juridically in states close to the model of law do not realize the need to banish the habit of pretending to limit the punitive power by imagining models of states and hallucinating their existence, instead of legitimizing in an almost exclusive or tatally predominant way the limiting function and operating rationally on the basis of the existing state, nor abndon the illusion that their addressees (operators in the judiciary) exercise the punitive power exercise punitive power, when the only thing they can do, in the legitimate exercise of their legal power, is to contain and limit it within rational and humane limits, to avoid its lethal overflows for the people and for the actually existing rule of law.

Re-legitimization through a new integration.

In order to legitimize itself, the legal-penal science has to limit itself to recognize and claim its character as a programmer of jurisprudential decisions of limitation of the punitive power, whose benefit becomes evident as soon as we observe

[96]Essa multiplicação de sistemas penais ocorre em todos os estados policiais, como Lola Aniyar de Castro salientou, sendo todos eles funcionais a uma forte liderança política.
[97]Nos estados *deteriorados*, também são pluralizados os sistemas penais, mas, sem uma liderança política forte, acabam pluralizando suas agências de cobrança, que exercem o poder punitivo como uma coerção necessária para cobrar, o que é formalmente chamado de corrupção e extorsão.
[98]Estamos nos referindo aos penalistas *garantistas*, também chamados *liberais*, expressão que tentamos evitar para não gerar confusão com o arrastamento lamacento deste termo pela ideología oposta aos direitos humanos que hoje encobre o totalitarismo financeiro.

the genocidal result that in the last century had the weakening of the *legal power* of containment, which is its indispensable and legitimate responsibility.

The legal-penal science is legitimized by the incorporation and union of sociological criticisms to the punitive power, as a builder of systems intended for legal operators, so that its jurisprudence operates the filters that interfere in the passage of the most irrational, selective, discriminatory, racist, violent, etc. punitive power. The characters of the crime have different levels of selection, as the gates of the legal containment dam to the most grossly violating power of equality, liberty and fraternity.

The *selectivity of the punitive power* is inevitable, given the disparity of what is legally programmed (primary or in-the-books criminalization) and the limited capacity of the executive agencies (secondary criminalization), as well as due to the marked differential training in highly stratified societies, which causes police capture of stereotypical perpetrators of gross subsistence offenses[99].

Regarding selectivity as an inevitably *structural* character of the punitive power, the legal-penal science must strive to *seek lower levels*, for which, above all, it must avoid its *negationism*, which is the *worst of social injustices*. It is the task of the *criminal law of the act* to reduce to the maximum or to the extent possible the *exercise of the punitive power of the author.* The worst that can happen is to theorize a criminal law of the act without real data, which ignores that the punitive power always tends to be exercised with author selectivity.

Legal dogmatics must construct its concepts and organize them into limiting *systems*, as a political program aimed at optimizing the legal power of containing the punitive power, in an attempt to reduce its negative characteristics and, therefore, like any political program, it must be fed by the social data that inform it about the real exercise of the power it is supposed to limit, under penalty of resulting in delirium. This task of programming the containment of a structurally selective power implies raising the standards for the realization of the constitutional principles of equality and respect for human dignity at the level of social reality.

The information and data indispensable to accomplish this mission must be provided to the legal-penal science by *criminology* and, within it, in principle, by *sociology*[100]. Thus, imitating in this way the rational path of humility and rationality followed by international law with regard to war, a *new integrated system of criminal law and criminology emerges.*

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[99]As polícias operam de acordo com regras comuns a toda burocracia, ou seja, eles fazem o que é mais fácil. A investigação de condutas mais sofisticadas, típicas dos estratos sociais mais elevados e com diferentes formações, como seu poder social, determina a impunidade dos chamados *crimes de colarinho branco*, que foi observada criminologicamente há mais de oitenta anos por Edwin Sutherland e há mais de um século por Gabriel Tarde.

[100]Em geral, a crítica vem da sociologia, mas como as outras ciências comportamentais haviam sido aplicadas com um sentido etiológico pela criminologia deste lado, ainda não foi totalmente operada uma reintrodução dessas disciplinas na perspectiva critica, uma vez que elas sofrem de uma espécie de *desconfiança devido à suspeita etiológica*.

The onticity of the exercise of the punitive power.

Here comes into play the second warning of Tobias Barreto: leaving aside the jusphilosophical discussion about natural or supralegal law, what matters in his assertion that *there is a natural law of law.*

Criminal Law interprets laws and, first of all, those of the *constitutional block* (constitutional and international norms)[101]; second, the infra-constitutional ones, which must always be interpreted within the framework of the former [102].

These laws are *valid* because they come from competent legislative sources, but if they are also to be *effective*, they must produce social effects in accordance with their *ratio legis* or manifest purpose. Well then: In order for the interpreter to be able to draw up a program aimed at this legal purpose, he must verify to what extent this *should-be* is realized in the world of being - above all laws of the highest hierarchy -, a verification that can only be made with social information.

Contrary to what neokantism postulates, law cannot isolate itself from the world, allowing itself to arbitrarily select the data that those who impose the order of values want to include or exclude, because, although the legal order is an *order, there are many other orders* - since the world is not a chaos - and when law refers to an entity of the world, it should respect what *this entity is (its onticity)* in its respective order (physical, biological, economic, social, etc.). If it does not, *it will not cease to be valid or to be law, but it will lack efficacy*, because *it will address a different being*, that is, it will construct a false discourse: it will proclaim a should-be A, but which will turn out to be B, of which it would have no knowledge.

This is the *natural law of law* of Barreto, but also, many years later, the realist thesis of the *logical-real structures of Welzel (sachlogischen Strukturen)*[103]. By the way, Barreto went further than Welzel, because his *natural law of law* allowed him to realize that punitive power is a *political factum.* Welzel was halfway there, for he took his thesis to the theory of crime, but did not reach the theory of punishment; nor could he

[101]Com frequência se observa em nossa ciência jurídico-penal – e em nossos juízes–uma inversão da orden hierárquica das normas, como resultado de uma assimetria de fontes doutrinárias. Todos os nossos estados regionais foram– pelo menos em teoria– estados de direito *constitucionais*, pois copiamos de perto o modelo da constituição norte-americana, com o controle pertinente da constitucionalidade. Entretanto, no momento da elaboração de nossas doutrinas jurídicas, exceto no direito constitucional, nós as importamos da Europa, ou seja, dos estados *legais* de direito, que não conheciam o controle da constitucionalidade, uma vez que esta se difundiu naquele continente somente após o último período do pós-guerra.

[102]O controle da constitucionalidade– como o de convencionalidade– pode desqualificar uma norma por incompatibilidade total com outra de hierarquia superior, mas também pode emitir sentenças interpretativas, que condicionam a validade da norma a certa interpretação compatível com a hierarquia superior.

[103]Essa abertura ao realismo abriu a possibilidade de utilizá-lo da maneira como Barreto o fez e da maneira como nós o fazemos, o que levou um penalista uruguaio a afirmar que facilitou a introdução do marxismo, por mais que essa afirmação possa ter constituído um verdadeiro disparate, embora perigoso na época em que foi formulada.

have done so, for he also legitimized the punitive power by following one of the traditional paths[104].

Welzel was trying to legitimize - as the guardian of a supposed ethical minimum - the punitive power of the time of German reconstruction, provoking a dangerous *etization* of criminal law. Barreto thought *outdoors*, alone in the Brazilian Northeast, which shows that sometimes underdevelopment has its advantages.

In parallel with international law, it will be verified that the principles of liberty, equality, fraternity (or solidarity), legality, humanity, human dignity, protection of legal goods, guilt, etc., emerging from the constitutionality block, are violated by the punitive power. It would be wrong to deduce that they are false for legal-penal science: false is only the hallucination that pretends that in the real exercise of the punitive power they are scrupulously respected, in the face of social data that verify that they are violated.

The legal-penal science must reaffirm these principles and *verify to what extent in reality the punitive power harms them*, avoiding the passage of the punitive power that harms them to a greater degree, which means making a *permanent effort to raise its level or standard of realization* of the principles that are never fully realized socially, for this would be to achieve an ideal state of law, which has never existed and we do not know if it ever will.

Consequently, this effort will always be a *game of pulses and counterpulses*, since *no state of law conforms to the ideal*. The real (existing) states that come close to the ideal model of law are always a shell that, the closer to the ideal, the better it will encapsulate the impulses of the police state that holds within it, for in every society there are always power factors that seek to impose their arbitrary will.

This game of drives *is not dialectical*, because it has no synthesis. It is an *unfinished* process in which *one must make the way as one goes along*, which requires constant and careful attention to the permanent dynamics of power, an aspect in which it is especially important to recognize and verify - at every moment - the social data on the changing *onticity* of power[105].

In this way, the legal-penal science integrated with criminology becomes the *indispensable appendix of the constitutional law* of any State that intends to approach the model of law, since, in short, the most irrational punitive power weakens it and its containment strengthens it. Thus, penal science assumes with full conscience the function it has always fulfilled when it has been useful to humanity: to contain the impulses of the police state or the degradation of the state, and to avoid genocide - frontal or dripping- with the consequent sinking of all rights.

In summary: In our days it is not impossible to conceive of an integrated model of legal-penal science and criminology, but quite the contrary: in our region, integration is of extreme urgency. It is very likely that in other realities and regions of the world,

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[104]Welzel legitimou o poder punitivo de acordo com uma suposta ética social mínima, que acreditamos que nunca poderia ter sido verdadeira, mas, após a inflação dos tipos penais nas últimas décadas, seria hoje impossível para ele sustentá-la.

[105]Dependendo das variáveis do poder, o que num momento pode empurrar um padrão para frente, noutro pode empurrá-lo para trás.

where between the *being* and the *should-being* of the punitive power there is still a *disparity*, but not a *nonsense* - as in ours - their Judges may exercise a discrete judicial power of restraint according to elaborations more impervious to the data of reality, but we have no alternatives but to take care of the *nonsense*, starting from the recognition of the deplorable conditions of the real exercise of the punitive power in our societies.

Given this unequal distance between *being* and *should-be* in our region, our science of criminal law must, as a matter of urgency, stop legitimizing - by action or omission - the most irrational and illicit exercise of the punitive power that, in recent decades, has accentuated its violent character[106], lethal[107], discriminatory[108], misogynist[109] and racist[110]. Otherwise, we will not only escape the ethical duty to make the maximum effort to avoid greater evils in times of regression of respect for Human Rights in our region and in the world, but we also run the risk of, in a not distant future, being stigmatized as Francesco Carrara did with the ancient pre-Enlightenment *practitioners*, whose knowledge he described as *schifosa scienza*[111].

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[106]A tortura não desapareceu na América Latina, muito menos todas as formas de maus-tratos e detenções arbitrárias.

[107]As execuções sem julgamento são registradas em vários países a um ritmo alarmante.

[108]A discriminação de classe é evidente em toda a região.

[109]O "machismo" ainda é dominante nas forças de segurança e em alguns tribunais.

[110]Basta visitar as prisões latino-americanas para verificar, num relance, a clara predominância de pessoas ricas em melanina e compará-la com a pobreza de melanina nas universidades, bancos, tribunais, etc.

[111]Carrara aspirava a um direito penal como *ciência sublime, que sentiría sua nobre missão de aperfeiçoar a humanidade, e que desprezaria reconhecer como irmão a arte imunda que em tempos anteriores era chamada de direito criminal, que consistia em ensinar os ditames positivos dos legisladores autônomos e cruéis, em estabelecer as formas de contornar um acusado e as medidas para regular o comprimento da corda e a pinças dos alicates (Varietà della idea fondamentale del giure punitivo (Prolusione al corso accademico dell'anno 1862-63)*, em *Opuscoli di DirittoCriminale*, Prato, 1885, voI. I, pp. 154 y ss., p. 180). A designação de *schifosascienza*foi retomada por Massimo Pavarini como título de seu livro, traduzido para o castelhano como *Un arte abyecto, Ensayo sobre el gobierno de la penalidad*, Ad-Hoc, Buenos Aires, 2006.