SHOULD CRIMINAL LAW PROTECT THE HUMAN RIGHTS? AN ANSWERBEYOND THE TRUISM

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Abstract - This paper aims to approach Human Rights toCriminal Law, highlighting the apparent paradox regarding Human Rights damage resulting from the criminal protection of them. Such a paradox does not subsist beyond appearance due to the dynamics of the criminal system: ineffective in achieving the supposed purposes of punishment, but lavish in strike diverse rights and diverse guarantees, which are within the Human Rights idea. It will be demonstrated how even movements engaged in the protection of Human Rights started to use criminalization demands that saturated criminal law and, consequently, decreased their effectiveness. Finally, the consequences of the increasing dysfunctionality of Criminal Law on Human Rights will be verified, and what criteria for the use of Criminal Law, in their proper position of ultima ratio, would be possible for a rational and effective protection of Human Rights.

Keywords - HumanRights; Criminal Law; risk society; legislative hyperinflation; punitivism

I. INTRODUCTION

Thereis a movement of autophagy that underlies the prevalence of Human Rightsdefensethrough Criminal Law, since the latterhashistoricallybeenless an instrument of social pacification and the attainmentof Justice and more a mechanism of oppression and marginalization, whichconsequently leads to a notableamplification of Human Rightsoffenses. The widespreadeddiscourse of criminalization of Human Rightsoffenses leads to a kind of “cannibalism” of allkinds of Human Rightsbyinhumanepunishments, which are disregardedbydegradingconditions in prisons (usuallycompared to medieval dungeonsbecause of the unhealthy and dangerousenvironment) in several countries of the world, especially Latin American countries such as Brazil.

As a terminological introduction, it’spossible to use the concept of André Ramos TAVARES (2008, p. 461) about Human Rights, which can be defined as "a set of faculties and institutions that, at each historical moment, fulfill the demands of humandignity, human liberty and equality, which should be recognized positively by national and international legal systems."

Crimes derive from an affront that damagesorendangers a particular legal right, which is necessarily related to some of the Human Rights (for example: life, liberty, honor, sexual dignity, among many others. Thus, "when a person commits an offense it isdisturbing some human right of the victim.” (RODRÍGUEZ MORALES, 2015, p. 52).

However, more tan just a tool forsafeguarding Human Rights, Criminal Law should also serve as an instrument for the protection of arbitrariness of the State in the application of hisright/duty to punish the citizen who commit crime. In that sense, the Universal Declaration of Human Rights of 1948 expressly deals with subjects related to Criminal Law, providing in its article 5 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The same idea is present in the Brazilian Federal Constitution, as individual guarantee inscribed in its article 5, item III.

Nothing is further from the reality of the criminal system of Brazil and othercountries of Latin America, since "violations of human rights in criminal law are the most varied: police abuse, arbitrary detention, pretrialdetentionbey on dreasonable time, deplorable state of prisons, the selectivity of criminal prosecution. " (RODRÍGUEZ MORALES, 2003, p. 13).

II. THE CONTEXT OF THE TREND OF CRIMINAL HARSHENING

As a background to the context of the growing demand for the protection of Human Rights through Criminal Law, among other possible theoretical proposals, ispossible to resort to a sociologicalconstruction, known as the "Risk Society" conceived by the German sociologist Ülrich BECK.

The permanent reference to risk, manifested even in the name ("Risk Society") of BECK'stheory, brings to light an object that has become focal in contemporary Criminal Law, since the perception of risk can be totally detached from reality, creating a favorable panorama for the manifestlysymbolic use of Criminal Law, whoseeffects are propagated expressively, regardless of the objective contribution of reality. The rationalization of risks serves the model of Criminal Law instituted in the lastdecades, sinceit allowsus to exploit the dangers to achieve an automaticlegitimization of establishedlaw and orderproject, an adhesion to the ideological and normativeproject of thosewhohas the power in the status quo, the ability toimpose the definition of risks, and to decide whichactions will beconsideredas crimes.

Insecurityis the tonic of contemporarysociety and thishas a directeffect on Criminal Law, sincethisinsecurity, whichisnot the exclusive result of the perception of criminality, iscompoundedby the fear of being a victim. "The fear of crime and the manifestations of fear and insecurity haveroots that cannotbedirectlyfound in the problem of urban crime. Fearissymbolicallyassociatedwith crime."
"The fear of crime and the manifestations of fear and insecurity have roots that cannotbedirectlyfound in the problem of urban crime. Fearissymbolicallyassociatedwithcrime."
(BARATTA, 1994, p. 16).Significant, in thissense, is Jean Pierre JEUDY'sobservationabout the characteristictrait of our time: "the 'condition of victim' is the condition that designates the recognition of the subject in a high-risksociety, orrather, we imagine it to be high risk." (JEUDY, 1994, p 71). In it'sturn, Roberto CORNELLIoutlineshow the instrumentalization of fearoperates:

Fear of crime is the mainsymbolicresource for legitimizinginstitutions in crisis. The fear of violence that threatensorderisrediscovered as a fundamental affectiveexperience in relationsbetweencitizens and institutions: thisemotionis the symbolicterrain on whichmoderninstitutions, affectedby a kind of 'sacredfear' of losingcapacity to createorder, try to legitimizethemselves and on which, in any case, new forms of citizenship are beingbuilt. Criminal institutions (police, courts, prisons) more than the othersrepresent the modernattempt to 'cage' violence - preciselywith the Weberianmeaning of managing the rational and bureaucraticway - it is on them that the expectations of order and safety. (CORNELLI, 2012, p. 336).

In addition, another point that approaches "Risk Society" toCriminal Law is the demonstration, in BECK'stheory, of howindividuals do nottend to analyzerisksobjectively. Statistics and probabilities matter muchless in the subjectiveconstruction of reality thaninformationinstilledwith an emotional appeal in individuals. Thisobservationisverifiablethroughout the wholeconstruction of the context of the ineffective use of Criminal Law.

III. PROTECTINGHUMAN RIGHTSFROM THE CRIMINAL LAW

To rely on thepunitivediscourse, evenif it isdirectedat the protection of absolutelylegitimate causes (like the Human Rights), seems to be a counterproductivestrategy that does notsatisfactorilyreduceviolenceagainsttraditionallyoppressedgroupsorhistoricallydespisedinterests.
Thisisbecauseotherpotentially more effective solutions are concealedwhencriminalizing a particular conduct, sincecollectively, it isthought that such a measure, as drastic as possible, is the one that will yield the bestresults.
To exemplify theidea of theimprisonmentstrategy as a counterproductivesolution, it'spossible to use the Brazilian prison system statistics: in lasttwodecades, in Brazil, the growth of imprinsoment rate is the biggesteverregistered. The country hassurpassed the mark of 622 thousandprisoners. Thisgrowingtendencymade the country sustain the regrettabletitle of thirdlargest prison population of the planet, surpassingRussia and beingbehindonly of the USA and China. However, the sense of insecurity of the community, paradoxically, does notdiminish, and isrelationshouldbeinverselyproportional, that is to say: more peoplearrested and lessinsecurity. In fact, criminal lawisscarcelyable to reduce crime. Thisassertion runs counter to common sense, whichisunderstandable, since social ideologyis based on the logic of "more repression, less crimes", somethingcompletelydetached from the pernicious reality of criminal law (especially in the use of custodialsentences) as a criminologicalfactor. Thus, whatshouldrestrain the crime endsupreplicating it.Whatshouldprotecthumanrights, endsupfacingthem, whether it isinside the prison walls, disrespect for the rights of the condemnedoreven "outside the walls", in the potential for recidivism, with the achievement of new crimes bythosewho have beenpreviouslyconvicted.

CONCLUSION

It isunquestionable that humanrights must bemassively and relentlesslyprotected, it isalsoundoubted that suchprotectionshouldnotberelegated to Criminal Law, removing it from its position as ultima ratio, as a final solution to social conflicts and narrowing it to the leading role of the protection of Human Rights. IfHuman Rightscannotdependprimarily on the Criminal Law to protectthem, in otherhand, Criminal Lawdependscrucially on humanrights, less as objects of protection (sinceall Human Rights are legal values, butnotall legal values are necessarily criminal legal values) and more as a fair measure of the limitation of the jus puniendi (the state'rduty to punish criminal offenses). In otherwords, answering the question that titlesthispaper: the Criminal Law onlycanprotect the HumanRights,byusingpunishmentsagainstwhoattacke dsomebody'sany Human Right, if the punishmentdoesn'tdisrespect the Human Rights of the convicted. In thisway, the penaltiesshouldrespect the dignity of the prisioner, observing the rules of the Constitution, the Criminal Code and the International Human RightsInstruments.

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