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GUARANTEE: CRIMINAL LAW AS AN INSTRUMENT FOR THE PROTECTION OF LEGAL ASSETS

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Abstract: The article aims to investigate Criminal Law through the contributions of guarantyism. It is an analysis of its aspects, based on the legal good based on the statements provided for in the constitution, as well as the study of criminal law as use of force. It also emphasizes the role of Criminal Law in defending the constitution of the Democratic State of Law.
Keywords: guarantee, legal assets, criminal law.

INTRODUCTION

There is a constant relationship between the objectives of the State and the content of legal norms. These are always defending and imposing certain predominant interests, certain values in the state order. Fernand Lasse's work, The Essence of the Constitution, written in 1863, reflects, to a certain extent, the dominant power relations that determine the legal order: "The real factors of power that act within each society are this active and effective force which informs all current laws and legal institutions, determining that they cannot be, in substance, other than as they are" (LASSALE, 2001. p. 10-11).

Bringing the thought of the sociological conception of Constitution to Criminal Law, it appears that it ends up acting as an instrument at the service of the State as a form of social control. However, it can equally serve both good and evil, justice and injustice, freedom and oppression, peace and war, the common good and human exploitation.

Paradoxically, justice is not inherent to law, it does not serve to define it, as supporters of jus naturalism would like. On the contrary, it is an eternal aspiration that must be achieved. It is not only the sanction that ensures that the norm is complied with, but also the values and, unfortunately, today's society is completely devoid of values. In this context, the expression risk society arises, which designates a stage of modernity in which the threats produced, until then on the path of industrial society, begin to take shape. Therefore, the risks of modernization characterize the current risk society that projects an uncertain future (CALLEGARI; WERMUTH, 2010. p. 14).

LEGAL GOOD AS A VALUE ENHANCED IN THE CONSTITUTION

It is important to report a notorious fact so that the alleged, by many, importance of Law Number: 13,104 can be understood: only from February 24, 1932, in Brazil, was the female vote achieved. Even before 1932, the possibility of creating a Brazilian Penal Code was discussed, which was only defined from December 7, 1940, through Decree-Law 2,848. That is, the idea of a patriarchal society prevails in it, whose relevance of women was still considered secondary, as note that the word "woman" is only mentioned 3 times in the entire Penal Code, to define specific crimes against women, citations to from 1984. With the advent of the Feminicide Law, the Code now mentions the word woman 5 times. (The word "man" is not mentioned nor is the adjective masculine, as it is understood that the Code was to punish men and also to protect them.) Then, there were the following articles:

The constant promulgation of incriminating criminal laws, which must be inserted into the legal system, in theory, to satisfy the new requirements to protect indispensable legal assets, do not observe criteria for criminalizing conduct.[1]

1. Prado, Luiz Regis. Johann M.F. Birnbaum is considered responsible for developing the concept of criminal legal good that breaks with this Enlightenment vision, based on the idea of Anselm von Feuerbach. According to this, the crime would be an injury to subjective rights, thus subordinated to a material principle, the preservation of individual freedom. Feuerbach outlined an advance, as it was a way of delimiting incrimination and state discretion, since the crime is no longer seen as an infringement

Added to this is the exaggerated and indiscriminate symbolic use of the criminal instrument, as well as the disregard for constitutional principles and norms, that is, an inconceivable violation of the procedural and criminal guarantees inscribed in the constitution. It is punished, therefore, not to defend society from the evil represented by crime, through the general or special prevention of criminal conduct, but also to encompass an extremely punitive dimension aimed at groups socially excluded from economic power (CALLEGARI; WERMUTH, 2010, p. 39).

Often, to this end, the real needs for criminal protection are ignored as an extreme ratio, to adopt political-criminal movements that are incompatible with the democratic state of rights and violate fundamental rights. Therefore, incriminating criminal types whose content serves as an expression to awaken persuasive effects in civil society, capable of emotional and political impact, must be removed from the legal system. Thus, to examine the incriminating criminal type, the interpreter will be able to inquire about the legal good protected by the standard penalty, which is the basis for determining an action as typical, which is based on the relationship of need to harm the legal good, the which concludes that there are no incriminating criminal types dissociated from legal interests (TAVARES, 2002, p. 180).

It must be noted that there is no longer any discussion about the symbolic character of criminal law, therefore, it is imperative to recognize the need for a total and drastic reduction in the already known criminal protection, which is only symbolic, aimed at the function of stigmatizing facts and perpetrators through criminalization., which would consequently lead to a reduction in the number of criminal figures. Only this way would the penal system be effectively endowed with additional capacity, carrying out its task of general and special prevention in an adequate manner.

It can be seen that the long-awaited deconstruction of the expansionist and extremely punitive penal discourse is a challenge that encourages the proclamation of some truths that media propaganda seeks to impose on society. In fact, the conservative criminal model seeks to increase penalties and retributive revenge, while the guarantor criminal model envisions a rational potential functionality, opting for proportionality, and consequently, based on constitutional criminal principles, such as the dignity of the human person, culpability, humanity of sentences, minimum intervention and proportionality and others.

As it can be inferred from the exposed reality, the penalty is an extreme means. In this context, Claus Roxin's words about the purpose of criminal law are fundamental:

> The most radical intervention in individual freedom that the legal system allows the state. Supporting these precepts, it is understood that the state must not resort to criminal law and its very serious sanction if there is the possibility of guaranteeing sufficient protection with other non-criminal legal instruments (ROXIN, apud BATISTA, 2005, p.84)

Furthermore, daily practice shows that the penalty is an imperfect solution and must only be conceived as a use of force, that is, criminal law must only be activated by the legislator in cases of very serious attacks on the most important legal interests, while lighter disturbances of the legal order must be the subject of other branches of law.

In fact, if the end of the sentence is to do justice, any and all offenses to the legal good must be punished. However, if the end of the sentence is to prevent the crime, it is worth questioning the need, effectiveness and opportunity to impose it for this or that offense.

of a duty towards the State. Differently, Birnbaum starts to consider the crime as an injury to legal assets.

CRIMINAL LAW AS USE OF FORCE

The principle of subsidiarity of criminal law, which presupposes fragmentation, derives precisely from its consideration as an extreme sanctioning remedy, which must, therefore, be applied only when other branches of Law are inefficient. In other words, the intervention of Criminal Law must occur exclusively when other barriers protecting the legal good set forth by other branches of law fail.

In this line of intellect, it is imperative to say that in the penal paradigm of the Democratic State of Law, there is no way to escape a close correlation between constitutional principles, which dictate not only fundamental rights and guarantees, but also, the political, economic and social and, on the other, the legal assets that make up the criminal legal order (BATISTA, 2005. p. 86)

There is, without a doubt, a trace of connection that links this set of values, expressly or implicitly revealed by the adopted constitutional model, to the legal assets that are objects of criminal protection. This does not mean that there is absolute identity between them, but a relationship of mutual reference is unquestionable.

It is worth remembering that in the selection of the State's own resources, Criminal Law must present itself as the law of use of force, positioning itself in last place and only acting when extremely indispensable for the maintenance of the established legal order (PRADO, 1997. Page 57). It must be noted that the legal interest is criminally protected only in the face of certain forms of aggression or attack, considered socially unacceptable. Likewise, only the most serious actions directed against recognized fundamental assets can be criminalized.

This orientation allows us to conclude that in a State of Democratic Law protective of fundamental rights "criminal protection cannot be dissociated from the assumption of legal good", precisely because of its legitimacy from a constitutional perspective, "when essential to safeguard living conditions, the development and social peace, with a view to the greatest postulate of freedom" (ANDRADE, 1997. pp 59-60).

It can be seen, therefore, that criminal control is not legitimized through an unlimitedly expansive intervention, suitable for reaching any and all human conduct that may harm or put at risk legal assets of criminal legal dignity. Criminal law can act in the face of the most violent attacks against such goods and whenever all other extra-penal social controls prove to be inert or ineffective in safeguarding them.

It is up to the constitutional legislator, as a rule, the relevant task of making the judgment assessing the need for criminal intervention, because:

> In the intricate world of criminal typology, he is the main character, the protagonist, the all-powerful. He is the one who builds the punitive fabric. On his loom, the threads unwound from the balls of suits and feathers are intertwined, transversally and longitudinally. He is the one who, observing the lack of criminal protection, chooses the most significant offensive facts and chooses the penalties that are appropriate to the social damage caused by them (FRANCO, 2006, p. 12-13).

In its sphere of activity, therefore, are the description of human actions with minimally coherent words and the quantitative choice of punitive sanctions that have at least proportionate magnitude. Each criminal type must have an internal balance, and the entire typological conglomerate does not support human conduct narrated in a greedy, spilled or conflicting way, nor abusive or aberrant penalties.

Precisely because it has, in this context, the fantastic power to compose criminal

figures and impose sentences, putting the citizen's right to freedom at serious risk, the common legislator is expressly guided by an inescapable constitutional principle: the principle of legality (article 5, XXXIX, of the federal constitution).[2]

In this aspect, the principle of legal reserve presupposes that criminal intervention must be disciplined by the stricto sensu law, thus aiming to avoid the arbitrary and unlimited exercise of the power to punish. This is a form of arbitrary source restriction regulations and, above all, a means to guarantee the citizen's personal freedom, representing a value that imposes itself on all those responsible for carrying out formal control.

It is also interesting to mention that the legislator's leading role in formulating the judgment of the need for criminal protection has given way in recent times to a constitutional stance that is recognized as interventionist. The 1988 Constitution opened up countless possibilities for criminal protection, so that the constituent legislator pretended to be an ordinary legislator, expressing in his place, and sometimes in a failed or inadequate way, incriminating choices.

Finally, and considering the history of decline of the prison system, in terms of its functions of controlling crime and promoting the social reintegration of convicts, as well as the true purposes it has served, we must fight for a minimum criminal law, able to act only in defense of legal interests that are essential to the peaceful coexistence of men, and that cannot be effectively protected by other means.

BRIEF ASPECTS OF CRIMINAL GUARANTEE

It appears that Criminal Law has been increasingly restricted to state interests as the only legitimate way to combat and prevent urban crime. In this context, Luigi Ferrajolli's theory of criminal guaranteeism deserves to be highlighted, since it suggests exactly an eminently social action, structured in an essentially procedural character, and totally disconnected from traditional forms of observation of the legal phenomenon (FERRAJOLI, 2002. p. 851. Translation: Tavares).

It must be stated that this orientation, which has been known for some time as guaranteeism, was born in the criminal field as a possible response to the growing development of criminal policies that claim to act in the name of defending the rule of law and a democratic legal system. Therefore, it is important to distinguish the guarantor meanings developed by Ferrajolli, which, although diverse, are closely linked.

The first meaning designates a normative model of law, respecting criminal law, above all, its model of strict legality, which on an epistemological level, is characterized precisely by the use of minimum power. At the political level, it is positioned as a protection technique capable of minimizing violence, maximizing freedom at the legal level, that is, imposing on the State the effective protection of citizens' rights.

In a second sense, Ferrajolli proposes a legal theory consistent with validity and effectiveness as distinct categories not only from each other, but also in relation to the existence and validity of norms. In this aspect,

2. The Principle of Legality is established in the Federal Constitution of 1988, article 5, XXXIX and in the Penal Code in article 1, which states: There is no crime without a previous law that defines it; there is no penalty without prior legal punishment. For the dominant doctrine, the principle of legality emerged with the advent of Magna Carta (13th century), in which English barons imposed their will on King João Sem Terra. The principle began to gain ground with the Enlightenment through written Constitutions. With Feuerbach, at the beginning of the 19th century, the principle of legality solidifies with the expression: *nullum crimen nulla poena sine lege.*

the word guaranteeism expresses a theoretical approach that keeps what is and what must be in law separate.

The central issue lies precisely in the divergence that exists in complete legal systems, between normative models that tend to be guaranteeist, as well as, in operational practices, which tend to be anti-guarantee.

In Ferrajolli's understanding, guarantyism would be a model of law that is concerned with formal and material aspects necessary for the valid performance of law. This correspondence between formal and substantial aspects would have the function of effectively making it possible for citizens to have all the fundamental rights inherent to them.

In turn, the third meaning conveys a philosophical-political guarantee, imposing on the law and the state a load of external justification according to their goods and interests whose protection and guarantee constitute precisely the purpose of both.

As it can be seen, in this last sense, guaranteeism presents a secular doctrine regarding the separation between law and morality, between validity and justice, between the internal and external point of view in the valuation of the order, between what is and must be of the law.

It must be said that this meaning proposes an attempt to increase the forms of effective guarantee of rights, arising from normativism, with the aim of obtaining state norms that function as a starting point and, consequently, verifying or not their compatibility with reality. Social.

It must be noted that these three meanings positively suggest the elements of a general theory of guaranteeism, exposing not only the linked character of public power in a state of law, but also the divergence between validity and validity produced by differences in standards and, even, a certain irreducible degree of legal illegitimacy of lower-level normative activities. Consequently, it starts with a distinction between the ethical-political point of view (external) and the legal point of view (internal) and the corresponding divergence between justice and validity (FERRAJOLI, 2002. p. 854).

THE PURPOSES OF CRIMINAL LAW

Criminal Policy is closely linked to the purposes of Criminal Law. The issue involving the purposes of criminal law can be approached from three different perspectives (MIR PUIG, 1996, p. 64).

An analysis, for example, of Brazilian positive Criminal Law is unable to indicate the theoretical framework on which any theory has been based for the purposes of Criminal Law, since completely different and contradictory norms survive, or even excluding, in terms of criminal legal ideology.

Firstly, therefore, it is necessary to know the purposes that must be fulfilled by Criminal Law in a society with a specific socio-cultural construction, and then conclude whether or not positive law coincides with these attributions of purposes.

To this end, a theoretical-critical basis is necessary to inform the conclusion about the legitimacy of Criminal Law. The constitution, as it represents the value consensus of the social group, offers a respectable framework, which not only must be consulted, but must also serve as a guide to the legislator, the interpreter, the enforcer and the person who will execute the normative commands.

Characterizing criminal law in terms of its nature and purpose has been a task that stands out, first of all due to the significant controversies it triggers. This brings, as a consequence, discussions about epistemological legitimacy, and also allows laws to be created without opposing ideological content, in line with the game

of forces to which a certain disagreement of opinions was subjected, with total disregard for principles already universally consecrated.

In countries that have consolidated a model of social and democratic rule of law, these problems have been largely resolved. The foundations of Criminal Law are also consensual. Its reason for being is found in the eternal search for the best human life. It cannot be forgotten, of course, that the understanding about the conditions necessary to reach the desired end has been changing and that its list is increasingly expanding, including, today, items that until recently did not frequent the agenda of social demands, such as the right to a healthy environment. The demand, however, has always been for the same product: satisfaction of what is at the level of the best condition of humanity.

In fact, the objectives of the Brazilian State (article 3 of the Federal Constitution) are "to build a free, fair and supportive society" (I), as well as "to eradicate poverty and marginalization and reduce social and regional inequalities" (III), in addition to "promoting the good of all, without prejudice based on origin, race, color, age and any other forms of discrimination" (IV).

The criminal Law, like all legal systems, obviously must conform to these objectives. In this context, the purpose of protecting relevant legal assets (1st purpose of Criminal Law) stands out, understood as those essential assets to satisfy the fundamental needs of the individual in society.

The origin of the theory of legal good is due to the emergence of liberal Criminal Law conceived by the Enlightenment, from which the demarcation of the assumptions for State intervention, in addition to being restricted by formal aspects (principle of taxation, for example), became, progressively, to assume functions of material self-limitation. (SILVA SÁNCHEZ, 1992, p. 41-42)

The use of Criminal Law is justified by the capacity of this State instrument to reduce the levels of violence inserted in social relations, understood as serious injuries that substantially undermine relevant legal assets.

But that's not all. The absence of Criminal Law would refer the control of deviance to a confrontation of social forces, in which the weakest would succumb and, as a consequence, on numerous occasions, Justice would succumb. Punitive power, therefore, represents a bitter necessity, without which the maintenance of a minimally peaceful and organized coexistence would not be possible, at least at the current stage of civilization.

This way, the violence of likely vengeful counter-reactions is replaced by another monopolized through a deterrence system and by the violence of the penalty itself. Hence the need for the State to protect the individual against the social reactions that the crime itself triggers (2nd purpose of criminal law). Despite the importance of protecting legal assets, as well as preventing informal reactions, such functions are not sufficient to legitimize punitive intervention. Another role also needs to be attributed to the State that claims to be modern: guaranteeing the application of the criminal principles, rights and guarantees provided for in the Charter (3rd purpose of Criminal Law).

This need arises from the fact that Criminal Law, paradoxically, while it represents the most incisive means used by the established power to ensure peaceful coexistence among those under its jurisdiction, it is also equivalent to the one that most restricts freedom and weakens security rights. and dignity. It remains extremely important, therefore, to seek to establish strict criteria represented by the guarantor model of Criminal Law for criminal intervention.

Regarding the first purpose, aspects linked to the legal good belong to the discussions about the merit of criminal protection, which, together with the categories of necessity and adequacy, make up the steps to be analyzed by the legislator when carrying out his task of criminalizing conduct.

As for the second purpose, the possible length is closely linked to the symbolic function of criminal law correlated with social expectations and its effectiveness.

The third purpose is linked to Guaranteeism, which simultaneously represents a well-developed criminal policy proposal.

While liberalism gave priority to formal guarantees, the increasingly ostentatious establishment of the ideology of the social state led to a readjustment of goals that, since then, has become permeated with practical guarantees. It is from this new conception of the State that the guarantor proposal arises.

This trend in Criminal Policy has been gaining space and content, to the point where Jesus-María Silva Sánchez states:

> The guarantee that, starting from the protection of society through the general prevention of crimes, proceeds to highlight the formal requirements of legal security, proportionality, among others, and welcomes, in turn, humanizing tendencies, expresses the hitherto most evolved state of development of basic political-criminal attitudes, the synthesis of efforts towards a better Criminal Law, and constitutes the necessary platform to approach in a realistic and progressive way the theoretical and practical problems of Criminal Law (SILVA SÁNCHEZ, 1992, 41-42).

More than a criminal policy proposal, Guaranteeism, as stated, represents a purpose to be developed by Criminal Law. This concern guaranteeing the individual against the arbitrariness of the mother State comes, however, from the consent of the majority.

The third purpose, therefore, does not seem to have a democratic aspect. For this reason, it must be considered from more sophisticated foundations. Its attribution is eminently guarantor:

> Guaranteeism, in effect, means precisely the protection of those values or fundamental rights, the satisfaction of which, even if against the interests of the majority, is the justifying purpose of Criminal Law: the immunity of citizens against the arbitrariness of prohibitions and punishments, the defense of the weak through equal rules of the game for all, the dignity of the person of the accused and, consequently, the guarantee of his freedom through respect, also of his truth. (FERRAJOLI, 1995, p. 335-336).

This understanding arises from the conception of a democratic rule of law.

The modern conception of the purpose of Criminal Law is characterized, therefore, by the prominent role attributed to guarantor considerations and is quite distant from the real perception of how Criminal Law works, since a more perceptive examination of history requires us to realize that Criminal law served and continues to serve as an instrument of domination. Its mechanisms, by allowing interference of the most varied orders which must be seen as a quality, by facilitating the process of dialogue between law and society ended up becoming instruments of hegemonic groups. These exclusionary interests are established through the legislative process, forgetting those of the large portion of excluded people, who are left with nothing but submission to the law.

It is well known that the lack of harmony between the missions or purposes that criminal law must fulfill and the functions that are actually carried out by it is quite significant. The current synthesis, therefore, implies this contradiction.

In any case, it is important to emphasize that it is not possible to guarantee an absolutely fair and valid criminal law. According to FERRAJOLI, the function of the principle of separation between law and morals, added to the relativity of ethical judgments "derived from the autonomy of each conscience and the meta-ethical principle of tolerance, prevent a system of criminal prohibitions from proclaiming itself, never, objectively fair or fully justified" (FERRAJOLI, 1995, p. 335-336)

For the author, perfect legal-criminal systems are not conceivable, being, as they are, irreducible, both the autonomy and the plurality of ethical-political judgments regarding their imperfection. Like the historical and political relativity of legislative opinions about what must be prohibited. Not even the fact that these options are those of the majority is enough to guarantee their justice, their morality, but only their agreement with dominant values and interests.

Since the law is a historical production resulting from the relations of force that are incident to it, it will be the possible law, not the perfect law, perhaps not even the desirable one.

CONCLUSION

A theory of guarantyism, in addition to justifying the criticism of positive law in relation to its external and internal legitimacy parameters, and also a criticism of political and legal ideologies, as they confuse justice with law on the external level and, on the external level, internal legal, validity with validity, or even the opposite, effectiveness with validity (FERRAJOLI, 2002. p. 854).

It is worth mentioning the important passage by Professor Alberto Jorge Correia Barros Lima in the sense that there would be no problem regarding the definition of new crimes, taking into account new concrete situations, including the provision of higher sanctions, or even increasing penalties and The way in which such penalties will be carried out in the case of crimes that already exist in different realities, however, criminal principles must be observed (LIMA, 2008, p. 299).

Thus, Guaranteeism constitutes a way of reconciling normativity and effectiveness, extending not only in the legal field, but also in the political field, minimizing violence and increasing the margins of freedom. The State, based on its norms, would exercise its power to punish in exchange for guaranteeing citizens' rights, that is, it would reduce the distance between the text of the norm and its practical application, generating a system closer to the ideal of justice.

REFERENCES

ANDRADE, Vera Regina Pereira de. **A ilusão da Segurança Jurídica: do controle da violência à violência do controle penal**. Porto Alegre: Livraria do Advogado, 1997.

BATISTA, Nilo. **Introdução crítica ao Direito Penal brasileiro**. Rio de Janeiro: Renovar, 2005, p.84.

BIANCHINI, Alice. **Política Criminal, direito de punir do Estado e finalidades do Direito Penal**. Material da 1ª aula da Disciplina Política Criminal, ministrada no Curso de Pós- Graduação Lato Sensu Televirtual em Ciências Penais – Universidade Anhanguera- Uniderp – REDE LFG.

CALLEGARI, André Luis; WERMUTH, Maiquel Ângelo Dezordi. **Sistema Penal e política criminal**. Porto Alegre: Livraria do Advogado, 2010.

FERRAJOLI, Luigi. **Derecho y razón: teoria do garantismo penal**. Trad. Perfecto Andrés Ibanézet al. Madrid: Trotta, 1995.

FERRAJOLI, Luigi. Direito e Razão: **Teoria geral do garantismo**. Tradução de Ana Paula Zomer, Fauzi Hassan Choukr, Juarez Tavares e Luiz Flávio Gomes: São Paulo. Revista dos Tribunais, 2002.

FRANCO, Alberto Silva. **Crime Hediondo: um conceito Fantasma** à **procura de um legislador Penal**. Boletim IBBCRIM. São Paaulo, abr. 2006, ano 13, nº 161, p. 12-13.

LASSALE, Ferdinand. **A Essência da Constituição**. 6ª ed. Rio de Janeiro: Editora Lumen Juris, 2001.

LIMA, Alberto Jorge Barros Correia. **Criminalização e Direitos Fundamentais: Entre a intervenção mínima e a expansão penal**. Revista do Mestrado em Direito, v- 2, n.3, dez 2006. Maceió. Edufal. 2008.

MIR PUIG, Santiago. Derecho penal: parte general. 4 ed. Barcelona: PPU, 1996,p. 64. PRADO, Luiz Regis. **Bem Jurídico Penal e Constituição**. 2ª Ed. São Paulo: revista dos Tribunais, 1997.

SILVA SÁNCHEZ, Jesús Maria. **Aproximación al derecho penal contemporáneo**. Barcelona: J.M. Bosch, 1992.

TAVARES, Juarez. **Teoria do injusto penal**. 2ªed. rev. e ampliada. Belo Horizonte: Del Rey, 2002.