The transition to democracy in Brazil and the Criminal Justice System[1]

1. Introduction

In Brazil, almost three decades have passed since the end of the military dictatorship, which began in 1964 and, in a negotiated transition in advantageous terms to the elites who ruled the country, gave rise to a civil government in 1985 and a new Constitution in 1988.

In more than twenty years after 1988, when the Brazilian Constitution was promulgated, the world has changed significantly – political, economic, cultural and social transformations.

The end of the Cold War, the new dynamics of a globalization apparently released from ties of the risk of extreme military confrontations, which moved to the global periphery, although having also risen in the center in the form of terrorist acts, the revolution proportioned by modern and extraordinary information and communication technologies are just some of the examples known of the new face of planetary life and all of them are extensively studied in Europe.

[1]Lecture presented in a conference cycle held by Faculdade de Direito, by Programa de Pós Doutoramento em Democracia e Direitos Humanos and by Centro de Estudos Interdisciplinares do Século 20 from Coimbra University on November 6th , 2012, in the scope of Penal Law course coordinated by the teacher Cláudia Santos.

The phenomenon of globalization itself, linking markets, institutions and people, subjecting increasingly large sectors of the world's population, with independence of the borders, to the economic and political effects of decisions, are most of the times made in opaque environments, impenetrable to democratic controls postulated and developed from the second half of the Twentieth Century on, seems to demonstrate that, after all, we have experienced common problems.

This impression, for sure, is shared by those who study the current issues of criminal law, criminal procedure and Criminology. And this is noted, particularly, when different legal systems are far from their traditional standards and put aside old dogmas to incorporate categories, methods and institutes that, independently of their origin – common law or European continental law – have led the criminal law reforms in a broad sense which is seen in all states.

Also in Brazil, to some extent, topics such as the use of hidden methods of investigation, the expansion of crimes of abstract danger, with emphasis on incrimination omitting forms of behavior, the election of the "fight against corruption" and the "drug trafficking", under the common heading of "organized crime" is only part of the menu of reforms designed or in progress. In the same perspective, we can glimpse decisions of the courts which, in a particularly dangerous way for democracy, weaken the legal regime of the guarantees and provoke antagonisms among scholars and even between criminal schools.

With so many contemporary questions, it must sound "strange" that media focuses on "authoritarian permanencies" in Brazilian penal process, evoking ancient practices which we would have to assume had already been dissolved at least by inexorable passage of time.

Unfortunately it is not this way.

History teaches us - and the concept of transition reveals that more than any other concept - that the best practices in certain times coexist with other ones, voted down by general opinion, but not even because of this specific aspect, extinguished[2].

Something similar to this fact happens to the official memory dictatorships spread and try to instill in people, but this does not make several dissident social memories disappear, of resistance to oppression[3]. Also the opposite is feasible to happen.

Authoritarian practices emerge and drown as the political cycle moves, but they do not disappear. And in the field of criminal justice, in Brazil, it is not even correct to state that such practices have lost breath with the end of the dictatorship.

It is exactly the opposite. Showing restored force, these practices have spread throughout and to some extent, they were infected by the level of theoretical discussions existing in Europe focusing on "the crisis of Criminal Law", which also opposes more or less rigorous models in the field of safeguards, seek to claim a new status.

It must be reinforced that, in Brazil, at the academics, there is a general consensus about the fact we are living a period of "crisis of Law" and, particularly, a "crisis of Criminal Law". The elements of this crisis, however, are distinct from those ones fruit of the more recent European experience.

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[2]MARTINS, Rui Cunha. Ponto Cego do Direito: *The Brazilian Lessons*. 2ª ed. Rio de Janeiro: Lumen Juris, 2011.

[3]AGUILAR FERNÁNDEZ, Paloma. Políticas de la memoria y memorias de la política. Madrid: Alianza, 2008.

And the thesis of this communication is that the permanence and the predominance of the authoritarian elements, consolidated historically in the Brazilian culture, constitute the key reason, to which other factors may be added; all of them contributing to the critical situation in which Penal theory and practice are found today.

Identify this scenario of authoritarian permanencies is, therefore, essential to understand political and methodological option of part of Brazilian scholars, defending principles in Penal and Penal Procedural matters which are vital to democracy, principles which have rarely materialized in daily experience of the operation of our (Brazilian) Criminal justice system.

2. Authoritarianism and penal practices

Some words about the transition in Brazil.

Anthony Pereira stresses that Brazil has remained away from the general trend, observed in Latin America, for the construction of the so-called transitions justices. On the contrary, Pereira emphasizes, the official attitude of the Brazilian government on the issue until very recently was only silence and amnesia[4].

Paulo Sergio Pinheiro, who integrates the Truth Commission established in Brazil in 2012, highlights that one of the characteristics of authoritarian regimes which monopolized the Brazilian reality during the course of the twentieth century (1937-45 and 1964-85) was to ensure the operation of previous legal institutions "within the dictatorial normative system "[5].

[4]PEREIRA, Anthony, W. Ditadura e repressão: o autoritarismo e o Estado de Direito no Brasil, no Chile e na Argentina. São Paulo: Paz e Terra, 2010, p. 35.

[5]PINHEIRO, Paulo Sergio. Preface to Anthony W. Pereira's book, Ditadura e repressão: o autoritarismo e o Estado de Direito no Brasil, no Chile e na Argentina. São Paulo: Paz e Terra, 2010, p. 9. There is nothing extraordinary in this situation when we compare this experience to those experiences inves-

Therefore the Penal justice worked regularly, even immediately after the occurrence of coups, and were also functional to new authoritarian regimes, incrementing and giving to practices which infringed the dignity of persons the seal of juridicity that, apparently, included such practices in a context of "institutional normality".

Classic examples of this can be extracted from the absence almost absolute, but quite significant, of social censorship to the use of torture, tolerated in a level of naturalization of violence which still today contaminates repressive state apparatus[6] and the equal naturalness on which the "enemies" of the order were socially built.

About this aspect, the case "Olga Benário" is very representative, companion of the communist leader Luis Carlos Prestes, that Vargas dictatorship delivered pregnant to the Nazis to be dead, after decision on her extradition, ordered by the Federal Supreme Court in Brazil in a trial that some of our most celebrated jurists took part (Carlos Maximiliano among others) and that counted on the favorable public opinion of Clovis Bevilaqua (author of the first draft of Civil Code

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tigated by Otto Kirchheimer, in Justicia Política: emprego do procedimento legal para fins políticos (México, Unión Tipográfica Editorial Hispano Americana, 1961, p. 48): “During the modern age, whatever the predominant law system is, not only the governments but also the private groups tried to stay near the courts in order to keep or change the political power balance. In a disguised way or not, the political questions are presented before the courts, in order to be confronted and weighed in the law balance, no matter how much the judges try to escape from them, because political judgments are inevitable.”

[6]KEHL, Maria Rita. Tortura e sintoma social, **in**: O que resta da ditadura. São Paulo: Boitempo, 2010, p. 124.

of longer duration in the Republic)[7]. The Brazilian law expressly forbids the extradition a foreign woman who was pregnant of a Brazilian man.

It is important to highlight that the authoritarian patterns of our criminal justice system are previous to the still existing Code of Criminal Procedure of 1941, which, in turn, had been inspired by the fascist Code Rocco (Italian) of the decade of 30 in the last century.

The Brazilian penal procedural doctrine has rarely became interested in investigating the origins and configuration mode of our penal justice model, contenting itself in most cases with the conforming "legislative history".

If there had been more dedication to this topic and disposition to interdisciplinary dialogue, the Brazilians processualists would have observed, along with our anthropologists and historians, that the increasing interiorization and presence of Criminal Justice in the Brazilian territory, throughout the nineteenth century, resulted from the strengthening policy of transient alliances with the agrarian elites.

It was decided by the institution of the judiciary through way of conversion of police officers in magistrates politically linked to local rulers, and also through the expansion of public jails, which were the expression of a dissent contention policy and punishment of rebel slaves[8].

The field of racist ideology, which has received attention of expressive jurists and thinkers and have provoked intense debates, particularly significant on the verge of slavery abolition, can not be discarded when one takes into account the

[7]GODOY, Arnaldo Sampaio de Moraes. A história do direito entre foices, martelos e togas: Brasil – 1935-1965. São Paulo: Quartier Latin, 2008, p. 26-7 e 49.

[8]MAIA, Clarissa Nunes e outros. História das prisões no Brasil. Vol. I e II. Rio de Janeiro: Rocco, 2009.

penal normative coverage placed at the disposal of the power in the first decades of the young Republic (period today called Old Republic, which closes with the coup of 1930) [9].

It is significant that the police investigation in Brazil have been established on the verge of entry into force of the Law of the Free Womb, in 1871[10].

The more secure working hypothesis to explain the fact that the balance of penal power have bent in favor of safety, for almost two hundred years, at the expense of freedom and of having fed the authoritarian culture which inspired practices and criminal laws in Brazil - and still inspiring - consists in my opinion, to admit that:

Despite the diligent efforts by the deployment of a democratic legality, especially after 1988, there is broad consensus in the Brazilian society of which the Criminal Justice fulfills the role of domesticating dissent, resistors and expressions of otherness which may cause fear and be inspiring of instability.

It is understood, in this scenario, Pinheiro's observation that the decades after deployment of political democracy in Brazil are marked "by 'relapses' in which the guarantees of the due process are inexistent for most of the population, in particular for the Afro-latins, Indians, girls, children, adolescents, LGBT people"[11].

[9]SCHWARCZ, Lilia M. O espetáculo das raças: cientistas, instituições e questão racial no Brasil – 1870 – 1930. São Paulo: Companhia das Letras, 1993. ALONSO, Angela. Ideias em movimento: a geração de 1870 na crise do Brasil Império. São Paulo: Paz e Terra, 2002.

[10]The Law of the Free Womb is from September 28th , 1871. The police process was instituted by Law 2033 from September 20 th , 1871 and started its application on November 28 th , 1871.

[11]PINHEIRO, Paulo Sérgio. This book has already been mentioned , p. 13.

Without doubt, the sociologist reminds us, "the greater the consensus among the civil-military elites on the functioning of the dictatorship, the higher the degree of authoritarian continuity in the functioning of democracy is"[12].

It is worthy mentioning that, after 1990, Brazil has experienced unusual increase of criminal laws, which have expanded significantly imprisonment times of people, thus hindering access to freedom and defining several kinds of offenses, emphasizing the presence of criminal power in several sectors of society[13].

In this same period, large urban centers have seen the phenomenon of militias, who act violently in search of territorial and economic domain of peripheral areas, arising in a great number of areas.

It is in this context we must ask ourselves about the spiritual state of Brazilian penal science at the moment.

3. The spiritual state of Brazilian penal science at the moment

I want to use as a "loan", from Bernd Schünemann, the fancy name of my communication: the spiritual state of Brazilian[14] penal science to speak of violence and social control.

And I do it, with basis on the Report on summary executions in Brazil (1997-2003), prepared by the NGO Global Justice. As it is presented in the text:

"The Report on summary executions in Brazil (1997-2003), prepared by the Center for Global Justice and Nucleus of Studies Blacks (NEN), points out that episo-

[12]PINHEIRO, Paulo Sergio. Preface to Anthony W. Pereira's book, Ditadura e repressão: this book has already been mentioned, p. 14.

[13]The Lei dos Crimes Hediondos (Law 8072/90) is only the most famous example of these practices.

[14]SCHÜNEMANN, Bernd. Consideraciones críticas sobre la situación espiritual de la ciencia jurídico-penal alemana. Bogotá: Universidad Externado de Colombia, 1996.

des internationally known, such as Eldorado dos Carajás, Candelaria, Carandiru, Corumbiara and Favela Naval are maximum expressions of a systematic extermination and oppression perpetrated daily, directly or indirectly, by agents of the State in almost all the national territory".

The report continues by adding that, relatively to the investigated period (1997-2003), 349 executions were detected and "follow a standard of extermination and guaranteed impunity to the ones who torture, smite and kill".

The burden of the deadly violence, that I understand as a sign of social tension and competition between public policies of security and clandestine or semi clandestine social control practices, can be measured through the survey of the sociologist Inácio Cano, dated from 2001, and it is portrayed in the interesting book Homicides in Brazil, 2007, coordinated by Marcus Vinicius Goncalves da Cruz and Eduardo Cerqueira Batitucci (FGV).

The estimate of murders in the State of Rio de Janeiro for the year 2002, "based on death certificates processed by the Ministry of Health, is of 8,930 victims resident in the state", in a proportion, according to the sociologist, of 60 murders for every 100 thousand inhabitants (p. 57), with 84% of the total registered in metropolitan region of Rio de Janeiro.

Obs. The victims are mostly young and Black men or mulattos.

These data are presented in a temporal context collected in full by the explosion of imprisonment.

Also, another sociologist, Julita Lemgruber, together with researchers from the association by prison reform (ARP), in a study financed by the Open Society Foundations, in 2011, pointed out that in December 2010 Brazil sported the in-

credible brand of 496,251 people arrested (p. 7), followed by their direct competitors - the United States (two million prisoners), China (one million, seven hundred thousand prisoners) and Russia (approximately eight hundred thousand prisoners).

These data are contained in an article whose title is "Impact of legal assistance to the provisional prisoners: an experiment in the city of Rio de Janeiro".

In the Brazilian case, the multiplication of imprisonment can be realized in the fact that the arrested population has practically tripled between 1995 and 2009, jumping from 148,760 prisoners to 473,626 prisoners in 2009.

Without embargo of expansion via net widening - p. 8 - whose risks I denounced in 2003, in my Criminal Transaction, consisting in the expansion of the network to control the criminal justice system, which, regarding to the alternative solutions to imprisonment, jumped from 80,364 people in 1995 to 671,068 individuals, also in 2009.

4. The direction of intersection between criminal law and criminal policy, currently, in Brazil.

Without doubt, this table shows a unique aspect of the functioning of criminal power in Latin America, particularly in Brazil, to justify, in the words of Lola Aniyar de Castro, the intention of building a criminology thinking own of our region[15].

We do not intend to and it is not even possible not to consider the relevant contributions of penal thinking that dominate the global environment.

[15]ANIYAR DE CASTRO, Lola. Criminología de los derechos humanos: criminología axiológica como política criminal. Buenos Aires: Editores del Puerto, 2010, p. XIV.

We can not fail to consider, however, that the punitive demands and the repertoire of responses idealized in different context can, instead of solving problems, multiply them and perpetuate injustices and this is something which belongs to the discussion of the doctrine itself.

Our ambition is to ask, therefore, the criminal doctrine in the broad sense of the term, about the abandonment of critical perspective that attended the Latin American academic horizon in the years 80 and 90 of the twentieth century, but which yielded to the theoretical paradigms perhaps more sophisticated and, without doubt, important, however suffering the cost of moving the debate about the power to the periphery of legal culture.

The adoption of a war penal speech in the Latin American context, and particularly in Brazil, is responsible, according to Eugenio Raul Zaffaroni, for the proliferation of corpses in our region.

As the Argentine teacher highlights, to what extent should we disregard the role of penal speech as criminal conditioner of behaviors which convert people in corpses? The words kill, Zaffaroni warns[16].

There is idle acknowledge among us that the change of perspective in the approach of legal phenomena generally coincides with the expansion of neoliberalism and the apogee - perhaps ephemeral - of a globalisation of rejoicing, as Boaventura de Souza Santos[17] defined, influencing the new generations of graduates in law.

[16]Zaffaroni – La palabra de los muertos – Buenos Aires: Ediar, 2011, p. 8.

[17]SANTOS, Boaventura de Souza. Crítica da Razão Indolente: contra o desperdício da experiência, 6ª ed. São Paulo, Cortez, 2007, p. 20.

Clemerson Merlin Cleve in the mid 90s emphasized the gap between theoretical critics - and also the practical activists of emancipating policies through law - and the world of bare life, from of Zigmunt Bauman's perspective.

Clemerson warned that "the critical jurist was, outside the academy, a non-professional, to the extent that he/she did not advocate, did not walk through the forum, did not behave as a legal operator"[18].

On the other hand, this jurist believed solely in politics "and in the change of law through politics". The outbreak of legal criticism in Brazil coincided with the emergence of individualistic demands own of neoliberalism.

In an environment run by the ideology of possessive individualism, of the personal competition in place of concerted action in the direction of social change, even the undeniable progresses of peripheral and semiperipheral constitutionalism, in the search for the constitution of a State of Law in Brazil, would bump into the strengthening of repressive ideology, almost monopolistic [19].

The reality saw the arising of a criminal policy anchored in the intensive action of media corporations, real constraints of the application of criminal and procedural guarantees, that in the level of speech are guaranteed in international covenants and treaties on human rights.

The legal professional formed in prevailing repressive atmosphere and challenged to survive in the jungle-market with the knowledge acquired in his/her academic formation was taken to choose to take a position before the most sensitive issues of criminal area beside the power.

[18]CLÈVE, Clèmerson Merlin. Para uma dogmática constitucional emancipatória, **in:** Para uma dogmática constitucional emancipatória, Belo Horizonte, FORUM, 2012, p. 36.

[19]WACQUANT, Löic. As prisões da miséria. Rio de Janeiro: Jorge Zahar, 2001.

In other words, in general the law professionals graduated in this period contented himself/herself with a liberal "big theory" of the criminal law, for rhetorical purposes, but rarely he/she saw himself/herself encouraged to apply it, with all its consequences and this basically happened for two reasons:

a) the critical reflux made the conservative wave viable in which the expression of order, widespread repeated, was the "fighting against crime". Therefore, abolitionist or minimalist speeches, in terms of criminal law, lacked power of seduction. The society moved toward more authoritarian attitudes in criminal matters and the legal professionals integrate society and reproduce in their environment the certainties of common sense about the "criminality control ";

b) The critical theories, especially in the field of criminology, were relegated to the ostracism within the territory of theoretical debates about the law. Be "in fashion", in similar situation, meant arguing that knowledge is not allowed inquire directly about the concrete exercise of punitive power.

Winfried Hassemer rightly stresses that the paradigmatic rupture of fact is something rare in the legal sphere. The German penalist warns about Thomas Kuhn's observation, in the sense that "the sciences outweigh their explanation and argumentation models less by means of refutation than by means of forgetfulness"[20].

The projection of such a state of things is measured by implication of jurisprudence in the making of constitution of penal law.

[20]HASSEMER, Winfried. História das Ideias Penais na Alemanha do Pós-Guerra, Faculdade de Direito de Lisboa, 1995, p. 31.

In Juarez Tavares's words, jurisprudence has become the only source of drafting of the law. The penalist emphasizes, in a passage that, in spite of being long, justifies the transcript [21]:

"There was always a doctrinary concern in criminal law to seek a rationalization for their institutes. Several proposals have been made in this sense. We can recall some: the positivist scheme based on causality and on the instrumental action, the adoption of the method as a way of creating the object in neokantism from Baden School, the claim of ontological finalism, with their logical-objective categories, the organizational sedimentation of functionalism and its criteria of usefulness, the posture of strategic sociologism in the Weberian sense, the contributions of analytical philosophy around the appearances of the language and the speech acts and the substance of a communicative theory as a way of exercising a criterion of truth on the basis of the claim of validity and the consensus. Although each of these concepts can suffer from defects, contradictions or controversies, all have a great quality: Raise the criminal doctrine to a particular scientific level, able to serve as a support for the understanding of all the citizens and, mainly, of the jurisprudence. Unfortunately, however, what we see today, in Brazilian law (also in the law of other countries, but especially in Brazil) is a immeasurable backspace: instead of the doctrine influences the jurisprudence to give the judgments a minimum of common sense, we make the jurisprudence the compendium of doctrine. When the jurisprudence becomes the sole source of drafting of the law, it can be said that the law is destroyed.

[21] http://naopassarao.blogspot.com.br/2012/07/de-volta-relacao-entre-doutrina-e.html?spref=fb Consulted on November 1st ,2012.

In the criminal procedural context, issues relating to the legal regime of illegal proof, the definition of the legal status of the procedural subjects, the structural shift of criminal proceedings according to the accusatory model of process will also give in to the courts decisions which search to understand and postulate a process type according to "the Brazilian traditions": that is, a "process" of investigative structure.

The burden of jurisprudence corresponded to the fragility of the doctrine.

The crisis of the Brazilian penal law, which enables the authoritarian permanencies, is essentially a "crisis" of basis and contribute for it, it is necessary to say, the extraordinary and uncontrolled expansion of law courses in the 90s, with the serial production, massively, of new professionals graduated not by law specialists, theorists, but by a new modality of teachers: the neocommentators, as Nilo Batista called them in a specific opportunity.

It is natural, therefore, that the alienation of the power issues in the “law political arena” has charged its price: important themes to contemporary constitutionalism, relatively to individual guarantees in the scope of criminal process, are the target of rather superficial approaches and, in this aspect, the doctrine and the jurisprudence sin and can not accuse each other, invoking to itself the role of "innocent".

One of the examples in which the field of theoretical common sense leaves doctrine and jurisprudence at the margin of reality - of the bare life - with the consequent unprotection of individual rights, which succumb to the speech of fear, is seen in the absence of control over the implementation of environmental and telephone interception techniques and the apparent legal-constitutional irrele-

vance of what is decisive when the repression control agencies appeal to the so called measures to obtain proof evidence.

Over the 70/90 decades of the twentieth century Alessandro Baratta postulated the overcoming of the liberal approach criminology by a new integrated model of law science[22] which took account of the criminal justice system as object of criminology.

Investigate the criminal justice system taking into account the concrete experiences of selection, marginalization and imprisonment of increasingly numerous sectors of the excluded population, on one hand, and seek to understand the emergence of a questioning knowledge departing from empirical data able to reveal the point of view of this other "excluded, invisible, surplus or undesirable", on the other hand, were, at some time, the contributions of Latin America around a stimulant theoretical alternative of transforming criminal practices.

Baratta proposed:

a) to weigh the density of the inequalities in the late-capitalist society in terms of incriminatory projection;

b) to take into account the point of view of the interests of vulnerable classes in the definition of the milestones of prosecution and imprisonment;

c) and, yet, he warned us of the risk of panpenalism, resulting from a massive employment of "alternative means" .

The multidisciplinary dialogue, characteristic of several critic theories, continues to be essential for the European and Latin American criminal dogmatics.

[22]As an example of BARATTA's positions, the reader should consult: A política criminal e o direito penal da Constituição: um novo pensamento sobre o modelo integrado das Ciencias Penais, in: Revista Brasileira de Ciências Criminais, n. 29, ano 8, janeiro-março de 2000, São Paulo, RT, p. 27-52.

The dialogue and interaction with the original thinking produced in Latin America by Nilo Batista, Juarez Cirino dos Santos, Juarez Tavares, Eugenio Raul Zaffaroni, Lola Aniyar de Castro, Salo de Carvalho, among others -, has been decisive to demarcate the theoretical territory of criminal sciences.

The fact we live in a political democracy demands, of course, the respect to the law, but also requires the denounce of the presence and updating of authoritarian elements, even in democratic regimes, to contaminate, in a negative way, the legitimacy invoked by criminal law and, consequently, the own Criminal Justice System.

Finally, it is worth pointing out that, at some point at the end of years 90, the reaction of punitive agencies to the debate stimulated by the theory of penal guarantees, in Brazil, has marginalized the critical theories of criminological tendency.

Also, the advent of new epistemological paradigms in law field has silenced the critical thinking, which, in several moments, was disqualified as a fake theory, of exclusively sociological approach, outdated expressions of a philosophy of consciousness, which, in fact, they have never been.

The biggest loss caused by isolation and ostracism of critic criminologies can be measured by the expansion of incarceration under unjust conditions, permanently denounced to the Inter-American Court of Human Rights, without the consequent reflexion of this in concrete changes in the public security policies, in Latin America - despite the abundant jurisprudence of the Court - and for an advance on the fundamental rights, in the concrete exercise of penal prosecution, supported by the courts.

Ironically, perhaps, it is in the criminal sphere itself that the proportionality is invoked with higher frequency to limit the exercise of the rights and guarantees of individual imputed.

I finish repeating Pinheiro's words:

"Without denying the immense value of the absence of political trials or of political prisoners ... the poor and marginalized members of society have been systematically target of bad treatment of the judicial system as a whole (judicial, police, prisons) on the illegal and arbitrary use of force, in flagrant violations of human rights, such as in the ' authoritarian legality ' ".[23]

Geraldo Prado

[23]PINHEIRO, Paulo Sergio. Preface to Anthony W. Pereira's book, Ditadura e repressão. This book has already been mentioned, 2010, p. 13.