


## Reflections on criminal policy and deliberative democracy in habermas

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### ABSTRACT

This article sought to conceptualize the Criminal Policy and its elaboration based on the thought of classic authors in the criminal area. The objective was to reflect on changes in the way of thinking and applying the Brazilian criminal legislation, that is, if the changes defended at the time were considered, if there was participation of civil society and jurists to change the way of punishing that is effective in relation to the poor, blacks and young people from the periphery, Habermas' thought was also considered in relation to the democratic perspective.

**Keywords:** Criminal policy, Criminal law, Democracy.

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## INTRODUCTION

In 2004, in the article "Criminal Policy: The Two Faces of Justice", the concepts of Criminal Policy were the target of the analysis in which it was sought to justify the influence of the logic of neoliberalism in the enactment of laws such as the "Heinous Crimes" and the one that regulated the Special Criminal Courts.

Despite the creation of these laws, aimed at solving serious social problems, such as crime, the mere increase in punishment in the criminal sphere did not show any change in relation to crime rates, and not even the system ceased to be selective, sheltering, since then, in its majority, poor, black, young and vulnerable.

Evidently, the expansion of technology, the need for environmental protection, and new forms of crime have led to the need to insert new appropriate typical figures into legislation.

In the present work, it was intended to conceptualize criminal policy, but also to go further, to go through the need for the production of new criminal policies, which consider in their synthesis, the social instruments and mechanisms of democracy, as described by Habermas, in his theory of deliberative democracy.

In its synthesis, criminal policy should thus consider social, economic and cultural information, provide the participation of social sectors, specialists, with sincerity, to allow dialogue between agents of importance to the development of criminal policies. Otherwise, the penal system will continue to be a sector of misery management.

## THE CONCEPT OF CRIMINAL POLICY

To deal with criminal policy, one must bear in mind the way in which certain crimes are punished and the benefits that are attributed in the application and execution of sentences, considering who benefits from them.

When dealing with the concept of criminal policy, Zipf<sup>4</sup> refers to the question of the punishment of an offence, and to express the practical meaning of the concept, he concludes after several considerations: "Criminal policy can be defined as the achievement and implementation of directive criteria and in the context of criminal justice<sup>5</sup>".

Zipf<sup>6</sup> also cites several concepts of renowned scholars of criminal law as being the "legislative wisdom of the state". For Feuerbach, it would be the "systematic set of principles founded on the scientific investigation of the causes of crime".

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<sup>4</sup> ZIPF.

<sup>5</sup> Author's translation.

<sup>6</sup> Op. cit. 1979, p. 14.



From the point of view of Mireille Delmas Marty<sup>7</sup>, "it is the set of procedures through which the social body organizes the criminal phenomenon."

When dealing with criminal policy, Nilo Batista<sup>8</sup>, in two different works (1998, 1996), refers us to concepts that, in addition to being perfect, are complementary.

If, on the one hand, it relates to social changes, new or old proposals of criminal law, the verification of the performance of institutions from which principles and recommendations for changing the body and criminal legislation derive, considering them (principles and recommendations) as criminal policy, on the other hand, it observes that the arbitrary exercise of the power of the agencies that are part of the penal system cannot continue to be discarded. as if it simply didn't exist.

The way of acting through various conducts that are as repeated as they are routine, such as the maintenance of illegal arrests, forced confessions due to violence, ignorance of fundamental and human rights, among others, should be considered as part of criminal policy and not as practices already integrated into the daily fight against crime.

Approximately two decades later, the main cause of the explosion of the prison population, made up mostly of poor, young people and people of African descent, can be identified as the use of criminal policies that aim to solve the complex social problem called criminality, with the application of increasingly severe penalties.<sup>9</sup>

However, it seems to us that only by questioning the way criminal policy is elaborated and thought will it be possible to move from a fanciful context to reality. For Marty<sup>10</sup>, "criminal policy is related to social policy, that is, its development, and conforms to the historical moment (socio/cultural/economic) in which we live."

## THE INTERNATIONAL CONSENSUS ON THE NOTION OF CRIMINAL POLICY IN THE UNITED NATIONS - UN

It was decided by the Fourth UN Congress in 1970 that criminal policy should be integrated into national development plans and be seen as an instrument of change.

As conclusions of the Fifth UN Congress on the subject, the following measures were established: (a) Social justice is the best means of combating crime; (b) Penal policy should be coordinated in its multiple aspects and integrated into the country's social policy.

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<sup>7</sup> MARTY, Mireille Delmas. Modelos e movimentos de Política Criminal, Rio de Janeiro, Revan, 1992

<sup>8</sup> Batista, Nilo.

<sup>9</sup> Regarding the data on persons deprived of liberty, we have that: The total number of persons deprived of liberty grew 8.15% from 2020 to 2021: from 758.8 thousand to 820.7 thousand. The number of vacancies in the prison system rose approximately 24%, with 123,000 new vacancies. Thus, the deficit of vacancies decreased by about 24.9%. The data were presented in the 2022 edition of the Brazilian Public Security Yearbook, published by the Brazilian Public Security Forum (FBSP). Available in Conjur.com.br – on 02/27/2023 and published on 07/10/2022 – Prison population increases again [...]

<sup>10</sup> Op. Cit. 1992, p.



Living in a democratic state based on the rule of law, at first sight, may indicate the impression that criminal policy in its broadest content is the best for society and the proposals for legislation to exacerbate penalties end up being seen as a way to contain crime and, allied to this, it seems to be an interest in diverting society's attention from other problems that affect and influence crime. such as unemployment, interest rates, inflation, poverty, corruption, among others.

Criminal policy should be guided by certain lines of argument, as Heinz Zipf (1989) thinks, and these should start from the perspective of what is understood as a person, whose definitions do not always consider it to be part of a certain cultural and social structure that must respect others and have guaranteed the right to life and bodily integrity. cruel, humiliating treatment or inhuman punishment is not tolerated.

Penal intervention is an observance of human dignity and is currently being advocated for more benign means of punishment, although its scope is very slow.

It should not be forgotten that Criminal Law is subsidiary and fragmentary, and, therefore, should only intervene in issues in society as the *ultima ratio*, which means that only the offense whose legal good requires the protection of criminal law can be deserving of punishment, excluding other protective means.

Finally, there must be rationality, practicability and effectiveness in criminal prosecution, which means requirements of ethical compliance and feasibility, and the establishment of measures that are difficult to implement is innocuous.

### **THE ELABORATION OF CRIMINAL POLICY: FROM A DEMOCRATIC PERSPECTIVE**

Criminal policy should, first of all, be part of an action plan that is outlined *pari passu* by the plural mobilization of representatives of various social segments, control agencies, as well as jurists, sociologists and researchers on the subject.

One could start from the elaboration of a diagnosis to contemplate the study of crime in certain places and the needs that influence this result, not to confront crime itself, but to effective prevention, which can probably occur to a greater extent through interdisciplinary involvement, such as biopsychosocial disciplines, in addition to legal reasoning.

Criminal policy, unlike other policies, has neither presented nor supported a democratic discussion. Civil society, when discussing an issue related to crime, does not perceive the impact caused by the sensationalist media dissemination that prevents an impartial trial and opinions free from manipulation by interests that are not clearly shown.

It is urgent to establish changes in conduct, in order to spread the discussion on criminal policy, such as: a) putting the discussion in the voice of those who know the subject, that is, jurists,



criminalists, legal operators, researchers, and, b) broadening the discussion to remove the exclusively elite forum and include the participation of society in general.

Habermas argues that deliberative democracy should be sought, in which democratic legitimacy in decision-making derives from broad public discussion, through language and communication, with the defense that there is no democracy without dialogue.

For Habermas, the deliberative character of democracy lies in the collective process of pondering and analysis permeated by the discourse that precedes the decision. In Brazil, these elements are also present in the performance of the high courts, through public hearings and the figure of the *amicus curiae*.

## FINAL CONSIDERATIONS

When reflecting on the Criminal Policy, its implementation and effectiveness, it was observed that practically nothing has changed significantly, but as a change in punitive practices that can bring benefit to the convicts, we can cite the law of alternative measures to imprisonment - Law No. 9,714/98, the permission to use electronic anklets - Law No. 12,558/10 and the custody hearing - Law No. 13,964/19, and, nothing more.

It is noticeable that incarceration in Brazil continues to increase, prisoners continue to face risks of death, serious illnesses and belong mostly to the same profile as in the past: poor, young, without formal education, drug smugglers, that is, the dehumanization of prison continues, without any democratic participation in the resolution of a social problem, that is, the problem of crime.

Thus, it is concluded that as long as the elaboration of criminal policy in our country does not go through the democratic sieves and allows the effective participation of society and interlocutors from various sectors, the idea of philosophical justice that justifies the institution of the penal system to reduce it to the instance of mere management of misery and nothing more than that remains has failed.



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