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## PANPENALISM AND THE WELFARE STATE

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Given the current social context in which there is a significant increase in crime, a fact that generates deep popular dissatisfaction that is a result of the feeling of insecurity experienced by society, criminal expansionism emerges, in which fundamental rights and guarantees are relativized in order to meet the “greater good”, which is the security of the community and the maintenance of society’s trust in the health of the State itself.

Before delving directly into penal expansionism, it is necessary to remember the contractualist theory of the social pact, one of the theories that explains the origin and formation of the State.

Inspired by the work: “*O Leviatā*”, by Thomas Hobbes, the theory of the social pact has as its basic premise the idea that men, rationally and with the intention of living together in society, entered into a contract transferring part of their freedoms and rights to a greater power capable of maintaining order and existence of the social body, this being the primary objective of the pact.

In Dallari’s words:

It is by virtue of this purely rational act that life in society is established, the preservation of which, however, depends on the existence of a visible power, which keeps men within agreed limits and forces them, for fear of punishment, to carry out their commitments and compliance with the aforementioned laws of nature. This visible power is the State, a large and robust artificial man built by natural man for his protection and defense. (DALLARI, 2013, p.25)

From the conception of the social pact, used to explain the origin of the State, the need arises to make brief digressions on the models of States already tried.

In the absolutist model of the State, power was unlimited, goods and values, material or legal, belonged to the sovereign who could interfere as he pleased in the sphere of the individual, as he represented in a single figure,

the legislative, executive and judicial power, this concentration of Power is well illustrated in the famous phrase attributed to King Louis XIV of France: “I am the State”.

The Enlightenment, a philosophical and cultural movement that defended the evolution of man through rational thought, was opposed to this concentrated model of power in the hands of a single person who was seen as the representative of God on earth. Favorable to the Enlightenment, the bourgeoisie, which demanded its participation in state politics, began revolts that intensified at the end of the 18th century, giving rise to the French Revolution, which became a milestone for the conception of the Liberal State.

With the growth of the Liberal State and the vertigo of the absolutist model, there was a need to impose limits on state power and guarantee individual rights and freedoms.

Thus, the written constitution appears as a social pact formed between the people and the State, in which the former, despite transferring to this portion of its power, preserves for itself a hard core of intangible rights, in which the State must refrain from intervening. It is true that there are situations in which the State can interfere with so-called fundamental rights. However, this action is excluded in the social pact itself, the political constitution that expresses the will of the people, the true holder of power.

First generation or first dimension rights, as the most modern doctrine prefers, are precisely the rights recognized in the Liberal State model, under which we want a Minimum, absenteeist State, which does not intervene in property, private life, individual freedoms, among others. The liberal model demands a negative stance from the State.

At the beginning of the 20th century, there was a need for a more active stance on the part of the State, factors such as the advance of industrialization, rising unemployment,

the global economic crisis intensified with the end of the Second World War and the process increasingly. The most advanced stage of capitalist globalization has given way to a Welfare State, the second dimension of fundamental rights, in which the State is required to provide a provisional action.

In fact, social rights require state action in order to implement freedom rights, as there is no way to implement, for example, the right to life (first dimension right) without providing healthcare (second dimension right).

Therefore, despite the distinction between freedom rights and social rights, this dichotomy must be made only for the purpose of demarcating the historical origin of the recognition of these rights, since fundamental rights, whether originating from the liberal state or the social state, are all umbilically linked, one cannot be achieved without the other being implemented.

As can be seen, the supremacy of the individual and the recognition of fundamental rights structure the model of a Democratic State, whose power is limited to the dictates set out in its legal-political pact, the constitution.

However, State interference in fundamental freedoms and guarantees, reducing the spectrum of protection for the individual, weakens democracy and takes away from the people the desired protagonism in the liberal model. In this context, the action of a maximum liberal, interventionist State becomes evident, with a profound relativization of fundamental rights, whose democracy is nothing more than a formal conception. Within this maximization of state power, panpenalism or Maximum Criminal Law emerges, in which Criminal Law, the most serious of the means of social regulation, is used as an instrument to solve complex social problems.

In the words of Marcelo D'angelo Lara:

Panpenalism, then, would be analogous to criminal maximalism, a tendency to

exacerbate state power through the use of criminal norms, with the aim of guiding social behavior; thus avoiding conduct that is harmful to the public interest represented by the State. This tendency, protected from a positivist legalist perspective, would authorize the State to dispense with fundamental guarantees in order to combat "social danger". (LARA, 2011, p.86-87)

Opposed to this, there is the idea of a maximum social State model, with the expansion of citizens' rights and, by correlation, the State's duties, as what matters is the maximum realization of fundamental rights and guarantees and a corresponding minimization of state power.

Here the proposal for a minimum liberal State and a maximum social State is presented, which, therefore, implies the conception of a Minimum Criminal Law.

In the words of André Copetti:

From here, a proposal for a minimum liberal State and a maximum social State begins to emerge, which implies a State and a minimum Law in the criminal sphere and, on the other hand, a State and a maximum Law in the social sphere. With this formula, which we neither believe nor intend to be magical, we believe it is possible to rescue a large part of a Democratic State of Law, which we have agreed upon in our Constitution, especially in the criminal field, with the realization of fundamental rights not only for those who find themselves entangled with the criminal system for the practice of actions considered criminal and embitter their official and parallel sanctions, but also with the realization of the fundamental rights of the rest of the population, potential recipient of criminal actions that will only be reduced to acceptable levels with the institution of a social state which until now has been nothing more than a simulacrum in our country. (COPETTI, 2001, p. 112-113)

The achievement of a social State, with the implementation of public policies, which effectively reduce exclusionary social factors

resulting in a reduction in crime, and the consequent minimization of Criminal Law, which will only be called upon to intervene when there are no more effective alternatives at the extra-penal level, leads to a reduction in repressive instruments, directly reflecting the reduction in public expenses, such as, for example, the costs of keeping prisoners in prison, with such revenues being able to be used to realize social rights, which, returning to the idea started in this paragraph, reduces crime and minimizes State intervention in individual freedoms and guarantees, thus forming a beneficial cycle for the entire society.

The realization of the social state depends much more on the provision of resources for the implementation of a series of rights, rather than on the repression of individual freedom.

[...]

With the minimum use of criminal law, not only will individual freedom be privileged, a fundamental value of the Democratic Rule of Law, but, as previously stated, by the reduction of the state repressive apparatus and, consequently, with the reduction of this public expenditure., resources from this item can be allocated to the realization of social rights. (COPETTI, 2001, p. 117)

It must be noted that from a Social State the liberal ideals of individual empowerment in the face of state power are resumed, since in this state model the focus is on the individual and on the implementation of the fundamental rights and freedoms that are inherent to them.

On the other hand, what is observed in the current Brazilian scenario is an increase in Criminal Law, either with the increase in criminal legislation or with the resurgence of existing criminal laws. In view of the failure of the Executive Branch's actions, Criminal Law is elevated to the level of a great pacifier of the social order.

The problem is that governments mask their

immense failure in managing public resources that must be used for the good of the people, but are not. They deceive the population with populist, romanticized, inflammatory speeches. They promise security and urban peace without prioritizing the real cause of the increase in crime, which is immense social inequality.

It was emphasized by the great jurist: Eugênio Raúl Zaffaroni, in the book: "*Criminalidade Moderna e Reformas Penais*", written in partnership with other authors in honor of professor Luiz Luisi:

The growing impotence of national political power to resolve social problems derived from exclusion and the degradation of social services (including public security) is undeniable. This is a phenomenon that political operators try to minimize, but its magnitude does not allow for concealment or dissimulation. In this context, the communicational emergence produces a completely new politician profile. These are people who speak as if they had power, launch their brief slogans in front of the cameras, hide their powerlessness as best they can and promise what they know they have no power to do. (ZAFFARONI, 2001, p. 150)

Thus, deceived, the people accept the exchange made. Receives the promise of public security in exchange for minimizing their individual guarantees. The social pact is relativized. The political charter, written precisely to limit state power, is cut and amended, but not for the benefit of the people in order to empower them with more rights and guarantees, I wish it were.

The Greater Law, in fact, is reduced to a mere piece in the political game of power. Diverted from its essential purpose, protecting individuals from the discretion of the State, the Constitution is nothing more than a mere sheet of paper, as Ferdinand Lassare conceptualized.

Considering everything that has already

been exposed, a reflection is proposed: The conception of the social pact giving rise to a greater and supreme law capable of limiting state power and implementing fundamental rights, the Enlightenment ideals of freedom, equality and fraternity, the spirit democracy that inspired the new constitutional order of 1988, can all of this be reconciled with a

Criminal Law inflated by tougher and more comprehensive laws?

The author concludes that it is not. It is not possible to reconcile the democratic regime with an increasingly intense process of reducing fundamental freedoms and guarantees.

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