

Toward another justice: Penal Law, State and Society¹

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Abstract: This paper looks at the relation between State and society in the contemporary world, focusing particularly on the role of Law and penal justice. Taking on a normative and interdisciplinary perspective (Philosophy, Sociology and Anthropology of Law), it takes a stand for the “democratization of democracy”, thus establishing an opposition between the socialization of the exercise of political power and the “statization” of society. More specifically, it opposes the Ethics of the Other to the Ethics of the One; the first represents alterity, which should be incorporated into our standards of behavior, while the latter represents confinement within particularist values. Furthermore, Penal Law is perceived as a privileged locus in which these themes – the ethics of the Other and of the One, the socialization of power and the statization of society – are related and become materialized.

Keywords: society; pluralism; the State; Law; Penal Justice; democracy.

Shouldn't government be over when crime is over, in virtue of the lack of objects over which to exercise its function? The power of the masters exists not only due to evil, but through evil. The violence that is used to maintain it, and all violence at that, engenders criminality. Soldiers, police and jailers, swords, clubs and chains are instruments for inflicting punishment and all inflicting of punishment is, in essence, unjust. The State employs the weapons of evil in order to subjugate evil and is thus contaminated in the same way by the objects upon which it acts and through which it operates. Morality cannot recognize it, since morality is nothing more than the expression of perfect law, and cannot lend support to anything that springs up outside this law, that subsists only through the violations that are practiced within it. It is for this reason that legislative authority can never be moral – it must always be merely conventional.²

SPENCER (1993 [1850], p. 18-19).

¹ English version: Miriam Adelman

² Translator's note: This citation does not represent the original English version, to which the translator was unable to obtain access; under the circumstances, we resorted to our own version based on the Portuguese version published in the *Revista de Sociologia e Política*.

I. AN ENTIRE WORLD

We cannot embrace notions such as of “the end of history” and the exhaustion of imagination, concepts which would lead us to believe in the impossibility of the renewal of our societies. In light of the considerations that we will make here, we intend to stir up debate regarding the urgent need to effect important social transformation, but above all, to be able to think these changes through democratically.

We believe that the relationship between society and the State should be seen as our main object, and in particular, we are concerned with the role that Law, and especially Penal Law, take on. We intend to reveal the underlying logic that sustains social relationships that are presented as an Ethics of the One and an Ethics of the Other. The direction of the change concerns us refers to the socialization of the State and of Penal Law, which is to be understood as resulting not only from the daily interaction of both of these ethics, but also from the importance that the Ethics of the Other has taken on within the context of globalization. The possibility for the “democratization of democracy” is contingent upon the transformation of both of these forms of logic, that is, through the recognition and strengthening of pluralism in the economic, social and cultural spheres and, above all, in the juridical and judiciary arena.

Our modern morality is simple. On the one hand, there are “the good”, and on the other, “the evil” Although such facile thinking seems to bring comfort to our spirits and to our state order - whether democratic or dictatorial- in reality, the much more complex social, economic and, at times, political situation that we are living does not cease to deteriorate. It has currently reached quite “alarming and considerable” proportions, if we take into account the consequences of the brutal wars that rage in diverse corners of the planet and the scope of social exclusion today. The world that is hanging there in limbo seems to be crumbling apart, and although it sometimes manages to generate some legitimate hope, such spirits soon give way to demobilizing forms of disillusion and of almost unbearable fear. Furthermore, the moral values that underlie this representation of “us” and “them” do not seem to undergo any transformation. As long as the celebration of the victory of liberal representative democracy – “we, the good” – over communist dictatorships and political regimes originating in Third World liberation movements - was underway, it seemed possible to ignore the fact that the order that had just crumbled owed its very existence to this duality. In other words, these events represented not only the urgency of important changes at the level of structure and social formation in those societies that belonged to the “bad side” but also the need to rethink and change the “good” social formations.

(WALLERSTEIN, 1991, p. 1-15).

The social forces that had previously been mobilized for change seem, at present, to have been significantly weakened. Some have taken an attitude of resignation, defeat and hopelessness and have abandoned efforts; others have taken to the elaboration of discourses and normalizing actions that tend to justify the worst detours to be taken from the formal objects of democratic political representation, which are now posed as the only and final model for society. Profit, individualist egocentrism and the attraction exercised by quick and facile gains; patronage, corruption and other forms of illegality are installed as the concrete values of the movement of globalization to the extreme that, given the receding and in some cases complete absence of the democratic function of accountability, even the Interpol went on, in 1994, to present an open demand for the moralization of States and of international economic affairs. This contradictory nature of the transformations initiated in

the eighties increasingly appears as a vicious cycle, with citizens and professionals whose lives seem to revolve only around themselves. The exacerbation of rigid nationalisms, the appearance of a new class of the wealthy in recently “democratized” countries – at the expense of the immense majority of the population, of monstrous fratricidal wars, both in Third World countries (mainly in Africa and Asia) as well as the West (as in Kosovo and Chechnya) – and the globalization of criminal behavior (in particular reference to organized crime and to States and large firms) has taken us to a point in which the economic and social model of the “first modernity” is on the brink of breakdown. Yet a “second modernity” has yet to be clearly defined and regulated. Nor is it enough to put forward a new catchword – “the new economy” – which will suddenly and miraculously clarify everything. In spite of the illusion that one unified world has been born, such a claim only amplifies the deceptive image of two separate and increasingly distant worlds.

After 1968, capitalism moved from a period of “social democratic” capitalism of Keynesian inspiration during which the State and civil society were looked upon distinctly, to a new period of world-wide and increasingly integrated capitalism in which the retreat or “submission” of society to capital has as its first consequence the at least apparent absence of a distinction between capital, the State and civil society (SURIN, 1994, p. 9-27).

For some, these changes have their roots in the concrete historic conditions of capitalist development and in the forms of resistance and opposition of the working class and the current “wretched of the earth” (Frantz Fanon), while for others, the bases of these changes are primarily philosophical: the Hegelian dialectic and notion of contradiction taken up by Karl Marx that marked the passage of the 19th to the 20th centuries leave little room for the singularity, multiplicity and difference (in the moderate version). Or, in a more radical post-modern version, the former constitute the very negation of the latter.

However, both the one and the other are in agreement insofar as they assert that this period of capitalism can be characterized by the fact that it increasingly operates in a dominion in which the separation between the State and society can no longer be maintained. This tendency is organized in such a way that State and society become one.

Nonetheless, and despite of the heavy role of social reproduction, civil societies do manifest doubt and questioning regarding the possibility that such a tendency can be indefinitely prolonged. Here and there, we see signs of disillusionment appear: disenchantment with the instrumentalization of society and politics (the State, its apparatuses and institutions) at the service of a particular social group (capital) and with the lethargy that is exhibited in extending democracy to other spheres of society. If globalization refers above all to the material world of economy and finance, it touches, nonetheless, on all spheres of society, including the globalization of civil societies and the formation of a new social, political and moral conscience. The constitution of a “network society” is no longer the exclusive privilege of the ruling and the powerful.

As long as we continue to believe that there is, on the one hand, a separation between “North” and “South” and, on the other, between the State and civil society, globalization will be seen as an all-encompassing movement, at least in terms of its current shapes and pretensions. This totalitarian “lapse” could lead, under the guise of representative democracy, to a concrete dictatorship, that is, to the total hegemony of a capital that is permitted to impose its projects and interests upon the State and, to a large extent, on civil society as well. One-dimensional thinking is thus manifested not as a kind of thinking that is in vogue or is a passing fad, but rather as a singular and exclusive dominant ideology that

represents real truth. Difference and disagreement – Lyotard’s (1983) *différend* – will be perceived as perturbing and reproachable. Thus, it seems necessary to us – in light of globalization – to redefine the relationships between society and the State, beginning from the “singularities, multiplicities, differences and disputes” that make up real societies and rethinking the democratic project, that of a society in search of greater social justice, respect for human rights from a pluralistic perspective, and for the democratic State of Law.

At a first glance, political societies occupy an ever-increasing place in the definition of the means and goals of social life. “Democratic” life is frequently neglected by major currents and the majority of social groups that characterize the diversity, fragmentation and pluralism of civil societies (peoples and their institutions). Today, under the guise of the legitimacy of new dominant historic blocs, democracy in the South is imposed over the social whole by means of the brute force of state apparatuses, the army and, above all, the police and external coercion. In the North, we recognize the domination of a particular force: Law, as defined and applied by State apparatuses (the legislative and the judicial systems in their specific instances.) Whether stemming from a founding situation or from the conditions for the exercise of democracy, the violence of both strong and weak states shows that civil societies have been relegated to a secondary role. Large firms -particularly transnational or global ones-, the State and its Law are the main actors.

Thus, we have just provided a brief description of what constitutes the global context of the “village” that we inhabit and to which we must refer. This “singular and final” model of democracy has become an item for export, together with all its misfortunes and other ancillary elements: handbook constitutions, academic specialists, political cadre, consultants of all species; institutions and new technologies but also – and certainly no less important – financial assistance for the institutional strengthening of the “new democracies”. The latter is premised (and obtained) on the acceptance of the following: the notion that the pillars of formal representative democracy are the free market, the State of Law and the institutionalization of human rights; police training, which is not limited to the academic function but includes the transposition of police models that are said to work, from “zero tolerance” to community police; restructuring of the armed forces, from education and training to arms themselves; and the Law, whose globalization seems to sum up to a struggle between “Western” systems or normative traditions, Common Law and Roman Law (GUÉNAIRE, 2000, p. 48-72).

Such an attitude completely ignores juridical pluralism and means, very particularly, denying common law any status as part of a juridical order. Under “the best” of circumstances it implements the latter in its written, positive and objective arrangement but removes its historical character and socio-cultural value. Such a transformation does not occur unproblematically Africa can serve as a perhaps extreme but certainly real example. The consequences of the “democratic turn” border on the absurd. Keeping our calculations on the low side, within the last 10 years, over three million Africans lost their lives. From a social and economic point of view, the “democratic” African political regimes fare hardly any better than the one-party administrations that were their predecessors.. Nonetheless, there is a significant difference: today they are largely designated as states in a period of democratic transition, nations aspiring to a State of Law.

In fact, much has been said of ethics, democracy and the State of Law in recent years, and not only in Africa. However, the discourse that deals with these three elements most frequently can be summarized as demanding, first and foremost, State presence and intervention - in particularly with regard to the definition and application of new norms of

citizen behavior-, while at the same time demanding its disengagement from financial and economic spheres. Thus, the possibilities for significant social change is reduced, since the latter is expected to fit within a multiplicity of State juridical norms added to institutional one that together are supposed to show the citizen what “good” democratic conduct is all about. This does little more than reinforce the position of the State and of private – in particular, transnational – firms, and further weakens the still- existing distinctions between the State and civil society. The norm – in this case State and juridical – becomes the criteria for belonging to the category of “we” and devaluing the “them”. And the penal norm has a central role to the extent that it is defined by its selective, repressive and especially stigmatizing role. This latter aspect remains a notable fact in Penal Law: the passage from abstract exclusion to the concrete promotion of “degradation in the social figure of its clientele” (BATISTA, 1990 p. 17-26).

This process of integration and exclusion, directed by the State and by private firms, but taken over particularly by the former, raises important issues that refer primarily to the production of norms, their content, their language and their application; to national institutions and, furthermore, to the “reinvention” of the relationship between State and society. If representative democracy has become unsatisfactory and frustrating, this is probably because of its ventures to attain hegemony, which have left it, today, unable to truly innovate and enrich itself. For the latter to occur, of course, State submission to the people’s sovereignty and the extension of democratic principles to the world of social, economic and juridical relations would be necessary.

In allowing itself to be materially and morally corrupted, democracy can easily become a camouflaged dictatorship of the strongest of sorts. In a democratic regime, Law is presumed to protect society not only from itself, but from the always possible abuses of political society and the powerful. Under the reverse circumstances – those of control over society – Law becomes an instrument, *par excellence*, for the legitimation of state absolutism and the domination of capital.

The field of Penal Law seems illustrative to us – although in ways not always evident – of the slippery terrain that serves as a boundary between democracy and dictatorship. This is a *chiaroscuro* zone fed by things that remain unsaid or are unspeakable, an almost invisible and indiscernible line and yet, one that is very real and quotidian. It is here that society is “disarmed” and must quite often make way for a sacrosanct omnipotence of the State, through the profession of an almost blind faith in its correctness. The State, in the name of society and through Penal Law, selects the behavior that it considers pernicious, unacceptable or inadmissible (criminal) and the sanctions that it considers useful in order to “punish, eliminate or correct them.” At the same time, civil societies, States, institutions and firms organize themselves concretely in order to resolve their disputes outside the state’s judiciary realm, and are therein obliged to employ extra-State rules and instruments. Evidently, this occurs frequently and especially when convenient for the actors involved in conflicts.

Penal law is aimed both at individuals and their acts – if the behaviors defined in the manner described above become the target of reaction and social sanctions. Given its stigmatizing nature, Penal Law attributes a social utility to “crime” that can, if necessary, allow for the justification of an imposing institutional apparatus, large and costly but with very little efficiency when it comes to carrying out its own official goals. Thus, “[...] Penal Justice serves less to protect society against crime and against criminals than to offer society an apology, in detriment to its rules and the rights of the weakest.” (LÉVY, 1984, p.

9).

Therefore, we are led to conclude that we are in need not of a simple technological innovation involving minor adjustment of mechanisms but rather of something that is much more crucial to the functioning of societies and - at this juncture in the world system and globalization - for the entire planet. The essence of this “something” can be found in the modes, the contents and the means with which each one of us makes individual and collective choices, in order to define and determine the goal of our lives as human beings (individuals) and actors (social groups).

This permanent research on what is essential and fundamental refers, first and foremost, to a “founding situation” that consolidates the past and puts a near or distant future into perspective (FAY, 1982; MAFFESOLI, 1984; KREMER-MARIETTI, 1987, p. 3-8).

Within the framework of the State of Law, the law maintains a fundamentally contradictory character. On the one hand, it functions as a fortress against the will of the State and as a means for making it imputative; on the other, it functions as a means of control over those who are governed that does not provide unlimited impunity (Giroux, 1991, p. 17). Charles Pasqua, a French politician who stood two terms in office as Minister of the Interior, was said to have claimed on French radio in 1987 that “democracy ends where the State begins”. This seems to provide an accurate picture of how things stand in democracy today, but it also characterizes the slippery slope that can slide us right into State absolutism (Russbach, 1987, p.9) Yet, in a democracy, the democratic State of Law is responsible before society both in moral and juridical terms.

Ethics cannot be solely reduced to values imposed as essential to political society. The latter’s attempt to maintain a monopoly, consequence of the usurpation of national sovereignty, is incompatible with democracy and with the democratic State of Law, since the endeavor to monopolize is an assertion of the supremacy and even of the hegemony of political society over the whole of society.³ Today, Ethics refers to the demand to redefine a guiding principle, the “supreme good”⁴ founded on the nature and the values of moral conscience – presented as a priority and as a point of reference – and on the relationship between the duties and rights of citizens and institutions. Nonetheless, Ethics should not be confounded with the nomenclature or listing of these duties and rights, nor with the completely- enunciated set of procedural rules that determine their application. The first aspect of its founding essence, wider and more global, is situated at the ontological level (General Ethics). It certainly exercises guidance over the second aspect, which is more pragmatic and specific, and is linked to social praxis, that is, to the organization of the concrete world of social relations (Normative Ethics).

II. TWO SIDES AND ONE WORLD

The confiscation of the autonomy of civil society by the State, the emancipation of the latter and the institutionalization and bureaucratization of Ethics constitute significant obstacles to the process of the democratization of society. Law, and Penal Law in

³ We include here everything that pertains to political society: the State (administrative apparatus) and its institutions, the executive, legislative and the judiciary, as well as political parties and the “state apparatuses”.

⁴ The “supreme good” does not refer to a natural or positive object, but rather a socially constructed object, which means one that is the result of national and democratic action.

particular, seem to be conflated with the Ethics of the One. By the latter we mean a specific set of values that is presented as a structured whole, taking on the form of a discourse and order founded, from an external point of view, on “processes of exclusion” whose essential nature is to pose themselves as a criteria of the “will to truth”, if not as truth itself, while masking the “prodigious machinery that works to exclude”. From an internal point of view, this discourse and order also refer to a set of “principles for classifying, ordering and distribution” that aim to annul the fortuitous in the name of coherence (FOUCAULT, 1971; DACUNHA-CASTELLE, 1996; VIGNAUX, 1996).

To the extent that they are a response to specific interests – and not necessarily with a spirit of conciliation of the different and divergent interests that inhabit individuals, social classes and institutions – state representations of social reality are necessarily imperfect and incomplete, and often quite biased. But what these representations most certainly have working in their favor is force and coercion, which enable the Ethics of the One to impose them as unique and true. In fact, the Ethics of the One claims to be the vehicle for interpretation of truth (General Ethics) and for State establishment of the principles and modalities of its application (Normative Ethics). It identifies itself with “us”.

The Ethics of the Other is presented as more dispersed, less structured and less totalizing. Taking society as its referent, it attempts to conjugate individual interests and conscience with collective conscience and objectivities. Thus, it is obliged to search for a moral, social but also national and human conscience that citizens may use to guide their behavior and to choose the means that are convenient to them for reaching their goals.

Whether at the level of General Ethics or that of Normative Ethics, the Ethics of the Other is, at least in appearance, less well-defined, since it is, above all, plural, that is, composed of multiple elements (non-state juridical elements) that are not reduced to insertion in an absolute and fixed reality. It is also pluralist, since the totality, characterized by internal diversity, is not the sum of its individual elements but rather, the articulation and relationship produced through the latter. Force and coercion still exist, but they are more “diffuse, divisible and invisible”. This allows for initiatives which are more centered around mediation, negotiation and conciliation, wherein the Ethics of the One is only able to visualize exceptions which it itself selects. The Ethics of the Other identifies with “them”. A range of others have influenced our conceptual construction regarding the One/the One and the Other/Others (Laruelle, 1986; Serres, 1991; Augé, 1994; Derrida, 1994; 2003; Dufourmantelle & Derrida, 1997; Blanchard & Bancel, 1998; Schnapper, 1998; Seffahi, 1999); therefore, we cannot be considered as heirs of any one particular theoretical school. Nonetheless, if one author has been more influential than all others, this influence can be found in the extraordinary work of the Polish scholar Ludwik Stomma (1986, p. 13-39), in which the “we” and the “they”, the one and the other, appear as contradictory and complementary, as inseparable as in a set of mirrors.

Situated within this context and due to its specific nature, the penal system, from Law to Penal Justice, is presented “[...] as if the letter of the Law itself, in our society, could no longer be authorized, unless it were through a discourse of truth”.(FOUCAULT, 1971, p. 21). Therefore, this fictitious interdependence should be seen as a problem which, in our opinion, is situated at the level of specific characteristics of Penal Law, and in particular, the fact the latter is a system of exclusion and stigmatization, as well as the current tendency to resort to an excessive penal juridicism as a means for controlling civil

societies⁵.

This monistic juridicism is an important strategic element of the current relationship between the One and the Other. Nonetheless, this movement is not free of the contradictions and malaise that affect political and civil societies. Can this tendency can be seem as revealing of a growing instrumentalization of Penal Law put simply into the service and aims of the State, of private enterprise and the globalization movement, especially when the State uses the argument of its right to monopolize the defense of society and its aims (HAARSCHER, 1988, p. 127-135)?

Within current democracy, the discourse of political society presents Penal Law as an exception, when in fact Penal Law should keep watch over and control social space as if this were absolutely necessary in order to oblige civil society to respect the democratic demands that the State is presumed to embody. In name of society, the State transforms Ethics and Penal Justice into a shield used to protect itself from civil societies, while the latter are taken as potentially dangerous or as factors of risk.

III. ONE WORLD, TWO SIDES AND MANY FACES

The democratic state at the end of the twentieth century finds itself in an embarrassing, if not contradictory predicament, since it has erected itself as both judge and interested party, as umpire rather than mediator and reconciler. The democratization of Law and Penal Justice implies the socialization of the State rather than the statization of society. Social pluralism should correspond to a concrete juridical pluralism that is not exclusively that of the State juridical order, yet also the recognition of the “multiple mechanisms and cogwheels, the relationships of authority and strength that create, modify, apply and ensure respect for the juridical norms” (ROMANO, 1975 [1946], p. 10) of civil society and their ability to resolve problem situations. The solutions of the Other are no less valid than those of the one, nor more onerous. (LANDREVILLE, BLANKEVOORT & PIRES, 1980).

This democratization is a necessary but not sufficient condition for us to move beyond the current situation. Nonetheless, it cannot be carried out without recognizing and establishing the Ethics of the Other and its importance as the guiding and founding principle of concrete social organization. Juridical penal norms and state law are not ethically neutral.

An Ethics of the Other presupposes the development of a notion of social and economic justice and the need to confront values, as well the democratization and socialization of Law and Penal Justice. Therein the need to reverse the state tendency to criminalize almost everything and to punish criminality so severely. As Pires argues, (1991, p. 51) “[...] we should give up the idea that penal punishment is a categorical imperative or a social necessity and that the goals that it pursues can only be reached through the application of the classic sentences (the death penalty, prison and fines) [...]”.

Another problem that emerges refers to the role developed by political society. The latter is presented as the guardian and repository of sovereignty, thus conferring it a distinct status. In the name of society, as was once the case of the sovereign king, political society endows

⁵ Other examples of this tendency can be found in many countries, related to such diverse phenomemon as marital violence, juvenile delinquency, the “underground economy”, prostitution, drugs, tobacco, etc. – and, nowadays, to the implantation of the “State of Law” in Third World countries, which frequently includes state organization of common law, as we have pointed out.

itself with the means (the laws and the strength) to impose values and the organization of a moral conscience on civil society, which also enables its self-proclamation as arbiter of the problem situations that State penal law considers as infringements of the law, faults or crimes. Its position is reinforced by the establishment of the principle according to which only Law and state institutions constitute “true juridical orders”. The State responds to the pluralism of civil societies through a type of “internal pluralism”(the multiplication, division and compartmentalization of state juridical orders) as a means of providing a grid work into which a maximum amount of social space can be fitted, while at the same time making an effort to maintain a certain unity and conformity and preserve the possibility of exceptions, according to its own definition of space and time, that is, the moments and places chosen by the State. This logically excludes extra-State pluralism.

The pluralism that is created through such methods is artificial: “[...] Penal Law, however outstanding it may be, in fact refers to all types of juridical phenomena.” (Kremer- Marietti, 1983, p. 108-109) In each branch of State Law some aspect of the repressive nature of Penal Law can be found. The difference – used as an argument for distinguishing it from other forms of positive Law – is one which consists of erasing the individuality of the party that has been wronged and identifying the latter with the social totality, represented by the State itself. This has implications at the level of the sanctions, the choice of repressive sanctions and the almost systematic refusal to resort to a wider and more diversified set of sanctions, particularly “sanctions of reparation”.

Here too, the Ethics of the One should not be taken as an absolute. Sometimes it is driven towards conciliation with the Ethics of the Other, which is expressed by social movements and by demands for the right to resist and to form an opposition (GOYARD-FABRE, 1982; PIRES & VALIÈRES, 1987, p. 80-82; RUSSBACH, 1987; SPENCER, 1993 [1850]), as has been demonstrated by the fact that, within the last few years, alternative sentences and community service have been put into practice. Nonetheless, as Pires has argued, there is still a general tendency toward concentrating “ on the justification and limits of ‘severe sentences’, and thus neglecting, first, the other common sanctions of criminal law (prison, fines, probation, community work) and then overlooking even more completely the issue of recourse to other sanctions and rules commonly accepted and integrated into other sectors of juridical life” (Pires, 1991, p. 52).

The Ethics of the One carries with it the “theologization” of positive Penal Law, resorting to a deontologism that is sometimes exaggerated, precisely in detriment of Ethics pure and simple, especially if we take into account the fact that juridical sentence is presented and defined as a punishment which means that it demands the definition of a guilty party, at whatever the cost.

It is worthwhile to remember that in modern society there is not just one juridical order but rather the coexistence of a plurality of juridical orders, each one of which may, in turn, be composed of multiple juridical spheres to which there is a corresponding system of discourses and values. Thus, “[...] to conceive of the State simply as one of the forms taken by human society, perhaps even the most evolved, but without for that reason attributing a divine character to it – something that is in fact not attributed to other societies of yesterday and today – obliges us to consider these other orders as nothing more or less juridical than the state order [...] It is perfectly possible to conceive of law without the State, but impossible to define the State without resorting to the concept of Law” (ROMANO, 1975 [1946], p. 81).

Law is a predecessor of the State, but the penal system is a product of the State and

remains, particularly in a political democracy, a contradictory element. Without a doubt, it is not always the pure and simple expression of the interests of a ruling or governing social class or the direct product of the Ethics of the One. In this same vein, we cannot naively pretend that it is the original expression of authentic, legitimate and unquestionable law. This would be the same as awarding state power (the Legislative and the Judiciary) and bureaucratic structure (the apparatus of Penal Justice) a supra-social essence, of which the State would partake in order to apply penal law.

Therefore, to conflate Law and laws (the State's juridical norms) pertains particularly to the ideological dominion of the State. Given its central position in the confirmation and configuration of the juridical and political order, the discourse that belongs to the Ethics of the One refers to contradictions, when they exist, as a fact of lesser importance to the extent that the State is "responding" to the general will of the people. That which the State creates and promulgates – Law and penal laws – should be seen as juridically legitimate and authentic. It embodies the truth. There is no law beyond nor below these laws.

Such a discourse is so rooted in our spirits as a crucial element of our mental structure that it has become fallacious. Thus, to dare to question the notion of crime, a debate that goes back to the 19th century, becomes a necessary condition for the development of a face-to-face relationship between the two ethics. Jurists, anthropologists, sociologists and philosophers of Law are confronted by an identical problem when they search for the essence of a juridical order: what in fact is Law?

IV. TÊTE -À -TÊTE

Today, the opposition between the Ethics of the One and the Ethics of the Other is very real and concrete, characterized by a movement that has a dynamic of its own. Nonetheless, this does not refer so much to relationship of the One with the Other, but to a *tête-à-tête* whose goal could not be the integration of the two nor the submission of the Other to the One: "If we could have, learn and get to know the other, s/he would no longer be the other. To have, get to know and learn are synonyms of power." (Levinas, 1989, p. 19, 83).

Through this process of negotiation, mediation and commitment (HUYGHEBAERT & MARTIN, 2002; LAJOIE, 2002), the Ethics of the Other questions the Ethics of the One and interrogates political society and penal law, leading us to rethink democracy and, above all, the fundamental question dealing with responsibility, accountability and sanctions: who is responsible for what, to whom, and how should this responsibility be carried out.

All States frequently react to conduct and discourses that question their own in ways that are arrogant, if not repressive. Even if capable of accepting institutional reform and change, the State seeks, above all else, to preserve the status quo, without taking into account the means that the Other has put to use. The latter, however – ever since the ascendance of the Republic – can and should demand its right to resist unjust, immoral or arbitrary orders on the part of those who exercise public power, as well as the right to oppose the actions of the State or of its agents if these are judged as contrary to its primary mission: "to serve public interests". Here we are situating ourselves within a contractualist perspective, since the rights of opposition are linked to the rupture or the violation of the pact that the State has established between itself and society.

From the perspective of an Ethics of the Other, it is a matter of demanding synchronic and diachronic recognition and a relationship that can move from confrontation to complementarity. Although it may go as far as a total rejection of the Ethics of the One,

this does not necessarily have to be its goal. Thus, it seems evident that the mutual lack of recognition that exists between the One and the Other can only be beneficial to the One, forcing the Other into a greater or lesser degree of “clandestinity.” Among all the forms taken by state law, penal law may very well play the primary role, due to its repressive, punitive and stigmatizing character and its range in terms of real, but particularly symbolic visibility, which therein include the particular institutions that are a part of it, such as police and prisons.

It is within the reach of civil societies to “strengthen their political rights” (citizenship) rather than to wait for political society to hand these rights over to them. Therefore, it is important that the former create their own institutions of juridical education, laying out their own strategies and making break from passivity, developing their own specific means. As examples, we can cite the creation of social movements geared toward defense, assertion and making of demands, and— when necessary — resorting more systematically to the state juridical order to demand the fulfillment of principles and values of compatibility between the One and the Other. It becomes necessary to “[...] juridically demonstrate that the world belongs neither to the State nor to large corporations, and that the existing order was never in possession of right - as has been historically proven —; that life is not a State issue”. (Russbach, 1987, p. 10).

Rights of resistance and opposition are an ethical demand in relation to the rights of state power. For some authors, they are the true rights of the human person. The state proffers itself a monopoly over legitimacy and holds penal law hostage, since the latter becomes a set of state norms that that uses behavioral models imposed by the state as an argument, under the threat of sanctions that have been organized in the name of society. Such sanctions become a prime ingredient in the functioning of penal justice. Sanctions are measures that accompany penal law; they may have a coercive nature and thus refer to the force that they impose as a result or consequence of a crime, fault or infringement. They establish the obligation that the infringing party has to carry out some gesture or concrete action that has been deemed necessary or sufficient to obtain pardon. Sanctions may also be of a punitive nature. This means that, in addition to obligation imposed through coercion (a contract established through force), reparation must be made for the infringement or crime committed. In this case, the ultimate goal of the sanction is to punish the person who has transgressed penal law.

The application of sanctions proceeds according to the institutions designated and created by the State. They are situated both within the dominion of a General Ethics and a Normative Ethics insofar as they attempt to define or choose the form and content of the two: which behavior, which individuals, which groups and institutions should be included in their goals? And, furthermore, which shall be their modes of application? Regarding the qualification of the sanction, it should also be added that: “[...] the use of the expression ‘legal sanction’ (in lieu of ‘sentence’) is meant to emphasize the notion that obligation prevails over punishment. It is adopted because the notion of obligation corresponds to that of punishment, while the reciprocal notion does not hold. Although the execution of all sentences is an obligation under the letter of law, they do not impose such a degree of privation that would merit legitimate reference to them as punishments.” (CCDP, 1987, p. 126).

Therefore, juridical pluralism justly reminds us that the Law as a social product refers to providing space for the multiple and singular productions, pressures and discourses that emerge from civil societies and than are translated through the extra-state juridical orders.

Having arrived at such a moment, we must arm ourselves against mythical constructions. To elevate the Ethics of the Other to the theological statute is just as pernicious as the domination of the Ethics of the One. The discourses, pressures and productions that emerge from civil society are not exempt of injustices and ambiguities nor are they free from punitive and repressive traits. Here we shall speak in generalizing terms: *sanctions are neither the invention of the modern State nor of Penal Law*. In reference to the indigenous Txicão of Brazil and the Achuards of the Ecuadorian Amazon, Kremer- Marietti notes that “In both societies with neither a penal system nor political order, sanctions nonetheless ‘work’ [...] In both cases, we see the functioning of a fundamental sense of guilt that is constitutive of existence and, in a certain case, we see that it is even a founding element, from the point of view of political power.” (KREMER-MARIETTI, 1983, p. 111). The example that has been cited here allows us to establish a universal that has little value, since it is constructed through a generalization that ends up hiding what is particular and singular in Penal Law and in sanctions. It is precisely this singularity that invites us to believe that a necessary *tête-à-tête* be established between the Ethics of the One and the Ethics of the Other, rather than to search for the legitimizing bases (not necessarily legitimate) of its supremacy.

V. PLURALISM(S) E SYNTHESIS(ES)?

Above and beyond all, Law should indicate the emancipatory values that reaffirm the sovereignty of the peoples that constitute civil societies and the norms that govern social emancipation, rather than emancipation from the political. Thus, law represents but one episode among others. Similarly, the responsibility and imputability – in the sense of responsibility and accountability – of the state institutions that make up the apparatus of Penal Justice demand the socialization of the latter, that is, they require that the police force, the prison system and the Judiciary no longer respond solely to the State, but also to civil society.

On the one hand, the discourse of the One tends to become the discourse of a technocracy, with a hermetic, opaque, calculated and distant language whose principal object is not to get closer to the other nor establish with him/her fruitful exchanges (Cárcova, 1998). On the contrary, this discourse creates an increasingly wider breach ; the State sees civil society as a possible and probable risk, or perhaps even as an enemy that must be watched, disciplined and controlled. Here, this discourse situates itself within what Pires (1991, p. 68ss), referring to the analysis of penal reforms, calls the paradigm of “total ethics”. On the other hand, the discourse of the Other, which is less uniform and therefore more fragmented, identifies with the paradigm of “comprehensive ethics”. Confronted with the necessity of the socialization of the institutions of justice, this discourse demands democratization.

Certain researchers (Baratta, 1985) proclaim the reduction of Penal Law to what they have called “minimal Law”, thus limiting the scope and intensity of State Law and penal justice. Thus, human rights become a point of support for the critique of Penal Law. The abolitionist movement goes even further (HULSMAN & BERNAT DE CELIS, 1987), to the extent that it believes in the juridical treatment of problem situations that do not usually require a “penal style” of conflict resolution. Furthermore, the “democratic” state disburses billions in order to strengthen its penal apparatus, developing a culture of crime control that becomes a veritable industry (CHRISTIE, 1993), while at the same time remaining extremely timid when it comes to adopting economic, social and cultural measures that

could rescue its rebels from the human misery they are subjected to through state institutions and norms (e.g., unemployment and social exclusion). On the other hand, the “democratic state” turns a deaf ear to demands regarding a redistribution of wealth, toward greater justice and equity.

We can hardly refrain from rejoicing when someone like Robert Badinter, French lawyer and senator, former Minister of Justice and President of France’s Constitutional Council, affirms that it is necessary “ [...] from here on in, to solve a greater number of conflicts (law infringements and crimes) through means other than the judicial ; I am convinced of this.” And that, in spite of his passionate defense of the French judicial system, “ substantial progress must still be made, particular in order to reinforce the statutory guarantees of magistrates, improve the penal process and free justice from the legal conflicts that could be solved outside its courts.” (BADINTER, 1997, p. 7).

The recognition of the Other and his/her place requires, prioritarily, moving through an analytic framework that incorporates cultural, individual and collective plurality. This plurality is characterized by the diversity and distinctions that are the basis of civil society – what is different- and not its homogeneity which, on the contrary, is the project of a society built up on the hegemony of one gender, one race, one ethnic group or social class. In the second place, this recognition of the Other presupposes the possibility of a pluralistic creation of values and principles that correspond to the multiple individual and collective interests that confront each other, eventually coming to a long-sought compromise. This would be the expression of a conception of a general will that emanates from society rather than from the State : “A dispute ("différend") would be a case of conflict between at least two parties that found no equitable solution, due to the absence of a rule of judgment applicable to the two arguments made” (LYOTARD, 1983, p. 9).

Thus, a dispute poses a considerable problem : why is it that Penal Law does not seem able to incorporate the Ethics of the Other ? Could this be due to the fact the State and Penal Law appropriate “conflict” for themselves ? If this is the case, then it is no longer a question of dispute but rather of litigation, and the intervention of the State and of Penal Law would be damaging to the Other, to the One, and to both : “ the rules of the genre of discourse through which judgments are made, are not those of the genre(s) of the discourse (es) judged”, Lyotard adds (ibid). Thus, Penal Law should become a judgment that can be applied to both arguments, that is, to both parties that confront each other in a lawsuit or criminal case, if a fair solution to the dispute is to be found. The latter must cease to be of a unilateral character and come to include the discourse of the Other, or leave the chance to deal with problem situations outside its dominion, which would mean allowing for the possibility of choosing “other” juridical orders which are more open to both parties, as more appropriate sites and means for the resolution of conflicts.

An ethics of the Other does not necessarily presuppose a non-written Law, rather a “ point of reference that is common to all effective moralities, as an absolute founding element of the moral person, necessary for the constitution of the subject : beyond moral obligation there is no responsible subject.” (Kremer-Marietti, 1987,p. 3-4) Its frame of reference is a conjectured founding situation, as we have stated above, from a synchronic and diachronic historical perspective. In order to describe and understand it, we must return to the logic, aesthetics and moral/ethics that characterize the One, which has always been guided by the goal of establishing conformity to the prevailing norms of truth, beauty and goodness and that have sustained the notion of the State as an absolute totality.

The two above-mentioned historical perceptions, that are related to the analytical categories

of time and space, constitute important cognitive references for interpreting what cannot be demonstrated and for relativizing the social totality through deconstruction, that is, undoing this totality and separating it into its singular parts, the Others. The social totality is no longer the simple sum of its parts, but rather – in the first place - its pluralist (containing a number of units) and plural (allowing the visibility of the largest number) scission ; second, it refers to the frequently contradictory articulation of the synthesis of this scission. There is not one subject, but unstable, indefinite, divisible and invisible subjects (Lyotard, 1979) that must be clarified and revealed in such a way as to be able to deduce significations that are useful for understanding, analysis and possible explanation.

Thus, it becomes necessary to break with the dominant form of aesthetic and moral judgment which holds our societies as its object and compels us to declare our conformity with its pre-established rules, seen as immutable criteria and taken as natural, rational and universal constructions. In order to go beyond what the Ethics of the One is, in these conformist terms, it would be more meaningful to see things from the perspective of the “sublime” (Kant) defined simultaneously as a “strong and erroneous affection”, painfully insufficient and therefore maintaining no determined form. The “sublime” demands research into and the invention of paradox, of the unintelligible founded on difference and what cannot be foreseen, on the instabilities that inhabit societies.

To deconstruct the social totality means to explore the multiple meanings, dominions and registers that it contains, to interrogate the logic, aesthetics and moral that it is founded on and to question the nature, the reason for existence and the components that it is made up of. Society, as an object of research, is defined above all by its diversity ; each researcher contributes precious elements of social knowledge but, in all modesty, these are always relatively partial.

Endeavors at deconstruction do not mean the systematic exclusion of a vision of the whole, nor a lack of precision – quite the contrary. They are the fundamental pre-condition for the demonstration of the multiple, diverse, pluralist and plural character of society and for providing for a harmonious Ethics of the Other. Society must not be considered a closed, autonomous and self-sufficient universe, but as containing a reality that must be apprehended as an open world, in the image of civil societies and not of the State.

The Ethics of the Other cannot be transformed into a shared, regulatory and guaranteeing norm of the juridical and political order, of the homogenizing and uniformization of civil societies. The general and the universal must make way for the particular and the singular, rather than serving as substitutes for them. This is something that the State ignores, insofar as “to determine a priori the content of the rights of man means to crystallize them arbitrarily, blocking the questioning of established rules and the search for new ones, prematurely interrupting the debate on the issue of the just and the unjust – which means proscribing conflict.” (LYOTARD & ROGOZINSKI, 1985, p. 33).

We have no pretension of foreclosing a debate that has just been reinitiated and that should proceed vigorously. We also do not intend to search for a model or ideal type of future justice, as if we were the only ones with access to the “real truth”. This would be an unpardonable “fraud” which would contradict all that we have just finished putting into words here. Ours is, on the other hand, the modest intention of contributing toward analytical and theoretical reflections on our contemporary societies, urgent and necessary albeit normative. We recognize that such work should be completed through the addition of social, economic and political dimensions that propose a direction, among so many that can be taken, since “what is unbearable is the idealization of an order that does not recognize its

own arbitrary nature, over which it is constantly creating the illusion of triumph (JEUDI, 1993, p. 34).

Delmas-Marty (1991) draws our attention to the fact that, traditionally, in Law and in Penal Justice, everything is constantly presented under the sign of coherence, homogeneity and stability, as is the case for the Penal Code. Nonetheless, when we face the task of the study of these objects and when we read the reports that allegedly sustain reforms, we perceive that reality diverges significantly from such claims. Order always corresponds to disorder, which contains such asymmetrical elements as incoherence, heterogeneity and, above all, instability – that is, life.

REFERENCES

AUGÉ, M. 1994. *Le sens des autres. Actualité de l'anthropologie.* Paris: A. Fayard.

BADINTER, R. 1997. *Justice pour la justice.* Le Monde, Paris, 8. fév., Sélection hebdomadaire, p. 7.

BARATTA, A. 1985. *Principi del Diritto Penale minimo. Per una teoria dei diritti umani come oggetti e limiti della legge penale.* Dei Delitti e Delle Pene, Bari, v. III, n. 3 , p. 443-447, sett.-dic.

BARBOSA, L. 1992. *O jeitinho brasileiro. A arte de ser mais igual que os outros.* Rio de Janeiro: Campus.

BATISTA, N. 1990. *Introdução crítica ao Direito brasileiro.* Rio de Janeiro: Revan.

BLANCHARD, P. & BANCEL, N. 1998. *De l'indigène à l'immigré.* Paris: Gallimard.

CÁRCOVA, C. M. 1998. *A opacidade do Direito.* São Paulo: LTR.

CHRISTIE, N. 1993. *Crime Control as Industry. Towards Gulags Western Style?* London : Routledge.

CCDP. 1987. *Réformer la sentence: une approche canadienne.* Ottawa: Ministère des Approvisionnement et Services du Canada-Commission Canadienne sur la Détermination de la Peine.

DACUNHA-CASTELLE, D. 1996. *Chemins de l'aléatoire.* Paris: Flammarion.

DELMAS-MARTY, M. 1991. *Pensée moderne et réformes pénales.* In: PLANTY-BONJOUR, G. & LEGAIS, R. (dir.). *L'évolution de la philosophie du droit.* Paris: PUF.

DUFOURMANTELLE, A. & DERRIDA, J. 1997. *De l'hospitalité.* Paris: Calmann-Lévy.

DERRIDA, J. 1994. *Politiques de l'amitié.* Paris: Galilée.

_____.2003. *Voyous.* Paris: Galilée.

- FAY, J.-P.** 1982. Violence. In: Dictionnaire politique portatif en cinq mots. Paris : Gallimard.
- FOUCAULT, M.** 1971. L'ordre du discours. Paris: Gallimard.
- GENARD, J.-L.** 2000. Les dérèglements du droit. Bruxelles: Labor.
- GIROUX, G.** 1991. L'éthique et le droit : convergence ou divergence en démocratie libérale? Cahiers de Recherche Éthique, Rimouski, n. 16, p. 1128, 3ème trimestre.
- GOYARD-FABRE, S.** 1982. Le peuple et le droit d'opposition. Cahiers de Philosophie politique et juridique, Caen, n. 2, p. 69-87. Actes du Colloque "Philosophie et démocratie", Caen, 26-27.mai.1982.
- GUÉNAIRE, M.** 2001. Droit Romain, Common Law: quel droit mondial? Le Débat, Paris, n. 115, p. 48-72, mai.
- HAARSCHER, G.** 1988. La raison du plus fort. Liège: P. Mardaga.
- HULSMAN, L. H. C. & BERNAT DE CELIS, J.** 1982. Peines perdues. Le système pénal en question. Paris: Le Centurion.
- HUYGHEBAERT, P. & MARTIN, B.** 2002. Quand le Droit fait l'école buissonnière. Pratiques populaires de Droit. Paris: Descartes.
- JEUDI, H.- P.** 1993. L'éloge de l'arbitraire. Paris: PUF.
- KREMER-MARIETTI, A.** 1983. Les fondements philosophiques du Droit Pénal. In: CHEVALIER, J. (éd.). *Le droit en procès*. Paris: Paris, PUF.
- _____. 1987. L'Éthique. Paris: PUF.
- LAJOIE, A.** 2002. Quand les minorités font la loi. Paris: PUF.
- LANDREVILLE, P.; BLANKEVOORT, V. & PIRES, A. P.** 1980. Les coûts sociaux du système pénal. Montréal: École de Criminologie-Université de Montréal.
- LARUELLE, F.** 1986. Les philosophies de la différence. Paris: PUF.
- LEVINAS, E.** 1989. Le temps et l'autre. Paris: Quadrigue.
- LÉVY, T.** 1984. Le crime en toute humanité. Paris: Grasset.
- LYOTARD, J.-F.** 1979. La condition post-moderne. Paris : Minuit.
- _____. 1983. Le différend. Paris: Minuit.

LYOTARD, J.-F. & ROGOZINSKI, J. 1985. La police de la pensée. L'autre journal, Paris, n. 10, p. 27-34, déc.

MAFFESOLI, M. 1984. Essais sur la violence banale et fondatrice. Paris: Méridiens.

PIRES, A. 1991. Éthiques et réforme du droit criminel: au-delà des philosophies de la peine. Ethica, Rimouski, v. 3, n. 2, p. 47-78.

PIRES, A. & VALIÈRES, S. 1987. Droits de la personne et information juridique : une recherche évaluatrice. Rapport n. 16. Ottawa: Ministère de la Justice du Canada.

ROMANO, S. 1975 [1946]. L'ordre juridique. Paris: Dalloz.

RUSSBACH, O. 1987. La déraison d'État. Paris: La Découverte.

SCHNAPPER, D. 1998. La relation à l'autre. Au coeur de la pensée sociologique. Paris: Gallimard.

SEFFAHI, M. (dir.). 1999. Autour de Jacques Derrida. Manifeste pour l'hospitalité. Grigny: Paroles d'Aube.

SERRES, M. 1991. Le tiersinstruit. Paris: Gallimard.

SPENCER, H. 1993 [1850]. Le droit d'ignorer l'État. Paris: Les Belles Lettres.

STOMMA, L. 1986. Campagnes insolites. Paysannerie polonaise et mythes européens. Lagrasse: Verdier.

SURIN, K. 1994. Reinventing a Physiology of Collective Liberation: Going "Beyond Marx" in the Marxism(s) of Negri, Guattari, and Deleuze. Rethinking Marxism, New York, v. 7, n. 2, p. 927, Summer.

VIGNAUX, G. 1996. Le démon du classement. Paris: Seuil.

WALLERSTEIN, I. 1991. Geopolitics and Geoculture. Essays on the Changing World-System. Cambridge, UK: Cambridge University.

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