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The Due Process and Crime Control Models of Criminal Justice

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Abstract

This essay has as main target the study of structures, functions, duties and rules of government agencies in charge of criminal law enforcement, which perform their multiple roles as soon as a crime is committed. Since the first attendance by the police forces, until the definitive sentence by the highest Criminal Court, several and complex individual and social rights are involved, aiming at both a valid investigation as a fair trial. First, some important questions will be focused: what are all the agencies and institutions that constitute the so-called 'criminal justice system'? Do they operate properly toward each others? Do they constitute a true system? Then, by analyzing the criminal process models and crime control patterns, and seeking to establish the necessary balance between public interests and civil liberties, the essay shall study the key features and problems related with the criminal punishment, understood as the most violent – but necessary – government interference in the citizen´s life. Finally, as the core concern of this work, it will be explained how (and if) the Criminal Justice System is able to be effective for the community safety and respectful towards the individual rights, at the same time.

Keywords: Criminal investigation. Due process of law. Crime control. Criminal justice system. Individual rights.

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Resumo

Este artigo tem por objetivo central o estudo das estruturas, funções, deveres e normas das agências governamentais encarregadas da aplicação da lei, os quais desempenham seus múltiplos papeis tão logo um crime é praticado. Desde o primeiro atendimento pelas forças policiais, até a decisão definitiva pela mais alta Corte Criminal, vários e complexos direitos individuais e sociais estão envolvidos, visando tanto a uma investigação válida quanto a um julgamento justo. Primeiro, algumas importantes questões serão enfocadas: quais são as agências e instituições que constituem o denominado "sistema de justiça criminal"? Cooperam eles efetivamente entre si? Constituem eles um verdadeiro sistema? Então, pela análise dos modelos de processo penal e padrões de controle criminal, e buscando estabelecer o necessário balanço entre interesses públicos e liberdade civis, o artigo estudará as principais características e problemas relacionados com a sanção penal, entendida como a mais violenta - porém necessária - interferência estatal na vida do cidadão. Por derradeiro, como preocupação central deste trabalho, será explicado como (e se) o Sistema de Justiça Criminal logra ser, ao mesmo tempo, efetivo para a segurança pública e respeitoso em relação aos direitos individuais.

Palavras-Chave: Investigação criminal. Devido processo legal. Controle criminal. Sistema de justiça criminal. Direitos individuais.

In a first approach, the criminal justice system can be seen as set of government agencies (as building bricks) such the Police, Prosecutors, Criminal Defence Service, Courts, Probation Service, Prisons and Youth Justice, all of them in charge of criminal law enforcement and further related tasks. In the same context might be put together the smaller agencies: Coroners, Criminal Injuries Compensation Authority, Forensic Science Service, Parole Board and Victim Support. As pointed out by Davies, Croll and Tyrer (2010) these multiple organs could be spread over four key 'sub-systems' of criminal justice: i) law enforcement (police and prosecuting agencies); ii) courts (making decisions about pretrial measures until the definitive sentence); iii) penal system

(prisons, probation and other instruments of offender's control); iv) crime prevention (agencies, even some private, that are in charge of dealing with crime-free environments or creating conditions for not crime occurrence).

In order to determine to what extent those agencies compose an actual system, it seems adequate to ask about two key related questions, as well highlighted by Newburn (2007): the co-operative work and the coincidence or proximity of targets. In accordance with his response, considering the predominant work in partnership and the similar objectives, there would be a real system operating, despite the examples on the opposite way. Nevertheless, according to Davies et all (2010) there will be some implications of regarding justice as a system, because if the agencies are interdependent, pursuing the same goal, simultaneously, it means that the work of one agency depends on the other's functioning, and sometimes it must be recognized that these aims are not easy to be reconciled. The use of word 'system' is also criticized by Uglow (2009) for whom it can hardly be identified all the characteristics of an actual system in English and Welsh criminal process, that is: clear targets, delineated responsibilities, lines of management and good communication between the different elements.

Besides the above remarks, it is now necessary focusing the nature or model of the criminal justice system that one is dealing with. It is a commonplace that there are basically two models of criminal justice system: adversarial and inquisitorial. The former can specially be found in those countries which were British colonies. The last has its origins in France and has been adopted by several nations, particularly those one with a statute law model (v.g. continental Europe and Latin America). Although this statement is not completely wrong, it would be convenient to remember, as Pakes (2010) does, that at least two

other systems have their own features: the indigenous and Islamic courts. The indigenous courts are often under-researched and come represented by some developing countries, for instance Papua New Guinea, Zambia, Kenya and Alaska (US). The same is observed in minor scale in some faraway places located in few Brazilian states, where sometimes the state's judiciary structure is borrowed by the tribes in order to perform trials in accordance their specific customs, traditions and non-written justice's rules. They must observe though the boundaries given by the national Constitution, mainly those related with the human dignity's protection. The trials in the Islamic legal tradition present their singularities and are predominant in the Middle East. The Koran, the holy book for Islamic people, embodies the set of most important rules, even in criminal field, and those marked religious basis are severely observed at the moment in which any wrongdoing is under judgment. The non-acceptance towards its methods usually triggers reactions by the western world.

In this essay only the former two systems, adversarial and inquisitorial, shall deserve a special attention, although the others also have their own importance and scientific interest. Once clarified the type of model, it becomes easier the understanding about the roles played by the implicated agencies, which arise mostly from the criminal procedure law. Broadly speaking, the adversarial system could be defined as the model where both parts – defendant and prosecutor – play the main role on gathering the necessary evidences, whereas in the inquisitorial system the judge is anyway in charge of the proofs' gathering, despite similar power often attributed to the parts, both seeking the *truth*. But there are other differences between these two models. As explained by Pakes (2010), under the inquisitorial model, the relevant facts must be placed before a court, and this goal is achieved by promoting extensive preliminary inquiries, in which the onus of proof also remains on the judge's hands, rather

on the prosecutor and defendant. The evidence is compiled into a *dossier* (file) whose content is often kept under wraps, until the public examination at trial.

British courts utilize the adversarial system of justice, as above mentioned. In this system 'the defendant and prosecution each seek to assert the validity of their own case by destroying the arguments put forward by their opponents' (Joyce, 2006: 232). There is, therefore, certain level of conflict into the adversarial system, since the prosecution´s goal is to prove the guilt of defendant beyond reasonable doubt, while the defence lawyer should create a reasonable doubt in the mind of the judge or the jury, aiming at an acquittal (Davies et all, 2010). Hence, the fundamental issue on understanding accusatorial procedure is that concerned with the burden and *standard of proof*, that is, the extent to which allegations must be proved and those responsible for this work in the trial context. Thus, the presumption of innocence plays a crucial role in the modern criminal procedure systems because, according to Kleinig (2009: 139), this principle implies 'a recognition that it is for states establish their cases against he individual, not vice versa, and that they must do so beyond reasonable doubt'.

It should be conceded that an enormous difficulty remains in order to make judgments how due process and crime control should be reconciled. According to Davies et all (2010), this issue involves controversies related with changes such as to the right to silence, admissibility of hearsay evidence, challenging over wrong decisions, pressures for cost effectiveness conflicting with crime control and due process needs. However, Sanders and Young (2007:954) sum up the key differences between due process and crime control models of investigation and trial, which determine how the government presents the response against criminal behaviors:

> 'due process *values prioritize civil liberties in order to secure the maximal acquittal of the innocent, risking acquittal of many guilty people. Crime control values prioritize the conviction of the guilty, risking the conviction of some (fewer) innocents and infringement of the liberties of some citizens to achieve the system's goals. Due-process-based systems tightly control the actions and effects of crime-control agencies, while crime-control-based systems, with their concern for convictions, do not'.*

Therefore, as pointed out by Sanders, Young and Burton (2010: 22), in crime control model the most important function of criminal process should be related to the repression of criminal conduct, in order to reinforce the belief in law by citizens, avoiding their permanent fear. Here, the social freedom demands high rates of detention and conviction with expected (not many) mistakes. The quality of control is conferred largely to the police. There are rules forbidding illegal arrests or coercive interrogation, nevertheless those rules should not spoil the evidence presented in trial. Talking specifically about the American criminal justice, Schmalleger (2009) suggests that is unavoidable the ideological conflict like that. The different goals of *crime control* and *due process* would be contrary and the main concern would be the crime control and the expense of due process. Despite these different points of view, the American system of justice is representative of crime control through due process.

Pakes (2010) suggests that the nature of trial is widely shaped by the nature of its prior investigative phase. This happens because whereas in inquisitorial systems the evidence gathered by the police investigation is given more importance, in adversarial model the pre-trial information has less weight. Police is often the first line between the offender and the further criminal justice agencies. It could be indicated many variations on the police system throughout the world, but all of them can be categorized either as *control-dominated* or *community-oriented*

models. Newburn (2007) explains that former model, more centralized, is characterized by many paramilitary features, by maintenance of order as its main function, by carrying out a range of administrative tasks on behalf of state and by lacking legitimacy towards the population. In contrast, the second model, generally organized and managed locally, corresponds to that one where maintaining order is important, but adding the view of crime as symptomatic of community problems. Since this local police aims to address the wider needs of community, it is accorded considerable legitimacy by people.

Regardless the model adopted, discretion in policing is somewhat inevitable, there should be tight control and supervision on this activity, particularly toward those tasks related to the integrity and quality of criminal evidence, that is, when the police force contribute for the ascertainment of the facts surrounding the commission of a crime. As claimed by Joyce (2006) Police plays vital role in the prosecution process context, when it determines how the offenders should be dealt with. A non-discriminatory attitude is expected to be adopted by the police forces, for instance toward women that figure either as victim or as perpetrator of crime. However, as pointed out by Kleinig (1996: 81) "discretion is a normative resource, not a mere power or capacity, and it can be exercised well or badly". The same author (2008) explains that police, under an 'interpretative' discretion, decides what rule should cover a situation where a strict or literal reading of the law might seem socially inappropriate. Furthermore, it should be highlighted that in England and Wales, prosecution remains largely on police hands.

It would also be an illegitimate use of the justice criminal system to respond to the media's pressure or political lobbying. This is why the political weakness of some police corps (like in Brazil) might be a hazard factor for the investigation or

prosecution fairness. Media intrusion can interfere directly in the police work. Newburn et all (2007) explains that press can conduct parallel and independent inquiries, can suggest further lines for police inquiry, can buy stories from witnesses, can damage evidences and use electronic devices in order to pick up confidential information.

It should be also said that criminal justice system in England presents a particular situation regarding the Crow Prosecution Service. Whereas in others Europeans nations the Prosecutor plays prominent role in the whole prosecution, the British CPS, as a relatively new institution, lacks visibility and clout. For Pakes (2010: 65) in most countries "the public prosecutor is by custom, by law and by practice in a much stronger position". Comparatively, in Brazil, the Prosecutor Service ('Public Ministry') is indeed considered as the "Republic's fourth power branch", though the Constitution has not granted it clear powers to the criminal investigation, but only to the exclusive prosecution. This represents a serious factor of permanent quarrel between Prosecutor and Police Officers, leading to unwanted results for the public interest and law enforcement. Hence, it is reasonable to conclude that agencies with sufficiently defined functions are most likely to fulfill their tasks in a more effective way. Joyce (2006) states that CPS was becoming too centralized and bureaucratic, with an inadequate organizational integration toward police forces, so impeding the desirable cooperation related with the charging of offenders. Anyway, it must be expected that either police investigators or prosecutors are required to find the truth rather than 'construct a case'.

As stated by Joyce (2006), CPS has several tasks as its role: to review cases presented by the police and decide whether to proceed with them or discontinue them, to decide what the precise charge against a person who is being proceeded against should

be, to conduct the prosecution. It is relevant to be argued that in England the Crown Prosecution Service possesses considerable autonomy concerning to charge a person and to decide which offence should be him indicted for (uneven other countries, for instance Brazil, where the prosecutor has no discretion to charge someone or to discontinue the trial).

The defence also has its needful role and defendants' rights must be taken seriously by police investigators, prosecutors and judges. Among others, as stated by Newburn (2007), the defendant, prior and during the trial, has the right: to know the detailed charge, to representation, to bail, to jury trial (if triable either way), to advance disclosure in such cases, to challenge the jurors, to call and not give evidence, to cross-examine witnesses. Despite the majority view, in accordance with the defender presence is not required during the pre-trial phase, in some countries of inquisitorial model, a movement is arising in order to recognize the defendant's entitlement to be assisted by a lawyer, from the first step of investigation, even the right to gathering the evidence by himself (Baldan, 2007).

Impartiality and independence of judges ensures their integrity and quality on decision-making. According to Kleinig (2008) the character traits that inform judicial integrity come from both the necessary qualities to the exercise judicial work and the authority necessary to be socially trusted. This does not mean necessarily a rigorous solemnity during the trials. Inquisitorial system does not seem to require strict formality, whereas in adversarial model some offenses against the etiquette can lead one to be indicted for contempt of court. Pakes (2010) adds that the traditional wigs, in British courts, contribute to the sense of decorum, making clear the non-acceptance upon any kind of irreverence. Many countries have a bipartite model of trial: trial by judges and trial by jury. Basically in the former, defendant

is prosecuted by the Crown Prosecutor Service and he will be required to defend himself in the magistrates' court or Crown Court, where a single judge issues the sentence. The second model, trial by jury, implies the judgment by twelve people selected among common people. As Newburn (2007) notes that there is controversy over advantages and disadvantages of the jury system (for many a symbol of the British justice system). The arguments in favor of juries primarily seek to emphasize its feature of democracy and legitimacy, lack of professional prejudice and a actual barrier against unpopular laws. On the other hand, is pointed out that juries are not representative, are not able to deal with complex cases, easily persuaded by lawyer rhetoric, controllable by few individuals and not knowledgeable about the law.

According to Cavadino and Dignan explanation (2001), the trial can be held in the magistrates' court or in the Crown Court, depending on how the offence is categorized: indictable only (most serious crimes, such as murder, rape and robbery) summary only (much more numerous group of offences, the least serious) or triable either way (offenses of an intermediate degree or seriousness, such as theft, handling stolen goods, burglary). The first group is tried in the Crown Court, whereas the second one is tried in magistrates' court. The last group will be tried in magistrates' court if the defendant indicates that intends to be plead guilty; otherwise a decision will be taken as to whether the case will be heard by magistrates' court (around 90% of cases) or by the Crown Court (10% left over). Sentencing decisions, according to Cavadino and Dignan (2001: 101) are 'the crux of the penal crisis' because they determine the size of penal problems such overcrowding and impoverished prisons. They can also be a source of perceived injustices increasing the crisis of legitimacy.

When the punishment comes eventually imposed on offenders convicted after going through all the phases of the trial, it is believed and expected that this measure can prevent further deviant behavior, contributing to community safety. Miethe and Lu (2005) points out that punishment might have a potential for deterring misconduct if they are severe, certain, swift in their application. Cavadino and Dignan (2001: 92) summed up this problematic: ´if the police do not act against an alleged offender or if the Crown Prosecution Service (CPS) declines to prosecute, the suspect will never reach court, let alone go to prison and contribute to the number crisis'. Criminologists often agree that punishment can be regarded as social prevention on crime, because it fulfills at least deterrent and incapacitating effects and can reinforce mainstream value (Sutton, Cherney and White, 2008). Nevertheless, where states pursue the philosophy of specific or general deterrence as the only one way to prevent the criminality, it is unsurprising the increasing of severity of penalties and lacking of defendant's rights. As a waited result, the miscarriages of justice happen more often.

According to Savage and Milne (2007: 611) the expression 'miscarriages of justice' can be used in two different meanings: *questionable convictions* and *questionable actions*. The former term identifies the "convictions which are made on grounds which appear to run contrary to the processes, procedures and principles stated to govern the justice process", whereas the questionable actions mean "decisions and non-decisions, actions and inactions associated with law enforcement and justice agencies and which can be held responsible for failures to respond". As claimed by Joyce (2006), liberal democratic states should have impartial courts with sufficient mechanisms to avoid mistakes or, at least, to rectify them quickly. For this purpose, the appeals procedure is vital, although it is not able to offer an effective safeguard against all miscarriages of justice, which can be generated by different agents: inadequate work by defence lawyers, improper pressure placed buy the police

on a defendant in order to confess to a crime, fabrication ('planting') of evidence, failure by the prosecution to disclose information relevant to the defence, uncorroborated evidence etc. Additionally, it should not be forgotten that the suspects may be remanded by the police and by the courts, even they are officially presumed innocent, that is, prior to their trial. This fact reveals how serious may be a miscarriage of justice or a mistake of police.

It is inconceivable a desirable state of community safety without a coordinated effort of the entire criminal justice system. This vital goal can not be achieved where the pieces of this complex system operate regardless or at odds with other agencies' work. There should not also be mere assumption that defendant's right (preserved into the due process of law model) represents an actual threat or inhibitor to the criminal justice system effective workings and consequently a real endangerment for the community safety. Odd as it may seem, the reality is quite the opposite, because as argued by Harfield (2009: 335) 'a sound basis in human rights will deliver effective policing which will, in turn, protect and promote human rights for the whole community'.

Summarizing, it could be argued that fewer entitlements to the defendant certainly would trigger a better (perception of) safety through the expected increasing of convictions and imprisonments (as wanted by *crime control* model). On the other hand, nobody can deny that lacking guarantees means more possibility of justice's miscarriages. The conclusion of this essay is that effectiveness and guarantee represent the two faces of the due process. They are only apparently conflicting. These two factors must be equally taken seriously by the agencies and institutions belonging to the criminal justice system. None of these elements can be overlooked or overestimated; otherwise the public interest will be harmed, either by convicting an innocent or by releasing the true criminal.

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