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A THEORETICAL DEBATE ABOUT INNOVATIONS
IN THE THEORY OF PUNISHMENT

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Pre-emption and punishment in the risk society: a theoretical debate about innovations in the theory of punishment

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1. Introduction

This paper will discuss two ideas that have long been established and consolidated in criminal law theory: the first is the idea of an intrinsic link between punishment and its pre-emptive effect and the second represents the intrinsic link between punishment and the infliction of suffering. It will address the possibilities of rethinking them in the theoretical field, considering that in a moment in which it appears to be important to re-discuss the role of the criminal law system in contemporary societies, having dogmatic ideas does not contribute to the debate about how the justice system can help be a solution to social problems.

In a society of risk, when guaranteeing security becomes a social demand central to the justice system, pre-emption also becomes a key concept. As we face great risks, the aim of our institutions is said to be preventing the occurrence of harm and not merely reacting to it for the purpose of ascribing culpability and meting out punishment.

The pre-emptive goal regarding these risks has also become a crucial one for the criminal law system, which has in itself the structure of intervening after the proscribed conduct has occurred and apportioning guilt and punishment. The demands of security play an important role in the contemporary phenomena – seen in most western societies – of the expansion and overburdening of the criminal justice system. And they also underscore the importance of achieving pre-emption through the criminal justice system.

It is certainly widely debated whether this system is able to deal with complex contemporary phenomena. I will say nothing further about this debate. I will start with the premise that a lot of conduct related to the risks we want to avoid have in fact been dealt with by the criminal law system. And from this perspective, I aim to discuss the role and function of punishment: how it has been understood and justified until now – as I said, presupposing an equally strong link to pre-emption as to suffering -and how these ideas may be reconsidered within a theoretical discussion. In other words, I will explore the theoretical possibilities of reframing the discussion about the answer of the criminal law system.

Aiming to reflect on the current theoretical moment with regard to punishment theories, this Article focuses on examining the thinking of the two authors – Günther Jakobs and Klaus Günther -and the points that can be considered innovative in their formulations.

I explore the idea, which appears to be innovative, of assigning punishment a role that is essentially communicative. The German legal scholar Günther Jakobs first articulated this concept in the criminal-law doctrine at the end of the 1980s. I will succinctly discuss how he develops his argument; his theoretical gains and flaws.

Jakobs always maintained the idea of punishment as communication at the core of his theory, but he held different positions regarding the status that the social effects of prevention would have on his theory of punishment. This text specifically addresses what we can term the second phase of his thinking – represented by the works Society, norm and person in a functional...
criminal theory (JAKOBS, 1996) and On the theory of punishment (JAKOBS, 1998) in which he develops the idea of communication more radically and put aside its necessary relation to pre-emption.

I will demonstrate that Günther Jakobs does not however extract the possibly innovative consequences of this idea. Next, I present the thought of Klaus Günther – philosopher and legal scholar linked to the Frankfurt Social Research Institute and to the tradition of the critical theory – who also uses the idea of communication as the output of the procedure for attribution of guilt, but he manages to show the potential of this idea to think about punishment today and its alternatives.

Considering that theoretical innovations play a great role in making possible or influencing innovation in policies and in institutional designs, the denaturalization of the function of criminal law as a necessary pre-emptive instrument on the one hand and, on the other, an instrument that acts through the infliction of suffering, raises the question about the role of the criminal law system in a society of risk and creates space to think about different paradigms, other than the mere infliction of suffering.

2. Theory of Punishment in Jakobs: Punishment as Functional Communication

Punishment is always a reaction to the violation of a norm. Through the reaction it is always demonstrated that the norm should be observed. And the demonstrative reaction always occurs at the cost of (that is, by the loss of the right to) the responsible party for having infringed the norm. (JAKOBS, 1991: 8)

Jakobs formulates this concept of punishment for the first time, in his Manual (1983). Using a theoretical point of view, he does this through a reinterpretation of elements from the Hegelian concept of punishment and from the Luhmannian idea of normative expectations. I will have time here to address neither to the nuances of Jakob’s thought nor to the conceptual movements that he himself makes throughout his work. I will present his central point, linked to the idea of punishment as communication, which is also the idea that I want to focus on in his work.

Social interactions take place only because one can rely at each moment on a certain expectation of the other person’s behavior. In other words, to initiate a social interaction is to trust that it will not have an indefinite outcome. In the context of social interactions, a deviation from the range of expected outcomes affects the expectations that the other part will respect the valid norms. So, when this expectation is not met, a conflict arises in which the model of expected behavior is put into question. The violation of the norm is the deviation from the expected conduct. The violation of the norm is, in other words, a challenging of the norm that creates conflict by questioning it as a guideline. The violation of the norm is essentially defined not by a conduct that produces concrete effects in the material world (e.g. not by the injury or by the damage caused), but by its meaning in relation to the meaning of the norm (JAKOBS, 1991:9-13).

As well as the violation of the norm, punishment should not only be considered an external factor – from which it would only appear as an irrational succession of two evils – but by its meaning: it communicates that the significance of the transgressor’s conduct is not to be considered and that norm should still be considered to guide everybody’s behavior. It is therefore a reply to the violation of the norm that is defined by its communicative function, although it is exercised, according to Jakobs, at the expense of the perpetrator. Violation of the norm and penalty must be both understood as communications about the validity of a norm. (JAKOBS, 2004: 495).
In other words, the perpetrator affirms the non-validity of the norm, but the penalty confirms that his/her assertion is irrelevant. That is, the penalty affirms that the reason for the conflict is the violation of the norm by the perpetrator and not the victim’s expectation that the norm must be followed. Thus, the penalty enables the norm to continue working as a suitable orientation model. The mission of punishment is to reaffirm the validity of the norm and thus maintain it as an orientation model for the social contacts. (JAKOBS, 1991: 13 e 14)

As the core of the violation is the communicative result in the sphere of social expectations, in Jakob’s theory, the meaning assigned to the penalty is fully connected to such a non-material characterization. The penalty is meaningless in relation to the possible damaged goods by certain conduct; it will not restore the damage to the victim. Its primary effect regards the validity of the violated norm. In short, the key to understanding punishment in Jakobs' theory is the idea that the punishment's function is to interfere in the sphere of the validity of the norms, rather than in the sphere of external and concrete effects.

For this reason Jakobs criticizes the preventative definitions of penalty. They focus on the effects that penalty exerts on the individual perpetrator or on the potential ones and end up not paying attention to the damage that the fact has on the social validity of the normative system. Given that for him the penalty is a communication process, its concept should be focused on communication itself rather than on the reflexes and the psychological repercussions of communication, which may be desired, but they are not part of the penalty concept. (JAKOBS, 1998: 33)

According to this view, the role of the criminal law system is therefore not to manage or immediately regulate conduct through penalty, but to protect in society networks of normative expectations that are fundamental to its functioning. Although Jakobs does not discard the possibility that a penalty can have specific or general preventative effects, they should not be used to justify the penalty or to define its function. According to him, it is possible to connect to the penalty certain hopes that positive consequences of social or individual psychology are produced -for example, the hope that fidelity to the legal system is maintained or solidified by means of the penalty. (JAKOBS, 1996: 18). But the consequences of social or individual psychology that it can possibly produce do not affect the core of the penalty theory. They are neither in its meaning, nor in its function. They are secondary and incidental.

This communicative understanding of the penalty is central to his thinking. It is true that the other formulations regarding the preventative effects of the penalty, also presupposed social communication processes by the penalty. But it only represented a means to achieve social effects of prevention. Here, differently, the end of the penalty lies in its very own communication. This is what I consider innovative in regards to Jakobs.

Meanwhile, even confirming penalty as communication, Jakobs continues defending that its implementation should not only be given as linguistic or symbolic communication, but also as deprivation of the perpetrator’s means of interaction. And this would be necessary for Jakobs because the perpetrator of the norm, by his conduct, have not only meant something, but also set up something in the concrete sphere (e.g. not only affirmed that one should not respect someone else’s life, but destroyed it). The significance of his conduct appears not only at the symbolic plan, but also at an external and concrete plan. Hence, he explains, a response only to the symbolic plan would have a lesser extent than the fact. (JAKOBS, 2003: 53).

Although the concept of penalty is related to Jakobs only to communication, in reality, he says, it is not enough to contradict the perpetrator. In the implementation of the penalty there is also the concern about the likelihood of further breaches of norms does not increase so that people do not doubt the reality of the legal system and fear for their interests. (JAKOBS, 2003:54)

However, Jakobs never managed to satisfactorily reconcile this position with his own communicative formulation of penalty.
The assertion that the penalty always needs to be materialized through deprivation and suffering discords with the whole road that Jakobs was drawing up until now. It deviates him from all of his effort to place the penalty in the plan of significance together with the concept of violation and validity of the norm.

Jakobs does not seem to have succeeded in bringing his own functionalist vision regarding penalty to the latest consequences. He continued stuck to a fixed configuration of punishment, not necessarily guided by his own idea of functionality. If we follow his own functional model, the form of communication of the penalty should be defined according to the criteria of functionality. That is, the form and means of punishment's implementation should be defined according to what is appropriate and sufficient to stabilize the violated norm in that concrete society. In other words, the means of communication should vary in relation to each concrete circumstance in each society (e.g. one society in certain circumstances may need harsh penalties to have efficient communication and stabilize the violated norms, while in other society or in other social circumstances maybe only the attribution of guilt made by the sentence would be enough to accomplish the communication that contradicts the perpetrator's message).

By setting a priori that the communication of the penalty should happen by material coercive means, Jakobs seems to be introducing in his theory, against his own principles, a dysfunctional fix element. Moreover, in maintaining the penalty's intrinsic nature as a suffering, Jakobs places loses the potential innovation of his communicative structure of attribution of guilt.

Until Jakobs, the crime and punishment pair was always presented in a material way and if the idea of a symbolic or even communicative potential of penalty had been thought of, it was never autonomous. That is, communication had not been considered an end in itself of the criminal law system, although, in some cases, the means to achieve social effects of prevention. The definition of criminal response as communication that stabilizes the normative system, given by Jakobs, could be used to liberate the process of attribution of guilt from achieving cognitive preventive effects. It represents a significant shift in the debate about the response to the criminal justice system: in the theory of punishment it is the first time since the overrun of the retributivism that the attribution of guilt breaks away from the function of guaranteeing public safety. As I will show, this opens space to think beyond penalty. However, Jakobs does not go further for not having noticed – or not having wanted to admit – that his communication framework, in defining the response of the criminal system as communication, made superfluous or at least contingent the need to respond through penalty, that is, through deprivation of perpetrator's means of liberty. In affirming that communication by the criminal law system should be made through deprivation of the perpetrator's means of liberty, Jakobs ends up close again to the traditional definitions of penalty and loses what would be a functionalist gain in his own concept: that the form of the communication that stabilizes the norm is contingent and it could possibly be made without suffering.

This view also binds again attribution of guilt to the goals of security through prevention in its various possible means. His theory's assumptions that penalty is defined only as communication and that cognitive effects that are related to it are secondary, made this relationship contingent. That is, the attribution of guilt should not necessarily carry out the role of guaranteeing public security in a society. These two issues could be think independently.

If, from the side of public security, the unilateral treatment of the problem by criminal law is already in question, it has been more difficult to think about the attribution of criminal guilt disengaged from this objective. This disengagement allows us to think about the social meaning of imputation of guilt itself. On the other hand, it would allow that a problem as complex as the one of public security and prevention of crimes to be effectively discussed without having the criminal law and the punishment on the front line, that is contemplating other institutional alternatives. I am aware that the simple release of this knot alone does not necessarily change the landscape of
penalty in contemporary societies. But, perhaps this has been one of the few times that a door opened in this theoretical field to rethink the relationship between attribution of guilt and prevention/public security. The communicative definition of punishment exactly enables the questioning of such a natural connection (and virtually unquestioned, at least since the emergence of penal utilitarianism), but it is Klaus Günter who carries this argument to the latest outcomes.

According to the traditional framework of the criminal theory, talking about attribution of guilt to a perpetrator for an act deemed unlawful is equivalent to speaking, simultaneously, about the enforcement of a punishment. The decision regarding guilt is traditionally seen as simply the prerequisite that authorizes the State to apply a punishment. We saw that Jakobs, while he has innovatively given the definition as much to crime as to the response of the criminal law system in communicative terms, he did not depart from this traditional view that claims the natural link between guilt and punishment.

Thus, it is Klaus Günther, philosopher and legal scholar linked to the Frankfurt Social Research Institute and the critical theory tradition, who articulates for the first time one of the most relevant consequences of the understanding of attribution of guilt as communication: he affirms the independence of communication of guilt in relation to punishment.

He questions, therefore, the datum, practically seem as natural, from which a response from the criminal system is necessarily the punishment. If the function of criminal law, as Jakobs already articulated, is to communicate the norm’s validity, the attribution of guilt presented in the sentence already does this, says Günther. For the communication of the sentence to be followed by another consequence, which can be a penalty, it is necessary that this have another function, different from the function of the sentence. It must be justified in another way.

Günther departs from a Habermasian concept of communication, which involves an understanding of it in linguistic terms. Therefore, he is able of recognizing in the sentence itself the communication of responsibility. Ascribing responsibility is for Günther a social practice with a very important social meaning in itself: it expresses an important social decision; the decision of choosing this way to explain an event, among a large range of possibilities available – for instance, coincidence, fate, accident, victim’s own behavior etc.. The attribution of responsibility itself organizes the web of facts and social interactions involved in the event and give them a social meaning – it was caused by someone’s wrongdoing and not by fate, accident or lack of attention by the part of the victim. In short, Günther sees an important social meaning in the communication of individual guilt that happens in the moment that the judge gives the sentence. He does not cogitate, like Jakobs, that guilt will be communicated by the exercise of coercion or suffering on the perpetrator.

Recognizing that the communication that stabilizes the norm happens at the time of the sentence is not equivalent to saying that the state reaction to the conflict should exhaust itself in this. The sentence, says Günther, opens space for discussion by the citizens about other possible forms of state reaction to the conflict, for example, victim’s reparation or the perpetrator’s re-socialization. The important thing is to realize that these other forms of state response stand out from the attribution of guilt and should be justified by having another function. If none of these examples provided by Günther could be called a punishment because they don’t have the character of infliction of suffering, this does not mean that he discards that a society may want, beyond communication of guilt, to have punishment. Günther only draws attention to the fact that this deserves a rational justification different from that which explains the decision about attribution of guilt.
In other words, unlike Jakobs, Günther says that the punishment as an infliction of suffering is superfluous to communicate guilt, since the sentence has already done that. This alone does not exclude that punishment can have some other meaning. It involves only in this sense that it has to be sought after. Günther dedicates himself to analyzing the meanings already attributed to punishment (GÜNTHER, 2004 and 2005). He launches into the formal and informal public spheres and compiles the arguments that until today were raised in favor of punishment. He concluded that none of them would resist to a rational criticism. I will not have space here to address Günther’s criticisms of punishment theories. It appears that this is precisely the debate that he opens. We can consider that, in this moment, Günther is one among many voices that can speak in favor or against punishment as infliction of suffering. This is an exercise that should be made by all citizens in a Democratic State.

What I would like to emphasize as Günther’s contribution to discussion in the criminal law field is that the concept of communication that he removes from the Habermasian reconstruction and his own concept of responsibility – that I just had time to summarize here -allow him to recognize a social communicative meaning in the attribution of guilt itself that gains autonomy and ceases to simply mean a requirement for the application of punishment.

By demonstrating the separation between communication of guilt and punishment, Günther denaturalizes the connection between them. If after the communication of guilt there will be another type of response of the criminal system is something to be reasoned and politically decided by the citizens and thus rationally grounded. It is in this moment that they can decide on the relevance and the “justice” of other forms of state intervention after the public recognition of guilt: repairing victims, offering re-socialization opportunities and even punishing.

In disengaging guilt and punishment, Günther points out the need for a discussion about the grounds and the reasons for punishment to be taken seriously. Punishment is not seen as a natural result of guilt and, therefore, the discussion about its reasons cannot be obscured by arguments regarding the justification of the attribution of guilt.

In a democratic free society and in ideal conditions of democratic deliberation, there would be punishment only if it is rationally justified by the best argument. To which extent each society is more or less close to these conditions of the democratic debate is something to be considered in each reality. What I believe to be relevant in Klaus Günther’s approach is precisely the fact that, in showing that there is not an ontological connection between guilt and punishment, he reopens the debate about the meaning of punishment. If it is no longer the natural response of the criminal law system, we should discuss in the democratic public sphere if and in which extent we need it and which are the rational arguments that ground it.

4. Bibliography


