CRIMINAL POLICIES AND CITIZEN SECURITY
DURING THE GOVERNMENT OF RAFAEL CORREA

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Summary:

In Ecuador a combination of mecanisms has been generated during the last nine years with which the State has addressed the phenomenon of crime, criminalizing the lower social stratum of society and organizations and social leaders, and overexposing in the media criminal cases with a clear vision of criminal populism, which has led to a relaxation in the implementation of the constitutional guarantees of the due process during the pre-trial and trial phases in criminal matters.

By way of precedent

The governmental program of Rafael Correa presented at the beginning a developmental proposal with five action points for the radical transformation of Ecuador which were reflected as: Constitutional Revolution, Ethical Revolution, Economic and Productive Revolution, Educational and Health Revolution, Revolution for Dignity, Sovereignity and Integration. (Larrea: 2009) During his inaugurational discourse of the Constituent of Montecristi the President Correa appealed to establish “socialism of XXI century” in the country; the President of the Assembly Alberto Acosta defined the constitution as a Charter of Rights and Guide of the primary obligations of the State and public management (Acosta: 2008). None of them defined the process as a breakup with capitalism or the change of production patterns, at the most, some speak of a process of political transformations focused on citizen participation and the strengthening of the State as an entity that generates and executes public policies, returning again to the debate of State and democracy.

The lack of consolidation of the content of State, its structures and fundamentally its class character, means that the strenghtening of the State finally benefits those who have hold political and economic power unlawfully. The State converts then into an instrument of social coercion that produces and reproduces behaviours, practices and values coherent with the ideas of the dominant classes, hence, we cannot see it as an entity remote from society but as an instrument of social class.

The neoliberals worked to organize society as a business, redifining the role of judicial institutions and the rules of law. The legal frame was being reformed aiming at a more fluid and more efficient functioning, loyal with the market. Hence, democracy, the State and the laws were reforming their form, leaving their essence of class unharmed. When we believe that capitalism has singularities that permit its transformation and we renounce cientific laws of development of history, we firmly believe that capitalism can be reformed, and leave it to judicial processes that permit the social regulation and redistribution of wealth. We give a “revolutionary” role to laws, but we are ignorant of the material essences of the system, human beings and their relation with production. This vision can then lead to a process of important judicial reforms, but at the moment of implementation it will have the limits of economic structures, and taking this into account,

various academics can only justify their mistake withe the criteria of lack of “judicial culture” of the administrators of justice.

This political process in our country has linked the policies of social incentives, known as passes, a process of administrative reforms spread over the State structure, the legal reforms that are strengthening the role of the State (upper class obviously), affirm its coercive power, control the administrative processes, reorganize and affirm the labour legislation to improve the production, especially of raw materials.

From this conception development depends on the public institutions, but these are created and transformed in the context of the political system. Due to this, we can affirm that the economic, human and social development depend on the existence of political institutions that facilitate an effective representation and permit the public control of politicians and leaders. The so-called alternative governments are characterized by generating mecanisms that control the opposition, primarily popular, criminalize the struggle and generate values which in the near future permit the social disciplining; they use the giving up of dialogue, police repression, disqualification, militarization of civil life, criminalization of the social protest, arbitrary detentions, violations of the proper trials, comparison of social fighters with criminals, aggravating the accusations and the banning of protests. This judicial machinery not only affects the opposition but targets in general to criminalize the socially dispossessed sectors, to whom its practices or social stratum are out of the moral and social values of the “citizen” process.

After eight years of government, and nearly seven with the new constitution in place, a question is legitimate: The policies of citizen security have achieved that the criminal justice is more social, or, to the contrary, have convetid the social politics into more punitive?

“A society in which the security is converted into a fundamental value is a paralized society, incapable of assuming the possibility of change and progress, the minor risk.” Muñoz Conde, Francisco

We cannot understand the complexity of the criminal justice system if we conceive it just as a system of social contro, this vision is unilateral and incomplete; the criminal law is an expression of political power (BUSTOS:1987), it expresses a model of society; various authors have identified it even as a “seismograph of the Constitution”.

The present article has the objective to analyze the coherence of the COIP with the Montecristi Constitution, aand the possible change of constitutional paradigm which would take place with the approval of this legal norm.

Guarantism vs. Punitivism

Our Carta Magna has as core focus the discourse of rights, allowing for the opening of courses, the establishment of mecanisms and the precision of demands to guarantee the compliance of these rights (WILHELMI:2008). This constitutional paradigm develops the fundamental rights, beyond the individualizing Kantian concept of the human dignity, covering communities, villages and nacionalities (CRE:Art.11.7); giving particularities to the text which are part of the area andina, such as the concept of Sumak Kawsay.

The leading role given in Montecristi to the fundamental rights implies the protection and realization of the same, in their objective as well as subjective sphere, defining them as “the law of the weakest” (FERRAJOLIO:1999), and giving the obligation of their compliance and protection to the State.

The criminal law which originates under own Constitution should establish a punitive minimalism (AVILA:2013) and guarantee the rights of the accused nd the victim, assuming this

way a double function of human rights: as limit of criminal intervention and as object of protection of these (BARATTA:2004), this way, the logic of traditional criminal law would have a change in vision, it would convert into an instrument of containment of punitive power of the State, of dissuader of private revenge; the punishment would not be seen any longer as rewarding the damage nd would be assumed as the last mecanism of solution of conflicts, mecanisms that are alternatives to the traditional instruments of criminal justice would be established at the same time as mecanisms of comprehensive reparation to the victim.

With the moment approaching where we will have a Organic Comprehensive Criminal Code (COIP) we will be able to confirm that each time the growing apart of the security discourse from the constitutional postulates becomes clearer.

The construction of the COIP expressed the Government´s turn to the right

The constitutional changes generated the obligation to have a legal frame consistent with the Carta Magna, and to establish the Ecuatorian laws of the judiciary under the structure of a constitutional State of rights and justice. This made a group of academics and jurists linked to the Ministry of Justice and Human Rights propose a draft bill of Criminal Guarantees to the country which was published in December 2009 by this ministry with a prologue by the Argentinian magistrate Eugenio Raúl Zaffaroni.

Amongst the most important elements of this work, the following need to be mentioned:

- A system profoundly guarantor which establishes mecanisms that strengthen the principle of innocene and indubio pro reo.
- Devolution of the conflict to the victim, granting the exclusivity of the ownership of the penal action.
- Preventive prison seen as the exception which could only be pronounced if the person called to trial has failed with the other precautionary measures.
- Considerable reduction of penalty to ensure the proportionality of the penalty to be consistent with the legal good damaged, and establishing a maximum period of ten years of deprivation of freedom.

The Public Consultation fo 7th March 2011, embodied a process of constitutional changes which led to the – exceptional - elimination of preventive prison, the limitation of the autonomy of the judicial function amongst other issues. This fact, added up to the political changes in the structure of the cabinet and the events such as the 30-S caused the closing the file on the draft bill in the Ministry and the construction of a new project of Law, the same that was presented to the Nacional Assembly by the ex Minister of Justice Johana Pesantez with the signature of the President Rafael Correa in October 2011(ANDOCILLA:2013).

This project was the basis the Assembly used to prepare the Organic Comprehensive Criminal Code (COIP), the same that after two years was passed, in the middle of a difficult situation due to the requirements of the GAFI, and later various of its articles were reconsiderated.

How to define the COIP in the actual moment?

The legal standards express the character of the government and the assembly that issue them, its correlating forces and the contradictions existing inside. The process of passing the COIP proves this, the confrontations of the thesis inside the Alliance PAIS had to be resolved by

the proper President of the Republic, as was the case with the decriminalization of abortion in circumstances of violation.

The judicial body mentioned before synthesizes the modernized thinking, authoritarian and populist, around Correa, expressed through:

- Modernization of the theory of crime: Nobody can deny the process of modernization of the criminal dogma which the new Code has with respect to the previous one. Figures such as the duty of care in the culpable crime, or the position of the guarantor in the omitted type are examples of it, and it is clear that the modernization with regard to the previous one is not more developed than in other legislations and errors such as the culturally conditioned ones are not taken into account, etc. These progresses are incomplete as they mix schools (of thought) and conceptions, which leads to a finalist genuineness, a causal anti-legality, a finalist guilt and risk crimes which belong to post-finalist conceptions.

- Expansion of the punitive power of the State. An authoritarian conception of the State is confirmed, reflected in the increase of criminal types, penalty periods and the relaxation of the procedural garantees, for example: the establishment of four to eight years of socioeducationl mesures for children and adolescent offenders; the increase of maximum penalty to 40 years, which in the case of an adult of 30 years or more would in practice mean a life sentence; the judicial arbitrariness is registered as well when establishing that a judge can oblige to other additonal mesures added to the deprivation of freedom without limit in time, such as the suspension of the custody amongst others; the establishment of a very dangerous accumulation of penalty, in which any common theft who robs four times a month – adding up the crimes – could without any problems be sentenced to 8 years of deprivation of freedom.

- Criminal Populism and symbolic crime types. The populist discourse on crime establishes as a fundamental element the normative solution to social problems, with this frame an increase of punitive power of the State is being justified. The decrease of criminal guarantees and the construction of a social enemy who has to be persecuted without contemplations, can even justify disappearances or executions with the pretext of citizen security.

As a conclusion, the words of Dr. Ramiro García Flaconí in an interview in the newspaper Commerce in which he states: “They are handing over a police State which goes against the constitutional State of rights” (EL COMERCIO:2013).

The criminalization of the Protest as State policy

After realizing an empiric analyses of the long list of criminalization of the protest which originates in Dayuma, the workers of the Public Post Office Enterprise, and recent cases of 21 from Saraguro, 7 from Pastaza, 10 from Luluncoto and the kids from the Montùfar college amongst others, we can conclude that the country has witnessed a systematic and persistent process of criminalization of the social protest with some characteristics that can be summarized as:

1.-) Application of the illegitimate criminal regulations that were incorporated into the national laws of the judiciary through the Supreme Decrees of the Dictatorship.

2.-) Application of the open criminal rules, loose, which did not allow to clearly differentiate a punishable behaviour from a non-punishable one, leaving the establishment of the criminal responsibility of citizens to the judgement of the judicial authority.

3.-) Disproporcionality between the acts and the criminal rule called on for the sanction.

4.-) Interference of the executive function in the judicial decisions, presence of the officials of the Ministry of Home Affairs and Justice in the hearings, persistent mediatic campaigning by the executive power against processed social activists.

5.-) Inconsistent probationary standards which left the assertion of what had happened, the causal nexus between cause and effect and the participation of the processed in the events to the discretion of the judge.

It is worth remembering that the criminal route is not the best to resolve conflicts, the social claims are in the end political and not judicial problems; take them to court only achieves a social coercion, where the accused leaders are a type of guinea pigs (laboratory) to discipline the rest of the social collective, developing this way the premises of the systematic functionalism of Luhman who assigns the function of general positive prevention to the punishment, hence confirming the validity of the State and its government and affirming the symbolic function of the criminal law.

REFERENCES

ACOSTA, Alberto; *Bitacora Constituyente*, Ed. Abya Ayala, 2008

ANDOCILLA, Vladimir; *En la legislacion penal: los afectados son las personas*, www.lalíneadefuego.info, publicado el 07 de agosto del 2013 y visitado el 06 de diciembre del 2013

AVILA, Ramiro, *Entrevista en Radio Visión* con Diego Oquendo 13 de diciembre del 2013

BARATTA, Alexandro, *Criminologia y Sistema Penal*, Montevideo, Editorial BdeF, 2004, p.299

BUSTOS RAMIREZ,Juan; *Control Social y Sistema Penal*, Ed. Promociones Publicaciones Universitarias, Barcelona1987, pg.16

El comercio, 13 de octubre del 2013, Sección Política.

FERRAJOLI, Luigi, *Derechos y garantías. La ley del más débil*, traducción de Perfecto Andrés Ibáñez y Andrea Greppi, 3a. ed., Madrid, Trotta, 1999

LARREA, Gustavo; *Revoluciòn Ciudadana*, Ed. Planeta, 2009.

MUÑOZ CONDE, Francisco; *De nuevo sobre el "Derecho penal del enemigo"*, Ed. Hamurabi, Buenos Aires, 2005, pag. 72

WILHELMI, Marco Aparicio, Derechos: enunciación y principios de aplicación en *Desafios Constitucionales la constitución ecuatoriana 2008 en perspectiva* (Ramiro Ávila, Agustín Grijalva, Rubén Martínez. Editores), Ministerio de Justicia y Derechos Humanos, 2008, Quito, Pag. 20