RULE OF LAW & STATUS OF NON-LAW: challenges to human emancipation in the contemporary prison system

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The Democratic Rule of Law in contrast to the national prison

At the sight of the Middle Ages, at the stage of the formation of national monarchies (exponents: Portugal, Spain, France and England), leaving for the Modern Age - Colonialism (exploration and settlement mainly of the Americas), Absolutism (total power in the hands of the sovereign) and Enlightenment (avant-garde of reason as a parameter for understanding the world), one can better support gnosis about Power.

Power was and continues to be, in contemporary democratic countries, the core of the non-parity development of different political-social organizations, showing itself as an instrument for defining courses and imposing decisions that modify or reinterpret symbolic spaces (affirmation of immaterial signs definers of identity), physical (disposition territory of organizations and their signs) and abstract (exercise defining knowledge of political movements of organizations).

Power, an institute of symbology, abstraction and impact , concrete or physical, is for the hegemony and for the dominion of humanity over the things of the world and, even over specimens of the species itself, to what is revealed as a way to reach the thinking that underlies the current institution of the State (the so-called representative of the power held by the people), qualified as de jure

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and intensified as democratic, for the contemporary age of political institutions (MONTESQUIEU, 1979; LOCKE, 1994, DIDEROT and D'ALEMBERT, 1755).

The Democratic State of Law , in the political-social-legal context, is seen as an expression of a complex cut in the face of the multiplicity of communicant elements. However, one can start from Constitutionalism to think about the denoted object.

What is Constitutionalism for ? It is said that to stop, to limit the Power today centered in the corporature of the artificial being of the State. And how does such a brake come about? The brake on the performance of state power is given by the institution of a political charter or constitution that reveals the duties and responsibilities of managers, agents and public authorities towards society. One can point out, as a splendor of the movement, the United States of America, raising the Paramount law (peak law) and the possibility of judging the subordinate laws based on the text of the elevation or summit law (ZOLLER, 2009; BONAVIDES, 2008).

The key idea for the Democratic State of Law is born as a force of the multifaceted movements of history for greater emancipation of the human being against the domain of elite minorities, of specific and hegemonic groups, it is important to affirm that the State is an institution at the service of society, that the Law authorizes and limits the political action of the State and that Democracy is the systemic, founding and qualifying element of the entire political institution of the State (BONAVIDES, 2008; NADER, 2003, emphasis added).

It should be noted that the portion of state power that is concentrated in the hands of penitentiary authorities or prison managers can easily be used to make up or deny systemic and historical problems of deprivation of liberty units in Brazil, when in social questions, from media groups or from public authorities who may eventually receive formal data from the criminal administrations adjusted to the law, but materially divergent from the reality felt by the incarcerated people. Therefore, the effective

(physical presence for vigilant eye perception) performance of the criminal enforcement bodies (National Criminal and Penitentiary Policy Council, Execution Court, Public Prosecutor's Office, Penitentiary Council, Penitentiary Departments, Patronage, Community Council and Public Defender's Office) in the physical environment of prisons, in order to compare formal data with factual reality so that the minimum fundamental guarantees are applied or the restoration of rights that may have been violated are claimed.

The system prison and national penitentiary, explicit due to the blatant violence against rights and people, reaches, within the current framework of 34 (thirty-four) years of democratic rule of law, the declaration, recognition of an unconstitutional state of affairs (Arguição de Descumprimento of Fundamental Precept - ADPF No. 347/PSOL).

The unconstitutional state of affairs , partially recognized in a precautionary measure by the Excellency Court of Brazil, aims to promote the practical adoption of measures, by all State entities, converging to remedy injuries to fundamental goods of extreme violation in Brazilian prisons.

The unconstitutional state of affairs , briefly, is made in the excess of negative and serious records of violations of minimum rights, the subjective and public basic norms, in certain social sectors, in casu , it is defended, in the Allegation of Noncompliance with a Fundamental Precept referenced , that violations of rights in the system prison and penitentiary are unsustainable in the Democratic State of Law .

There are many implications of a vilifying order of the human condition in an environment of execution of sentences, and it is not the main object of the debate to address and scrutinize all the vectors and reflex elements, but those of a basic core that radiate effects to the entire physical and symbolic structure of incarceration.

The explanations advanced here should not be taken as a defense of impunity for the fact considered criminal offense, nor the defense of immoral, arbitrary practices that undermine democratic and republican values and national good customs. All elements in the orbit of the underlying cause are defended as points of reflection and criticism of the loss of good zeal for human nature and the concern for the due applicability of constitutional and legal norms, largely ignored relatively or absolutely in certain concrete contexts (eg , the prison), regardless of any overweight of conduct negatively evaluated by the political or social body.

Abnormality and exception states and the locus prisoner

The Rule of Law is scintillating to the shelter of legal and constitutional goods (CANOTILHO, 1999). The institution is averse to arbitrary, cruel, inhuman and non-supportive laws of groups with less representation (eg political, social, cultural, economic, ideological minorities, et cetera). The institutional figure, likewise, denies fulminating State acts of good law (written rights and guarantees), of apocryphal and tendentious public discourses to legitimize practices of non-law and disrespect for beacons and public-legal parameters to the performance of justice to the conformation of the binomial legality and equality.

The State of Non-Law asserts itself contrary to the Rule of Law, signaling the first as a legacy of absolutist states and the second as a consequence of the modern State not positioned in favor of arbitrary or unlimited power. The states of abnormality and, especially, the states of exception, engender scenarios of non-law or of relative or absolute distance from the incidence of the Rule of Law , thus mirroring the rancidity of periods of the State of Non-Law in the face of the possibility of mitigation, relativization , suspension or even loss of rights, made possible by insurrection and the eventual institution of a new political order.

Notes regarding the scenarios that keep with them possible conditions of conditional or unconditional removal relative to public rules or rights, are made on the figures: a) emergency

situation (Decree n. 7.257/2010 , b) state of public calamity (Decree n. 7,257/2010) , c) federal intervention (art. 34, CRFB/88) , d) state of defense (art. 136, CRFB/88) and e) state of siege (ar. 137, CRFB/88).

It can be observed, in summary, that the circumstances of abnormality and exceptionality express the following remarkable particularities: a) in the emergency situation, there is support from the Federal Executive Power, when the Public Power's response is partially compromised by the entities affected by disasters; b) for the recognition of a state of public calamity , there is a substantial commitment to the Public Power's response to entities affected by disasters; c) with regard to federal intervention, this takes place in the prediction of certain scenarios and conditions and of potential commitment by the State, demanding the intervention of the Union in the states and in the Federal District; d) in the state of defense , there is a forecast of certain scenarios and conditions that lead to its enactment, being very sensitive issues and liable to limit rights; e) in the state of siege , certain scenarios and conditions are foreseen that lead to its authorization, being very sensitive issues and not harmonized with the declaration of a state of defense , which makes it possible to suspend guarantees and fundamental rights.

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