


Textes réunis par
Yves CARTUYVELS, Françoise DIGNEFFE,
Alvaro PIRES, Philippe ROBERT

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THE *DEMOCRATIC DEFICIT* REVISITED : CONSIDERING THE POLITICS OF CRIMINAL JUSTICE

Mathieu Deflem

*Was aber nicht einmal ein Volk über sich
selbst beschließen darf, das darf noch
weniger ein Monarch über das Volk
beschließen.*

Immanuel Kant, 1784¹

Nearly 40 years ago, C. Wright Mills described three roles sociologists can take up to link their academic work with issues of public policy². First, the philosopher-king stands for the model of the scientist who takes full command of the political agenda by virtue of acquired expertise and knowledge. Second, the royal advisor is the scientist who bureaucratically recommends the most efficient means for particular ends determined by the king. Third, in the role Mills advocated, the sociologist unites private troubles and public issues and is directed at kings and publics alike. Exemplary of Mills' stance, Immanuel Wallerstein recently argued that social scientists should be involved in the analysis of utopias, that is, the study of real historical alternatives to the present³. This endeavor would have to be executed through a public dialogue, the participants of which are to be determined by that very dialogue itself.

In what follows, I will argue that the propositions of Wallerstein and Mills have often haunted critical perspectives in the social sciences. Specifically, critical scholarship, also in the area of crime and criminal justice, has often remained

¹ Kant, 1784, 490 (*But what a people cannot even decide about itself can even less be decided by a monarch*).

² Mills, 1959, 179-181.

³ Wallerstein, 1997.

premised on the idea that the social scientist has privileged access to the world, in evaluative matters as well, thus failing to develop a democratic notion of the public use of reason, to which I will here devote attention⁴. I will not develop a critique of the criminal justice system⁵ but rather debate a standard by which its empirical forms can be judged. Particularly, I propose this standard to be rooted in a concept of democracy. This enterprise is as speculative as it is relevant for perspectives of criminal justice that are situated in a scholarly tradition committed to analysis as well as critique. This aspiration, as we know, is also at the heart of the work of the sociologist whom this book is devoted to. I develop my argument through a critique of the dominant sociological theories of democracy.

I - Perspectives of democracy

A system of government is called democratic when political rule is dependent on the will of the people. Sociological theories differ on the manner in which this relationship is to be conceived⁶. First, liberal theories emphasize the output capacities of democracies (political decisions) under conditions of citizens' formal freedom. This perspective holds that democracies should have productive economies and effective political systems in order to survive. Most famous of these approaches is Seymour Lipset's research on the prerequisites of democracy⁷. Lipset argues that democratic principles have to be secured in the constitutional rights of freedom and equality and should allow for the independent functioning of free market and state

⁴ Kant (1784, 484) described the Enlightenment as the public use of reason.

⁵ See this volume's chapter by Cartuyvels, Kaminski. Elsewhere, I have sought to substantiate the argument that certain contemporary developments in social control are rooted in historical antecedents, especially since the late-19th century (Deflem, forthcoming).

⁶ See, generally, Habermas, 1992, 358-361 ; Pettit, 1993.

⁷ Lipset, 1992, 1994. See also Berger, 1992 ; Fukuyama, 1992.

bureaucracy. The most critical factor for the acceptance of democratic rule is effectiveness: *What new democracies need, above all, to attain legitimacy is efficacy - particularly in the economic arena, but also in the polity*⁸.

Second, republican theories stress the input of democratic regimes (elections), manifesting the formal equality of citizens⁹. The democratic participation of the citizenry in shaping and legitimating political authority is emphasized. Legitimacy is secured through elections, competition between political parties, the rule of law, and the principle of majority rule. Most critically, the outcome of the electoral process, relying on competition between political parties and the rational calculus of political subjects, is the formation of a majority.

Liberal and republican theories both hold that a democracy can only be based on popular legitimation. But whereas the output model reduces legitimacy to systemic efficiency, the input model over-burdens the citizenry with the postulate of a sovereign rationality. Liberal theories posit that the state should only liberate the free market, while republican theories assume that the state reflects the common good of all.

II - A procedural concept of democracy

Liberal as well as republican theories of democracy abridge the role of civil society to mechanical acceptance, based either on the autonomy of systems or on a postulated sovereignty of the citizenry¹⁰. Whether curtailed to systemic (output) performance, or reduced to public (input) consent, these theories do not take into account the extent to which political regimes realize the democratic ideal. The liberal model reduces legitimation to the efficiency of capitalism,

⁸ Lipset, 1994, 17.

⁹ See Dahl, 1992 ; Pettit, 1993.

¹⁰ The following critique and propositions are mainly inspired by Durkheim and Habermas (Durkheim, 1900, 76-97 ; Habermas, 1981, 1992 ; see Ingram, 1993).

while the republican model curtails democracy to institutionalized electoralism. As such, these theories only manage to highlight the empirical correlation between democracy and capitalism and between democracy and the rule of law. But neither one of these theories develops a normative concept of democracy (though both theories have normative implications).

Against the liberal model, it can be suggested that political regimes do not survive because and when they are effective, but that they have to be legitimated, i.e. accepted as effective and desirable. Against the republican notion, it can be argued that government cannot be assumed to rely on consent, particularly not under conditions of a plurality of lifeworlds. Instead, democracy is a form of government which concerns, not the capacities of political decision-making, nor the multiple voices of civil society, but the connections between them. A procedurally understood notion of democracy emphasizes that between citizens and the state there should be *a constant flow of communication*¹¹. Thus, the conditions under which elections take place and political decisions are reached determine whether a governmental system is democratic or not. Hence, democracy does not refer to the realization of certain goals but to the institutionalization of procedures that make possible the free pursuit of goals without a predetermined direction¹². It entails the possibility of dissent and the promise to peacefully handle disagreements. Democracy is risky business.

III - Towards a democratic critique of criminal justice

The suggested procedural perspective brings out the specific qualities of a democratic rule of law. The rule of law should not be conceived as the establishment of certain laws,

¹¹ Durkheim, 1900, 91.

¹² As John Dewey remarks: *Majority rule, just as majority rule, is as foolish as its critics charge it with being... The means by which a majority rule comes to be a majority is the more important thing* (cited in Habermas 1992, 369).

neither the development of a system of rights on which laws should be based, but an institutional arrangement which allows decisions pertaining to law (from the legislative process to juridical proceedings) to be reached under the conditions of procedural justification. The rule of law itself, then, is to be understood as a procedure, its democratic qualities measured by the potential to allow a process of dissent rather than a state of consent, for otherwise democracy would become but a label for any governmental system with formal institutions. At the same time, it should be understood that institutionalized democratic procedures remain in confrontation with the necessities of state bureaucracies and the market economy. The citizenry remains susceptible to repression as a result of the structural forces of politics and economy and the unequal distribution of power and money as a result of those forces¹³.

A democratic perspective of criminal justice, therefore, understands the criminal justice system as the embodiment of a system of rules (criminal law) produced under conditions of a democratic political system. A first and necessary, but insufficient, requirement of democratic criminal justice, then, is that there can be no democratic criminal justice without democracy in government and law. The criminal justice system is imbedded within a political and legal system upon whose democratic qualities it remains dependent. Additionally, in its own constitution and operation, too, the criminal justice system can be measured to be more or less democratic. Specifically, relating to the workings of the criminal justice system, its means and procedures are to be democratically organized. This implies that the criminal justice system should remain open to the scrutiny of the citizens (accountability). Thus, only legalized from above and legitimated from below, a democratic criminal justice system is possible.

¹³ This critique of output and input theories of democracy parallels my earlier observations on systems and interactionist perspectives in critical criminology, structuralist and phenomenological abolitionism, in particular Deflem, 1994, 1995.

IV - The tasks of a critical criminology

There is absolutely no doubt that the main obstacle to a fruitful development of criminology remains, as has been the case for all too many years, the instrumentalization of criminological knowledge in service of the criminal justice system¹⁴. This is easily testified by the excess of criminological work that examines and evaluates blunt propositions dictated by various agencies of the criminal justice system. Thus, a critical criminology, reflexive of a society's constructions of and responses to crime, as well as of its own premises, today remains as desirable and necessary as ever before¹⁵. But a critical attitude, today often abused to imply a nihilistic cynicism, does not have to assume that everything existing does not work or should not be, nor would it have to presume that any critique goes¹⁶. What I have here attempted to suggest are the broad contours of a critique of the criminal justice system whose standards ultimately rest with the citizens whose well-being it is intended to benefit. I believe that critical scholarship to date has more often than not relied on certain premises and values to criticize existing structures and processes which were far removed from the realities of the public it once promised to serve¹⁷.

At the same time, critical criminologists should take into account, and carefully investigate the mechanisms that determine, that not all the people want is free from fabrication, that popular views on crime and its control are often made to fit official policies. Critical scholars committed to democratic ideals, while surely reluctant to proscribe an ideal, would not have to abandon all educational functions to

¹⁴ See Tunnell, 1995.

¹⁵ Van Outrive, 1995.

¹⁶ Marx, 1997.

¹⁷ Typically, for instance, the index to a recent (and illuminating) compilation of texts in critical criminology contains no single reference to democracy, Nelken, 1994.

inform, if not to train, the public. The dissemination of knowledge itself is not bereft of critical consequences¹⁸. But a democratically informed critical criminologist can dictate no more than can anyone else the desired direction the criminal justice system should take. Among the participants of society there are no experts.

¹⁸ Jerome Skolnick, 1995, discusses a move from *raw opinion* to *responsible public judgment* as the result of a dissemination of information. Informed judgment, however, need not necessarily imply a change in attitudes. For instance, research has shown that merely informing citizens about the death penalty does not automatically reduce support for this form of punishment, Bohm, Vogel, 1994.

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