

Legal Sensibilities and Implicit Filtering in the Administration of Second Degree Murder on Criminal Persecution

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Sentidos de justiça e filtragem implícita na administração de homicídios dolosos na persecução penal apresenta dados e análises preliminares de etnografia que compõe parte da minha pesquisa de pós-doutorado em andamento. Descrevo e analiso as lógicas que orientam a administração institucional da categoria "homicídio doloso" ao longo da persecução penal. A hipótese é que tal crime não tem um caráter imutável nem puramente legal, dependendo da valoração policial e judicial perante cada caso, motivando como devem ser administrados institucionalmente. O objetivo é expor algumas contradições da cultura jurídica brasileira, explorando os usos das sensibilidades jurídicas na análise de fluxo para tal crime.

Palavras-chave: homicídio doloso, sentidos de justiça, filtragem, fluxo, sistema

In this paper, I present some data and analysis of ethnography, which composes part of my post-doctoral research in progress. I describe and analyze the logics that guides the institutional administration of the category "second degree murder" throughout the criminal prosecution. The hypothesis is that such a crime does not have an immutable or purely legal character, depending on the police and judicial appraisal before each case, determining how these should be managed institutionally. The aim is to expose some contradictions of the Brazilian legal culture, exploring the uses of the legal sensitivities in flow analysis to such a crime.

Keywords: second degree murder, legal sensitivities, filtering, flow, system

Introduction

In this paper¹, a mixture of article and essay, I present some data and preliminary analysis which compose part of my ethnography developed, since the beginning of my PhD research, at three locations in Brazil: a Homicide Division at Rio de Janeiro state and a Homicide Division and the Judicial Forum of a municipality in the interior of Minas Gerais state. This way, in a preliminary moment, I describe and analyze the practice of police and judicial investigations in the identification, administration and clarification of felony manslaughters, questioning the fact that the Brazilian penal system is oriented by the principle of mandatory prosecution with inquisitorial characteristics, specifically the state's secrecy about its procedural actions and decisions. It implies a filtering system, implicit to all involved in the judicial process and also implicit to the law, legitimized by the unequal institutional treatment in the case of felony manslaughter throughout the accusatory procedure, in which such triage confronts itself to the constitutional principles of juridical equality and presumption of innocence, as well as confronts the ends of the penal prosecution in regulating the judicial process itself and the equal application of penal law to all people.



The definition of a research field

The beginning of this research was a matter of opportunity. Since my admittance as a PhD student in 2014, my intention was to continue my master's research about *Juizados Especiais Criminais*² (JECrims) at Rio de Janeiro metropolitan area³, where my ethnographic fieldwork took place for nine months. There, I observed case agreement sessions, public prosecution, and pre-sentence hearings, as well as trials. I contrasted the legal objectives of the JECrims and their practices, focusing on the analysis of the articulation between theory (as the natives in the law fieldwork describe it, legislation, and juridical doctrine) and judiciary practices on the field. To this analysis, I also quantified observed cases, crossing data on characteristics of the people involved, the conflicts and the kinds of outcome for each hearing, in order to verify the influences over outcomes of different hearings.

I intended, for my PhD, to accomplish a comparative study among other instances similar to JECrims, something I could not manage during my master: Civil Police's Precincts, at the very beginning of all JECrim procedure. This research was rejected in every police station where I tried to exercise observation, making it obvious that my stay in this field was perceived as some kind of espionage, as an investigator of investigators.

Only through the exchange of contacts with fellow researchers who already worked on this field and who possessed a network of relationships with high-ranked public security operators I managed to open my fieldwork at a police station. However, all interlocutors belonged to the Homicide Division at the Metropolitan Area of Rio de Janeiro state (*Divisão de Homicídios do Rio de Janeiro* [DHRJ]), involving 13 cities. This way, I "let the field define" my research focus (VELSEN, 2010, pp. 437-468)⁴, which lasts until the present moment, inside areas of my academic interest: the fields of criminal justice and public security.

However, my experience with the networks of legal social relationships would still have a twist. After a few months after at this DHRJ, the chief of that Homicide Division was substituted. This change was accompanied by a harder and harder stay at this field. New attempts to talk to the chief were made, unsuccessfully. As a consequence, I noticed a certain distance from the police inspectors and deputies. They denied a conversation more often. I persisted for over a month until, looking at an almost sterile environment for my stay and my research development, I decided to leave it.

At the same time, by chance⁵, I had been talking to a friend from my childhood who became chief of police at a Minas Gerais small county, who read some of my papers about how the police and the judiciary system operate. When coming across my current research on homicides, he invited me to conduct it at his own police station, since he was recently designated to the Homicide Division at Minas Gerais. This is how I began my ethnographic research at that Homicide Sector at the same year, on a weekly basis.

One of the motivations for the chief of police's invite was the sudden raise on homicide and attempted murder rates over the past five years, at the city where he works. He was unsettled by the large increase on felony manslaughter rates over 100,000 inhabitants, from 7.8 in 2009 to 29.8 in 2014, according to data offered by the civil police based on city records. It corresponds to an increase of 382% over that period of time. Although there is not a uniform police database to elaborate analysis on national scale, I point out that Brazil, in the period of 2009 through 2013, had an 8% increase on homicide and murder rates, according to DataSUS⁶. There is a discrepancy between the national numeric "evolution" of homicide and murder rates and the ones of the city in question, which reveals these rates to be interesting in a social and a sociological way.

In the face of fieldwork access to police records and inquiries, to the *Instituto Médico Legal* (Coroner's Office), to the digital record system of Minas Gerais state civil police and the possibility of interviews with agents from that police station, I defined the analysis of accusatory procedures on second degree murder cases, at a Minas Gerais state county, would become viable and promising to my PhD, because of the social network already established and also on account of my own experience on the analysis of criminal flow at JECrimis for my master's thesis.

On the following sections, I present my analysis and hypothesis through the field observations in Rio de Janeiro e Minas Gerais, respectively. In the end, I display my conclusions.

Juridical sensitivities and meanings of justice: contradictory logics and the principle of mandatory prosecution

On the present topic, I problematize the fact the Brazilian criminal justice system is oriented by the contradictory logics⁷ and by the legal principle of mandatory prosecution, characterized by an inquisitorial feature, specifically, the secrecy performed by the state over its procedural actions and decisions. It implies on a tacit filtration system of penal cases throughout the accusatory process, particularly on second degree murder cases, which is the object of analysis at the present work. Such triage is confronted with constitutional principles of legal equality and presumption of innocence, also confronted with the final objective of the criminal procedure towards the regulation of its own judicial proceedings and the application of penal law equally to all citizens.

In order to expose and explore such contradiction, I am guided, at first, by the comparative analysis by contrast⁸, a proper anthropological technique, as a way of thinking about how police records and judicial proceedings are constructed. Such method is particularly important to me, because of my original law background, since this form of comparison presents itself as a method to the search of knowledge about certain aspects of our own society, in other words, to find strange

what is familiar to us through this comparison with the other. About the subject, Roberto DaMatta (1987) points out that, when the study is aimed at our own society, there is a movement, similar to a self-exorcism, on which the social scientist must strip of his belonging to a social class, removing the member's cloak of a certain class and social group, and search for some familiar rule, unveiling the exotic petrified inside all of us (*Ibid.*, p. 28).

On the juridical field, Clifford Geertz (1997) proposes to understand law as a local knowledge, in which one should notice the juridical sensitivity of each field analyzed in contrasted comparison, identifying the logic that influences the workings of each system. Geertz's proposition is to compare differences in meanings, emphasizing institutional context and its local meaning. Juridical sensitivity is, therefore, the first factor that deserves attention of those whose objective is to speak in a comparative way about the cultural foundations of the law (*Ibid.*, pp. 253-254). His classic example about the variation on these sensitivities depicts that "facing anti-pollution laws, Toyota hired one thousand engineers and Ford, one thousand lawyers" (*Ibid.*, p. 259). One of the forms in which Western juridical sensitivities become explicit is, among several possibilities, in its juridical traditions, such as the *civil law* and the *common law* (KANT DE LIMA, 2010, p. 26).

From this premise, I imply that judicial traditions between the North American judicial system provided by the common law tradition—whose jurisprudence is its main source on the law—and the Brazilian justice system, derived from the civil law, however presenting *sui generis* characteristics. The choice is given by a significant share of the Brazilian juridical discourse that assumes the North American model is a guidance source to the workings of our juridical-penal system⁹, generating a tension between the traditional juridical discourse (based on an ideology originating from a state that highly intervenes on the judicial procedure, and also grounded on 1930s Italian law and inspired our current Criminal Code from 1930) and the modern juridical discourse (based on a state with a minimal degree of intervention over the judicial procedure, based on the current American model), on the application of penal law.

This way, the category "homicide" implies different perceptions regarding society and also juridical and police institutions, when it comes to Brazil and in the case of the United States. As a result, despite socio-juridical consequences and implications so diverse they would halt a comparison simply because they belong, at first, to the same juridical-normative category, it is possible to notice such category through local knowledge. It authorizes the comparison and the understanding of certain judicial aspects of our own society. It is important to notice such comparison does not aim to attribute more or less value to one of the systems, or to elaborate a proposition as to how they should work, but to expose some contradictions in Brazilian juridical culture, and how they affect the filtration and the institutional treatments before second degree murder cases in our penal system flow.

In order to undergo such study, and also to expose how the filtration of cases happens on the criminal flow of the penal system, I resort to Michel Foucault's class of March 21, 1979, in which the author analyses criminality from an economic perspective, highlighting the importance of the utility calculus of criminal justice before criminality, in which the penal reformists sought a penal system whose state cost was the lowest one possible (FOUCAULT, 2008). As a result, there is a displacement of point of view, from the crime perceived through the criminal and the punishment, particular from the 18th century, to the analysis of crime as the acknowledgement of risk of punishment by a person who commits an offense. Foucault presents the way through which the North American neoliberals use market economy, in the 1970s, by the means of an economical interpretation, in order to study social phenomena¹⁰. There is a generalization of the economic form of the market to perceive its social system.

For a better understanding of this issue, the author gives the example of the neoliberal economic analysis of the relationship between mother and son, in which there are costs and investments implicated on the mother's end: quality of care, affection, education (beyond the scholastic), surveillance, feeding ways etc. This investment constitutes on a human capital, which, in this example, is the human capital of a child that will produce income as he or she grows. The capital is not just financial, but also constitutes a psychic income as well as an income of other natures to the mother (satisfaction, pride, physical care on old age etc.). The other example used by the author is the economic interpretation of the couple: there is a contractual commitment between two parties providing costs and benefits to the couples. This long-term contract is intended to avoid renegotiating constant everyday actions, in a way that small contracts work implicitly, and yet acknowledged by the ones involved in the negotiation, as in the example: "hand me the salt and I'll give you the pepper." There is an exchange of winnings and compromises that do not need to be (re)negotiated regularly but become an explicit negotiation in moments of tension. This way, there is as "decoding process in economic terms of traditionally non-economic social behaviors," by the American neoliberals (*Ibid.*, p. 358).

Foucault highlights this economic analysis is also used by North American neoliberals in order to test governmental action, measure its validity and assess costs and benefits of their public policies. The author specifically brings this economic interpretation to the North American penal system. It means to economically calculate the workings of the penal justice system as a whole, avoiding the sole consideration of the punishment as the single measurement standard, as seen in the European model demonstrated in his work, *Discipline and Punishment* (1975). Now, the analysis focuses on the costs judiciary practices represent to the State, calculating its utility and its workings in face of their ends.

Such displacement of perception implicated on a corresponding shift of penal investment, from repression and punishment of the criminal itself, to the suppression of supply and demand of crime on the market. Now, on the one hand, it calculates what is tolerable or not in society, on a scale that involves judicial costs of political and financial order and also costs in time etc. On the other hand, the assessment involves penal procedural ends: reduction of criminality rates, despite the perception of criminality as intolerable, from the state's point of view.

This transition on the perspective of criminal justice, about crimes, happened due to a paradoxical effect. The utility estimates of criminal justice on the 18th century saw on penal law a solution to evoke a penal system with the lowest possible costs. This perspective was a consequence of the understanding of law as the cheapest way of punishing criminals, since it previously defined penalties and procedures in order to punish the offender, remaining to the state the mere responsibility of its application to a concrete case. However, this application would only be effective individualizing each case, which promoted a swelling of procedures, instances, discourses and institutions of judicial nature, around the 19th century. The procedural economy prescribed by law resulted on the swelling and stoppage of the penal system.

Perceiving the problem, North American neoliberals pursued the understanding of crime as an economic problem, not as an issue of delinquency and penal policy of its own. The change of perspective was a consequence of this logical transition, from a classification of the offender as a criminal to a person who accepts the risk of punishment. In this view, neoliberals defined the following questions: what would be impossible to tolerate? How should the problem of crime be analyzed, inside and economic perspective? The answer was a redefinition of crime: every action which submits an individual to the "risk" of punishment by a judicial sentence. That is different from: crime is a deed punished by law.

This way, the idea of eliminating crime in society was surpassed, subject of normalization mechanisms and as an objective of this very process, in which the punishment (prison) was believed to be the principal way of prevention of action, in which the individual would believe the certainty of severe punishment in case he broke the law and, therefore, would not commit a crime. That was the panopticon idea (FOUCAULT, 1975, pp. 162-187), the logic of transparency, the idea of a fixed gaze on every individual, the idea of a gradation of sentences sufficiently subtle on its calculation so that every individual, in his core, in his economic estimates, would refuse to commit a crime, given the overly heavy nature of the sentence to which one would be exposed to. It was a kind of general overruling of crime, in which the objective was to apply the rationality principle, the organizing principle of the penal assessment of the reformatory spirit of the 18th century. The fulfillment expectation on this logic, previous to the North American neoliberal dilemma (posterior to the 18th century ordeals) did not come true.

According to the author, criminality continued, and even increased in many European countries. As a result, the abandonment of the exhaustive suppression of crime occurred, accompanied by the admittance, by the North American neoliberals, that criminality is something that cannot be eliminated. The focus is no longer the administration of sentences (to eliminate crime), but the management of crimes. Penal action is seen as an action on a game of possible gains and losses. To Foucault, the governable subject in this context is not the punishable one, but the economical one, which, in the words of the author, is the subject who, “in the strict sense, seeks to maximize his or her profit, optimizing the relation gain/loss; on the broad sense: the one whose conduct is influenced by gains and losses associated to it.” Here I adopt the broad sense, in order to proceed the proposed argumentation.

In the workings of the North American criminal justice system, the state should prove its allegations, meaning, the accusation. The onus of having to prove the alleged facts is one of the state (accuser), where the accused does not need to manifest to defend himself. Whoever reaches criminal justice has *a priori* their innocence assured.

In this context, the logic which guides the workings of the American penal system is developed from an adversarial system (BISHARAT, 2014, p. 767), in which the parties, accuser and accused, are adversaries and participate on a form of combat or dispute, in which the parties are individually responsible for presenting evidences before the court, in which the judge is relatively passive, exempt of the responsibility of investigating or bringing facts to the process, yet acting as a referee who assures the laws and protocols are not violated during the production of evidences.

However, most judicial cases are not solved by the adversarial system¹¹, but through a neoliberal market logic, in which there is the *plea bargaining*—a negotiation between prosecution and defense which closes the criminal case without a judicial trial. Although it presents a contradictory first impression, there is no plea bargaining without the adversarial system. The plea bargaining is an informal instrument of the State to bargain with the accused, the facts, and the punishments to be applied in this case, involving tensions between the economic interest of accusation and defense. This way, for example, if the state demonstrates lots of proofs and evidences against the accused, it might concede a negotiation of the punishment applied, avoiding a possibly more severe conviction. The negotiation can be reversed, where, for example, the district attorney realizes it possesses weak proofs, and on the verge of losing the case, offers a deal conceding lighter punishment. Judicial bargain is, therefore, a consensus of personal conveniences between defense and accusation, following a neoliberal market logic.

Inside this neoliberal market logic, which orients the workings of the criminal justice, there is the *trial by jury*, which is a right invoked by the accused (different from Brazilian jury trial, which is a mandatory part of the state’s judicial procedure), in case one perceives an injustice or

does not agree with the negotiations of plea bargaining, one can call their peers to decide litigation—and not only in cases of felonious crimes against life, as it occurs in Brazilian jury¹². The trial by jury is a doorway at judicial procedure in which the state is the conductor.

In order to illustrate the trial by jury as a right of the accused, I present here a case observed on my fieldwork, the trial by jury of Jose Ines Garcia Zarate¹³, a Mexican immigrant, illegally in the United States for over 26 years who was accused of murder, in July 2015, of a young 32-year-old woman at a San Francisco pier. I attended more than 30 days of trial, throughout November 2017, for the entire duration of the trial. The defendant was represented by a *public defender*, focused on criminal cases involving immigrants. The non-citizens detained in the United States did not have the right to a free attorney named by court. Without the possibility to afford one, many would be forced to defend themselves against prosecutors trained by the government. Hence, this *public defender* was an attorney focused on this type of cause, since, according to himself in press conferences, half the San Francisco population was constituted by immigrants. In one of these press conferences about the case, on the court's hallways, he stated that he always avoided plea bargaining cases involving immigrants, since accepting a plea-bargaining implied declaring guilt of a certain crime, which justifies deportation.

Therefore, on this case, the plea bargaining would go against the interest of the client, whose wish was remaining on the United States. In addition, the public defender considered a disastrous offer of the prosecution, since she was going for a conviction on murder with criminal intention, even in the absence of solid evidences. Thenceforth, a trial by jury was convened. According to him, not only Jose Ines' innocence was at stake, but also a declaration made by President Donald Trump in 2015, when he was still a pre-candidate for the United States Presidency, during an interview to CNN channel. According to this statement, Garcia Zarate was an animal who had killed a wonderful, beautiful woman and who had already been expelled to Mexico, but Mexico sent back, through the border, criminals, and drug dealers¹⁴. After winning the elections and becoming the president of the United States in 2017, Trump gave new demeaning statements about the case and the accused. In another interview, the attorney stated, paraphrasing:

Nothing new about Mr. Garcia Zarate ethnicity, nothing about his immigration status, nothing about the fact that he was born in Mexico, has any relevance about the events on June 01, 2015. Since the day one, this case was used as means to fuel hate, to incite Division and to instigate a mass deportation program.

Therefore, a political issue affected the case, and only the jurors could judge it. That is the reason why it was so important the jurors did not have any communication with the “world”: they could not watch the news, access social media, make phone calls or talk to people who did not participate in the case¹⁵. Zarate's innocence, to the public defender, was obvious and his

accusation, an accident. The jury of six men and six women deliberated for almost a week, when, on December 1, 2017, he was declared “*not guilty*.” The prosecution had presented the possibility of conviction for murder on the first or second degree.

As a right of the accused, the trial by jury is understood as a right, which the accused can choose to refuse, in order to negotiate. The trial by jury is a doorway to the judicial process, where the state is the conductor. Trials by jury ideally exist as a way of inserting the community between the individual and the state, to soften the great unbalance between them, since the power of the state is much bigger, for it possesses investigators, the police, professional accusers, and prosecutors.

Since it is a right of the accused, the trial by jury is also an exchange coin at the plea bargaining since, once convened, it evokes a great state apparatus, unleashing an economic cost originated on the hardship of orchestrating a jury (displacement of the defendant if he/she is arrested, jury selection, evidence evaluation, the work of police officers, clerks etc.), also the emotional costs affect lawyers, the accused, witnesses, and jurors. Therefore, it is interesting to the state to negotiate with the accused and avoid the trial by jury. Procedural economy tries not to resort to *jury by trial*, but it does not imply not administrating the conflict in a lawsuit, which happens through negotiations previous to the criminal judicialization of a fact or during the trial.

Therefore, the North American penal system is ideally oriented by the adversarial logic, one of dispute on the trial by jury, however, practice holds most cases under the administration of the plea bargain machine (BISHARAT, 2014, p. 767) oriented by a market logic. Plea bargaining is a common practice well known by North American citizens, as a derived product of the trial by jury. Without the trial by jury, as it works today, there would not be a plea bargaining. Informality is one of its main characteristics, in which the negotiation usually occurs under private circumstances, and even outside the court houses (*Ibid.*, pp. 767-769). It can happen at any given point of the process, before the opening of the case in court, once the trial has already begun, extending during the process, to negotiate the criminal facts attributed to the case (charge bargaining)¹⁶ and/or even the sentence (sentence bargaining)¹⁷.

This way, the market logic influences most of the workings of the American criminal justice system¹⁸. The negotiation can happen at any point of the process, since the criminal justice system entails the whole body of institutions—police, judges, lawyers, and prison guards—without separation between the police and the judicial system, as in Brazil. All these actors perform on the same criminal system, unified.

Therefore, on the logic orienting the workings of the American penal system, there are three characteristics on the filtering process of the penal system flow: the filtering is legal and explicit to the parts and to the penal system, on legitimate negotiations between accusation and defense; they

may occur at any moment, before or during the trial; and they are informal, absent of a procedural or legal quality, that is, and accepted and socially acknowledged informality (DIAS, 2012, p. 25).

In Brazil, in contrast with the North American judicial model, penal action—specifically unconditioned public penal action, to which second degree murder is submitted to—is not a right of the accused, instead it is an obligation of the state when it is aware of traces of an action known as criminal. It is not an option neither an object of negotiation. In addition, the state cannot quit a penal action after its proposition.

On our justice system, penal procedure is a mandatory prerogative of the state for the purpose of punishing transgressions to preestablished norms described by the law. The ones accused of a crime must prove their innocence, that is, the onus of proof of innocence belongs to the accused. This way, there are two important characteristics on our criminal justice system: the judicial process belongs to the state; and the inquisitorial quality, on which the one who arrives at criminal justice is, *a priori*, partially guilty of the criminal fact attributed to them, and it is the accused's duty to prove his/her innocence. There is a strong contrast between the logic influencing practices and the workings of our penal system (of *a priori* culpability) when compared to the juridical dogmatic principle of presumption of innocence, guaranteed by law on our Federal Constitution of 1988¹⁹.

On this workings logic, *contradictory logics* stands out (KANT DE LIMA, 2010, p. 43), in which the accused must contradict the accusations made by the state as a form of defense. Dissent, contradiction, antagonism of theses influences the workings of our criminal justice system. Also, our justice system derives from civil law tradition, and the foundation of its legitimacy on an abstract rationality, considering the jurist's technical judgements better than the ones of ordinary people, for having a specialized juridical knowledge. This way, judicial and police interpretation about the law before a case develops a much bigger "weight" than the law as it is commonly understood.

In order to analyze the Brazilian criminal system, I also make use of the concepts of field (the social actors are spatially involved in specific social fields which work according to their own logic); *habitus* (internalized practices of each field that reproduce themselves); and capital (interests at stake as dispute, competition, etc. on each field) from Pierre Bourdieu, who applied them to the analysis of the French law field, on the system of civil law. The author explains there is a demand on the juridical field as an autonomous field, to construct a set of rules and doctrines completely independent from social constraints and pressures, grounded on itself, building itself on an autonomous universe which produces and reproduces through its own working logic.

Besides, it is a place of competition by the monopoly of the right to state the law, which means law operators have their own logic of rule interpretation and application, marked by an internal dispute between them and also between these operators and the ones subjected to the judicial field (the parties, for example) about which interpretation and law application will prevail.

The field of law is, consequently, one of struggle, of dispute over juridically constructed truths. The consecration on the interior of the field demands a competition over its legitimacy which, in turn, highlights the ones who reach intellectual recognition from others. It distinguishes the “owners of knowledge” from ordinary people. There is no negotiation over private ways to see the world, neither about possible gains and losses, but there is a dispute on how criminal justice operators categorize and interpret these views, through their own interpretative language and dispute logics.

An interview extract with the chief of police in Minas Gerais’s Homicide Division about the workings of police investigations and the use of criminal statistics to felonious homicide cases illustrates such questions, which refer to the construction of categories and disputes, and also enlightens how it influences the classification and filtering of accusatory procedures on criminal cases:

— How do records and police inquests are used on criminal statistics? (Interviewer)

— Dude, here’s the deal, you have to use both, records and inquests. *If you do that, you’ll see a lot of difference. Here in Minas Gerais, official statistics only use police²⁰ records, and that’s wrong.* (Chief of police at DHMG²¹)

— What do you mean? (Interviewer)

— For example, there was a case in February, during my shift, where this kid shot by three policemen²² was staying at the military hospital²³, and nobody put the kid on record. I heard that because we hear things, and I sent two investigators to the hospital to talk to the dude [*the victim*]. Man, not even an hour latter some commander from some fucking district shows up asking “hey doc, how are we gonna handle this?” And another hotshot from PM went straight to the civil police chief. Then it began. You can’t take the case away from me, from my shift. If you did, it would be a shit storm, because the case is under my jurisdiction, my authority. *Then it generated a crisis. And there is crisis all the time.* I told the commander, you present the three PMs and their guns and we start talking”. “Are you gonna arrest all three of them?”, he asked, and I said I didn’t know. I had to do the procedure first, the record of *flagrante delicto*. If we are gonna arrest them or not, we’ll see later. Then the guy tells me they were already answering a prosecution in the military justice, that they were already registered and their guns were already apprehended in the military proceeding [*laughter*]. (Chief of police at DHMG)

— And what did you answer? (Interviewer)

— That the procedure belonged to the civil police, not to them, that doesn’t exist, we had to investigate the facts. We are the instituted instance to handle that kind of crime. Attempted murder is my jurisdiction. And what happened? They had to present all three PMs and their guns [*laughter*]. That’s fucked up, man! *But then I classified it as serious physical injury, not as attempted murder, because it would fuck up the poor cop, I thought.* But you have to put it on record. You have to do the civil police procedures. Fuck, it all really has to be registered on notary, it’s a fucking court record’s office, a shit-fuck. The guys do it all wrong, they don’t classify anything right, I keep doing their records all over again and they don’t want me to complain, they don’t wanna go through the police inquest. *You have to negotiate.* Understand? (Chief of police at DHMG)

— I see. It looks like there is a certain tension between the civil and military police. And with the judiciary system too, is that right? (Interviewer)

— Oh, there’s a lot of fucking tension! The problem with the public prosecution service and the judiciary system, district attorneys and judges, is that they live disconnected from reality. They put themselves in a situation separated from ours. They think public security is not their responsibility. The thought, the perception is another. *Instead of analyzing the inquest, of working with the investigation we made, they supervise our job. Their focus isn’t the inquest, on seeing if the just cause is at the police inquest or not, but what the police did and didn’t do. It’s competition, not cooperation.* If you see a recommendation from the public prosecution service at Belo Horizonte city, you get sick. It is a recommendation of what the chief of police has to do, in their perception. If I could, I would tear it in

front of them. Then they would want to indict me for something they would just make up. They think they are bigger, they want to be the boss of us. (Chief of police at DHMG)

— I don't know. I believe there is a dilemma there. On the one hand, there is no standardized administrative procedure, a written document, a protocol about it. And for what I could get, the lack of this standard gets in the way of police work. And on the other hand, there is the police discretion that's going to confront the protocols, if there are any. (Interviewer)

— Yeah. A lot of people would complain about that. Man, I had a meeting not long ago with the district attorney and the grand jury judge to talk about murders. *The district attorney said he won't file a complaint without the identification of the author, and the guy has to be arrested so the public prosecution service can indict, that is, people can do everything, but if the guy isn't arrested, the case won't go on. The judge already said he's not going to accept denounces without a testimony and the crime weapon, even with the guy locked up.* Each to its own, right? The fucking thing is that we get the heat, the civil police. *We have monthly goals, of amount of inquest shipments to the judiciary, but without the personnel and resources for it.* Then, where are we? In the shit. We find our way. *There is a chief of police who starts everything, without an audit, without a fucking thing. At least, this way, he shows he did his part. Let the MP [Ministério Público, public prosecution service] fight us later, they always do anyway.* (Chief of police at DHMG)

— And how do you handle these goals? (Interviewer)

— As we have a lot of cases, and we have the obligation of seeing everything that arrives here, we prioritize what we think is the most serious. And we are a new team. Everything is new here, even the place. And there's no record management. The homicide team was another, and they did everything differently. *Each team does it their way, at their time. So, everything changes all the time.* I can't find records, inquests, it's a mess. Even if the system helps [*digitalized police records system*], the amount of details is very scarce. In practice, okay, to the people, it doesn't make a lot of difference, they only want to be assisted. But this mess gets in our way all the time. It delays everything. And gets us stuck in unnecessary bureaucracy. We have more bureaucratic than police work, really, of investigating violent deaths. *I'm not just a cop, I manage the bureaucracy of this entire unit. So, in old cases, of the previous team, we kinda say fuck it, you know? And as there's always a new team, the cases almost always get old.* Because there is no proper documentation, the inquests are all incomplete. Sometimes, there's not even the author's name, only the nickname of the dude. The cases we start are different. We know the progress, we follow it, remember everything, the facts, who made the arrest and all. Keep reading facts on the Reds the PM does [*records of event of social defense*] is a pain in the ass. You have to keep reinterpreting, trying to understand what the PM meant. But in general, almost every registry becomes an inquiry. Investigation is something else. (Chief of police at DHMG)

— I was curious about something. I remember once you said that illegality exclusion of deaths on police approach during service doesn't exist here. And how do you use the newly discovered dead bodies or bones? At Rio it is a common category on police practices. And it covers any death, even the natural ones. (Interviewer)

— Dude, here is the thing, *PMs don't have a lot of use to us. We investigate, that is our job, and they end up using repression, that's their job.* And they have resources we don't have. Man, *military justice is the craziest thing. The guys fuck up and are judged by themselves, on their own military inquiry* [laughter]. *It's piece of cake. But we don't do shit like that. We open a police inquiry to the shit they do. There is no talk of illegality exclusion on deaths like in Rio. Newly discovered bones isn't used much.* I myself, since my first seven months at the Homicide Division, have never classified anything as newly discovered bones. (Chief of police at DHMG)

From here on, I discuss questions perceived on the field. The relation between police and judicial activity is produced on a dispute of forces, internal and external pressures to the police and judicial institutions, sometimes contradictory among themselves, subject to different standards and on different levels. At the same time, the police presents itself as a bureaucratic and administrative institution of control, frequently confronted by the judiciary system. This tension also produces knowledge and information belonging to the police and the judiciary. In general, policemen and judiciary operators know criminal statistics can be negotiated and manipulated, overproduced or underproduced.

Taking Bourdieu in my analysis, there is a certain clash of knowledges between institutional operators of criminal justice and public security who act upon the investigation of felonious homicide: the Military Police, the Civil Police, the public prosecution service, and the Judiciary (judge). They display nuances between categories over how to classify and administer second degree murder cases, on each step of the criminal system flow. Here I highlight the contradictory logics, because the search for the facts' truth is only achieved through the opposition of theses, an overlapping of knowledges in order to construct a real truth, juridically built²⁴ and which happens at what I define as six procedural moments.

On the criminal procedure there is a frequent search for a real truth from distinct knowledges, where it produces not a communication of facts built on each procedural moment. Instead, a dispute is set, overlapping one truth over another one, producing instability on the murder classification system and, as a residual consequence, juridical insecurity, regarding identification, clarification, and judicial prosecution of second-degree murders.

On the one hand, criminal justice appropriates judicially from the police inquest (which is not a judicial procedure, but an administrative one) and turns it into a mandatory action to the public security agents involved on judicial and police institutions in charge of solving murders. It binds bureaucratic problems institutionally acknowledged, generating implicit screening of cases, because of the accumulation of opened procedures that are yet unfinished. On the other hand, the police inquest becomes a disciplinary system, with a normalizing quality, yet aiming to normalize only police practices—which do not possess written action protocols, conceiving actions always in an abstract dimension—by the means of judiciary interventions assuming a surveilling role.

It follows an important matter about on the accusatory procedure flow regarding the narrowing screening of criminal cases. There is a tension between a high volume of homicide cases necessarily registered by the police and the investigation of the same cases throughout the accusatory procedure. The public prosecution office takes a supervisory role at the police inquest which implicates it on the procedural timeline with an increased filtering of cases.

The principle of mandatory prosecution combined with the contradictory logics grounded on the accusatory prosecution do not achieve a certain goal in terms of its process and procedures: solving homicide cases and applying criminal law equally to all people. State actions on criminal conduct do not become a sum of individual interests (of the involved in a crime, the family victim and the crime's author), neither a sum of institutional interests (given the dispute and distrust over police activities on the Judiciary). A self-justification for the State actions is generated, on a position of permanent suspicion against all. The notion of public is a mere State perspective, grounded on itself.

Thereby, two distinct meanings of justice or juridical sensitivities stand out. In Brazil, there is a state “apart” from society, that surveils it through its operators and, secretly, remains in a

permanently suspicious condition, searching for mistakes and transgressions of its members. When the case is identified, testimonies are collected while other procedures take place, reduced to classificatory terms on police records, displaying inquisitorial characteristics before the accused. They are transcribed, prepared, and ratified before a notary authority of full faith. These records are later forwarded to the public prosecutor who, if satisfied with his elements, presses charges. Only then, the accused is aware of the formal accusation, which brings along an advanced culpability presumption and is already properly materialized on the judicial phase.

This way, the inquisitorial characteristic of our criminal system implicates on the state's search for a culprit of a criminal deed. Henceforth, it verifies the facts instead of checking a fact first, in order to identify a culprit after that. The expected result of such procedure is the conviction. A confession does not close the case, serving only to the purpose of obtaining a lighter sentence. There is a prevalence of the state and its operators over society, specially over those who are accused of a crime.

On the other case, the parties offer to negotiate the truth that will prevail before the judiciary authority, which administers a consensus—either on plea bargaining or on trial by jury—and finishes the judicial procedures. The bigger decision belongs to the parties. Society prevails over the state's decision.

The Brazilian case, therefore, suggests our juridical model to society, to conflict administration and to the exercise of social control ultimately associates legitimacy and legality, knowledge to power, attributing the role of official riddle solvers to our justice operators, as if this ability was the only legitimate source of its power (KANT DE LIMA, 2010, p. 45).

'Not every dead is a victim': implicit filtering and institutional legitimacy of the unequal treatment of cases

Many researches of the justice system flow point to a funnel effect on the cases, demonstrating it to be an inherent characteristic to the modern criminal justice systems that presents itself on countless types of criminal offenses. However, on the Brazilian case, we have implicit case selection filters which promote inequality of treatment, on a contextual triage absent of legal demand. Every so often they are contrary to the law and do not involve the parties' interests, while in the North American judicial model, these filters are explicit, due to the logic of the judicial bargaining (RIBEIRO, 2007, pp. 671-697).

In order to illustrate such matter, I resort to two cases I observed certain day, at the Rio de Janeiro police station. Although the fieldwork research at this precinct is already over, the

experience of observation performed there are valid and dialogue with my current field, at the Minas Gerais police station. The first case refers to an old lady—black and appearing to be around 50 years old—and her son also black, on his twenties—who showed up at the station to require information about the murder of her ex-husband and father of her, who accompanied her to the station. I interviewed her after she went to the waiting hall.

— I heard a little about your story at the reception. What happened? (Interviewer)

— Oh, it was my ex-husband, he was killed. We almost didn't talk anymore, but he didn't have anybody. So, I'm solving the problems. This is one of our three children, the oldest. He was the closest to him. It was all very strange, you know? He was in his house, in his bed, in the middle of the night, and someone stabbed him to death. Nobody saw or heard anything. The neighbors only realized he was dead because of the smell. (Madam A)

— I see. And what do you seek here, at the station? (Interviewer)

— He rented his house, at *Coelho da Rocha*, on a hill. There are many little houses really close to each other, you know? But after the police went there, last week, the place was full of those tapes, you know? Forbidding people to go inside, but I went in anyway, just to look. So, there are many of his things there, and I want to take them. And the rent expired, and the owner is now charging me, because I am his only contact. And I also find it odd, nobody from the police picked up the phone to call me, to tell how the investigation is going. He was my ex-husband, but he wasn't a bad person, you know? And now, it's all there, a mess, with gloves, gel [reference to criminal forensics material]. The blood has already dried out at the wall. It all smelled really bad, like smoke, but there was nothing burned. (Madam A)

[*The police inspector arrives shortly after*]

— Look, mam, I looked at the case and we still have nothing. There are many procedures ahead. *We still haven't decided how to classify his death* [reference to penal type, crime and motivational classifications]. Take this phone, this is the number for my desk. I'm here on Tuesdays and Thursdays. Call me after carnival. (Police Inspector A)

— But look, the house is rented, and we have to return the keys. The carnival is two weeks from now. I was responsible for it. There is gel, gloves, and other things there. The house is sealed, not even the owner can go inside. (Madam A)

— Yeah. *But every investigation has its own time. Each cop has his own procedure, there isn't a rule. We haven't even examined the body properly.* Close to carnival there are lots of deaths, so *we can't handle everything, we have to prioritize some cases.* Call me next week and we see what we got. (Police Inspector A)

— Okay, doctor. Thank you. (Madam A)

The second case is about the homicide of a civil police officer. I was sitting next to the counter when a white woman, about 50 years old, and a young one, also white, apparently around 20, walked in. They were the mother and girlfriend of a young man arrested in *flagrante delicto* that day. After everyone left, I asked the receptionist what that was about. I reproduce here part of the dialogue:

— Oh, this kid, yeah. His friends killed a cop. The cops found them and they said the gun was stashed with this kid. The police went to his place and found the gun. Now, he is here. He was arrested in *flagrante delicto*. You should talk to the policemen outside, at the patio. They were the ones who arrested the kid. (Receptionist)

[*Arriving at the patio, I spotted three policemen examining a car, and started a conversation*]

— Hello. I'm a researcher here at the station. Would you mind talking to me? I saw the case of the kid who killed a police officer and I wanted to know how that happened. (Interviewer)

— Sure, no problem. You are the philosopher of homicide, right? Look at that. A civil police officer was killed yesterday, at Mesquita. *We caught the guys on the same day.* We put some pressure and they gave in the kid you saw in there. He was the scapegoat this time. We went to his place and found the gun hidden on the water tank.

He didn't kill him, but he participated. And the ballistics confirmed the gun that was used was the one hidden in his house. (Police Inspector D)

— I see. How did you find the gun in the water tank? (Interviewer)

— Every police officer knows people hide the gun in the water tank. (Police Inspector D)

— I see. And now? What happens to him? (Interviewer)

— Oh, he already confessed to keeping the gun and turned in the other guys. (Police Inspector D)

— Oh, that was fast. Not a long time ago he said he didn't want to tell anything. But was it in his own benefit, to confess? (Interviewer)

— *Oh, no. On the contrary. He only confirms what we already know. Actually, it is worse to him.* (Police Inspector D)

After this conversation, I said goodbye to the police officer and decided to try again at the front desk, because I had noticed a certain movement inside the station. When I walked in, I saw one of the inspectors who was with the kid before, and started a conversation:

— Good morning. Would you mind talking? (Interviewer)

— No. It's cool. Tell me, philosopher of homicide. (Police Inspector C)

— And the kid arrested, how did that go? (Interviewer)

— Oh, that's settled. He confessed. In a while he's going to Bangu [*where the Gericinó Penitentiary Complex is located*]. (Police Inspector C)

— Oh, he is going to be temporarily arrested? (Interviewer)

— That's right. The doctor [*reference to the senior chief inspector*] has contacts with the judges. To speed things up, you know? *This kind of thing is terrible. They killed one of our own. This has to be solved quickly.* You can't fool around with it. The other three are already there [*at Bangu*]. (Police Inspector C)

— I see. It was all pretty fast. Less than a day. Has the inquest started already? (Interviewer)

— Yes. You know. *Got one of ours, they are fucked, right. Can't just let it go.* First degree murder. That's while killing a cop doesn't become a hideous crime. (Police Inspector C)

The institutional treatment of each case was very different, considering the types of victims: on the first case (dead ex-husband) and on the second case (dead cop). There was a big contrast on time passed between putting it on record and starting the police inquest, as well as the time it took to determine the crime's author and the objectivity on the crime's classification. While on the first case, the crime author was not identified and the police inquest still has not started one week after the murder was registered, on the second case, the identification of crime authors, temporary detention, gathering of criminal evidence and opening of the police inquest happened in less than 24 hours. The unfolding of the facts and the time of the criminal investigation were quite different on each case. The institutional effort to investigate and the time passed between registration, investigation and opening of the police inquest between the cases was very distinct, despite the fact they were both initially classified as second-degree murder, the same category²⁵. Another civil inspector's conversation, from a Homicide Division at Rio de Janeiro, strengthens the existence of an institutional perception which legitimizes unequal treatment of cases:

— Look, only in January there were 133 murders in the area. But the criminal record of 130 of them was very extensive. They were already criminals, not victims, you know? They were criminals who died in the *favelas*. They asked for it. They weren't regular civilians. The ones who kill and the ones who die are criminals. They are always the same. It's criminal against criminal. So, this is false statistics. Violence is only for criminals, not for good, ordinary people. Of course this has bad consequences on all people. But you get it, don't you? There are people who look for it, man. It's not really a victim. *Not every dead is a victim*. But they are also not like drug dealers. That doesn't even come here, to the homicide division. That's storage file, *auto de resistência* [police category for the dead on confrontation with the police which constitutes an illegality exclusion, meaning, there is no crime]. The police doesn't even arrest this kind of guy to spare the bureaucratic work of imprisonment and investigation.

The police valuation on the depiction of victims and crime authors, in which the victim is not necessarily the one who dies a violent death but depends on its representation among the policemen's values. There are categorial nuances on the passage of a social fact to the status of a juridical fact, undertaken by the operators of public security on their practices.

My questions emerged from this context: how can there be unequal institutional treatment—on the part of the polices and judiciary agents—on cases that exist inside a criminal system legally designed to be egalitarian? What is the standard treatment of justice in the cases received and investigated by the police? There are many interpretive and strategic nuances behind the generic category “second degree murder,” about the perception it provokes and its administration on the part of police and judicial institutions.

The preliminary hypothesis emerged from the screening and the filters on the second-degree murder cases on its judicial flow in Brazil is that the public security and judicial system operators do not act merely as institutional investigators and administrators of murder and attempted murder cases on the justice system. They can “predict” and “anticipate” the felonious facts, as well as the procedures to undertake on the influence of situational institutional agreements and tensions, and also relative assumptions of the author, the victim, and the facts character, in which the category “second-degree murder” does not represent an unchangeable of purely legal quality. It depends on the police and judicial valuation before the cases, determining how they should be classified, legitimized, and administered. They are subject of a moral and contextual hierarchy, which guides the process's unfolding and institutional procedures, confronting the constitutional principles of juridical equality and presumption of innocence. It is yet confronted with the ends of the judicial process, to regulate the judicial process itself and to apply criminal law equally to all people, which eventually interferes on the quantification and interpretation of statistical analysis of second-degree murder.

The facts narrated at police records and criminal procedures in addition to those debated on trials do not derive exclusively from cold judgements, “neutrally” assessing the actions of the parties involved in a crime. They derive not only from police and judicial practices which guide

what must be considered right or wrong in terms of a moral conduct, but also what must be considered an appropriate practice (RIBEIRO, 1999, p. 1).

Also, about the filtering of cases, on a given occasion, a police investigator from Minas Gerais said “the cases without witnesses or without a temporary arrest are always delayed on their way to the judiciary system, and usually do not even get there. On the other hand, if the family keeps a lot of pressure, coming here, or if there is a lawyer, it is almost certain the inquest will go on, and soon, be sent to the judiciary.” A public defender, from the same place, spoke to me:

— We have a lot of cases. Everyone knows, the police and us [*Judiciary*] that we can't handle it all. The cleavage is necessary. And we are the ones who have to do it. If a case comes to jury trial it's because there was no other way, the guy is going to be convicted. We try to filter the cases as much as possible, before the jury. But if it gets to the jury, sometimes I still can cut a deal with the DA and the judge to, at least, lighten the punishment. (Public Defender)

— I see. And what are the deals like? (Interviewer)

— They are informal. There is no legal forecast. I try to ponder about the concrete case with the DA and the judge. (Public Defender)

— They would be illegal, then? (Interviewer)

— In a certain way, yes. Because if there is already a punishment before the jury trial, the constitutional principles of sovereignty and equality of parties are already violated. But everyone knows those deals exist. It's something common and acknowledged between the operators. I ask myself, why not make these deals legal? It would be much easier for us. And it would relieve the judiciary. The North American system is there, teaching us. (Public Defender)

There is an implicit ambiguity on our criminal system, which comes from the alternate and alternative usage of judiciary logics and practices, overlapping one another. We have equalitarian and universalizing principles, in practice marked by personal and hierarchical traits that bring us dilemmas and paradoxes. Juridical doctrine principles have legal bases, allowing inside the juridical order practices deliberately incompatible with the law.

Final considerations

The debates on the workings of the public security and criminal justice system in Brazil, inspected from a contrast comparison, considering juridical sensitivities on each field, intent to expose the need of analysis and elaboration of models to explain the peculiarities of the Brazilian case. Here, the economic theory of crime and the rational choice theory, traditionally used to think how our accusatory procedure treats criminality, for example, are not able to explain the Brazilian case. The reason why is that such theories originate on societies market by juridical sensitivities very diverse from Brazil, either by the societies' characteristics or by the peculiarities of its judicial and police institutions. They also present different implications and socio-judicial consequences when it comes to institutional treatment given to crime and criminality.

Empirical researches on the criminal justice system in Brazil are yet scarce and recent on the scope of social sciences, and even more rare on law studies, although remarkable advancement has been made on the last 25 years²⁶. Traditionally, in Brazil, the theme of public security is held as monopoly by juridical-military discourses, and the juridical academy is the main representative of the studies on this field. It reproduces its dogmas on its arguments, absent of any use of scientific method, no strangeness is inspired by its own practices, ignoring empirical researches.

The investment of social sciences on this field intends to provide an oxygenated and empirical view over police and judicial practices on the treatment of crimes beyond legal definitions, considering specific characteristics of our socio-juridical context. In this sense, there are universalizing laws on a society of hierarchical relations, in which egalitarian laws display particularized applications and unequal implications, inside a secrecy logic, regarding judicial practices. It means there is no normalizing characteristic on societies on which rational choice theory and economic crime theory are conceptually inspired.

There are also many studies pointing out that moralities and valuation of judiciary and police operations hold influence on their institutional practices, individualizing the law application according to its values. It implies unequal procedural and administrative decisions to similar cases, implicit to the parties and the law itself. However, there is still a scarce number of studies developing a systematic argumentation on how and how much these valuations influence practices and decisions the selection of police-judicial cases, also considering the influence of the characteristics this logic holds, when orienting the workings of our criminal justice system.

Given the hypothesis there is an implicit screening and funneling of cases on criminal accusation legitimized by unequal treatment of cases, the methodological proposition, given the characteristics of our police-judicial system, to studies of this kind is not only analyze the statistical behavior of the public security and criminal justice system flow regarding crimes – the percentage of cases that remain in each procedural stage until the final phase of the criminal justice system flow. The methodology also implies the verification of motivations from native categories and descriptions perceived on the field, in order to perceive and demonstrate how and why certain cases proceed, and other, do not.

This perception is directed towards each moment of the procedural flow, considering the characteristics of the parties and the constant facts on the records and fieldwork observations. Therefore, to the flow analysis, the proposition is to use the orthodox longitudinal method, which intends to reconstitute the flow of roles and people inside the criminal justice system (RIBEIRO, 2010, p. 169), considering native descriptions and not analytical categories traditionally used in this longitudinal method.

Such combination of methods intends to follow a combination of police events of each type of crime, from their records, throughout a certain period, verifying the percentage of cases that follow, and the ones that do not follow, the subsequent stages. As the information systems of the criminal justice and public security institutions in Brazil do not operate on an integrated and uniform system of their official records, it is necessary to pursue each case individually, observing its passage on the fieldwork, aware of the moments this passage happens as expected or not, in each case.

Hence derives the importance of the combination of methods for field research (qualitative) with statistical analysis methods (quantitative)²⁷, since each institution uses its own categories, corporate ethics, and workings logics, highlighting the difficulties in identifying what is the outcome of a case, of a stage onto the next, the meanings implied. Such difficulty can be overcome, or minimized, by the combination of the listed methods.

This way, such proposition does not intent to analyze criminality itself, but the institutional treatments administering crimes these institutions classify. It is expected to contribute to studies about the relation between society, police, and judicial institutions, aside from the effort on the contribution of a field marked by the struggle on the operationalization of analysis on the criminal justice system in Brazil. In this system, data bases are always fragmented and incomplete, produced by each institution composing the criminal justice and public security system, according to its own logic and also according to the documents of interest to each institution separately. There is no concern of the outcome of these data on ulterior procedures, apart from the inexistence of an official and transparent statistics system which incorporates information on all the procedural moments.

Ultimately, this study also intended to expose difficulties of the dialogues between anthropology, sociology, and law, and to demonstrate the relevance of empirical research accomplishment, of ethnographical orientation and of possibilities of statistical usage (and its improved use combined with ethnography) to the understanding of the law and its institutions, beyond its own interpretations (KANT DE LIMA, 2010, p. 41).

The anthropological craft and the juridical craft also present similarities between their world views, focusing practices on individual cases, which can either divide or unite them. The dialogue between these crafts is a big challenge, in which the interaction of two professions so guided by their practices, so profoundly limited to specific universes and strongly dependent of special techniques can have as a result more ambivalence and hesitation than synthesis and accommodation (GEERTZ, 1997, p. 249). And the winnings of this dialogue go both ways, transposing juridical sensitivities on anthropology and assimilating sensitivity of ethnographic researches on law.

Notes

¹ This paper was initially presented and debated at the work group intitled Public Security and Democracy at the 10th meeting of the Brazilian Political Science Association (GT Segurança Pública e Democracia do 10º Encontro da Associação Brasileira de Ciência Política), which took place between August 30 to September 2, 2016, at Belo Horizonte city. The research began during my PhD in sociology at the Social and Political Studies Institute at Rio de Janeiro State University (Instituto de Estudos Sociais e Políticos [Iesp] da Universidade do Estado do Rio de Janeiro [UERJ]) which I continued and enlarged at my current postdoctoral research at Veiga de Almeida University (UVA), funded by a Faperj “Nota 10” scholarship. English translation by Luiza Aragon Ovalle. Technical revision: Michel Lobo Toledo Lima.

² N.T.: Special criminal courts called by the initials JECrim’s. Their specific function will be further discussed.

³ N.T.: Specifically at Baixada Fluminense, an administrative area defined by cities close to Rio de Janeiro inside the officially defined metropolitan area, contemplating Japeri, Queimados, Nova Iguaçu, Mesquita, Belford Roxo, Nilópolis, São João de Meriti and Duque de Caxias.

⁴ Van Velsen sets situational analysis as a way of ethnographic research based on analytical descriptions of individuals’ actions, in a fieldwork journal transcript, of everyday situations and specific behaviors. It provides possible abstract conclusions about the material, emphasizing a study of normal and exceptional actions of individuals. This kind of analysis displays dialogues and actions as sources for diagnosis, sociological questions, and hypothesis on a specific field. From situations, conflicts in particular, emerge the greatest sociological problems to be spotted. Here, dialogues are not the sheer example of problems, but orientations on the formulation of questions, presenting the perception that the “fieldwork speaks.” About that, see also Eilbaum (2012, pp. 12-29).

⁵ See, in this case, the “imponderabilia of real life which don’t invalidate, but on the contrary, enrich and provide that essential human dimension to the understanding of sociological phenomena.” See more reflexions about this issue on Peirano (1992).

⁶ Available at: <http://www2.datasus.gov.br/DATASUS/index.php?area=0205> (accessed on September 2, 2018).

⁷ N.T.: Free translation of the Brazilian term *lógica do contraditório*, developed by Kant de Lima (2010). The differences between contradictory logics and adversary logics (BISHARAT, 2014) will be further explained on this paper. Despite several similarities observed inside the criminal justice systems of both Brazil and the United States, it is important, to a comparative analysis, to know the different logics behind it.

⁸ Analysis stimulated by my stay abroad, funded by Capes, from August to December 2017, at U.C. Hastings College of The Law, University of California, San Francisco. In this occasion, I was under the supervision of the professor, jurist, and anthropologist George Bisharat, attending the fall disciplines “Criminal Procedure and Criminal Practice Clinic”. I also performed fieldwork at the Criminal Court of San Francisco, in an exercise of direct observation of trials by jury in second degree murder cases.

⁹ The analysis of juridical discourse is based on bibliographical and archival research of reputed in criminal and constitutional law in Brazil, such as Luis Flávio Gomes, Geraldo Prado, Julio Fabbrini Mirabete, Damásio de Jesus, Fernando Capez, Rogério Greco, Alberto Silva Franco, and others. It also involves discourses observed in fieldworks of several authors in social sciences, such as Kant de Lima, Joana Vargas, Carlos Antônio Costa, Luis Roberto Cardoso de Oliveira, and others, as well as observations I performed in the past and still do at judicial and police institutions since 2013 at Rio de Janeiro state, and now also at Minas Gerais state, from June 2015 to December 2016, beyond the observation of discourses of students and teachers at and from the undergraduate and post-graduate law courses at the institution where I am currently associated during my postdoctoral work.

¹⁰ To Foucault, there are two main forms of neoliberalism, which he calls “anchorages” and have different backgrounds. There is the German anchorage, derived from the Weimar Republic, which clings to the development of the critics to Nazism and to the post-war reconstruction. The other form of anchorage is the American one, a neoliberalism that refers to the New Deal policy; it will develop and organize, mainly after the war, against federal interventionism. Later, it will oppose to the social welfare programs and other programs implemented by democratic administrations, mainly focusing on the reconstruction, planification, socialization and on new social objectives. It implies a policy concerned about the allocation of public and private resources, and also about the equilibrium price, the savings accounts levels and the investment options. The neoliberalism adopted on the understanding of the North American penal system logic on this paper is the second one, of American anchorage.

¹¹ It is estimated that 95% of criminal prosecutions in the United States are solved through plea bargaining (see DOUGLAS and BIBAS, 2006).

¹² In the Brazilian Criminal Procedure Code, article 74, first paragraph.

¹³ See more details about the case at: <https://edition.cnn.com/2017/11/30/us/kate-steinle-murder-trial-verdict/index.html> (accessed on May 7, 2018).

¹⁴ Donald Trump's speeches oppose, mostly, the policies of "sanctuary city" on the United States, where immigration laws, including about those in illegal situation, are not rigid, where the local authorities do not cooperate legally nor direct their police force to immigration issues. Such places have economic reasons to protect immigrants, either because of the undocumented labor or because of their share as consumers. The market economic dynamic is the reason why these cities oppose to cooperate with federal authorities. Most of this explanation was obtained at City College of San Francisco, where I studied English on a class directed to immigrants. The classes also had a behavioral pedagogical quality, and introduced themes like drugs and alcohol consumption, unemployment, success cases among immigrants, the job market in the United States etc. A few hours after the jury's decision on December 1, 2017, Trump tweeted about it, saying it was a shameful verdict and that he was not surprised Americans were so angry at illegal immigration. Paraphrasing, he said: "the killer of Kate Steinle is back, and he is back through the poorly secured border of Obama, always committing crimes and being violent, and still this information wasn't used in court. His exoneration is a complete caricature of Justice. Build the wall!".

¹⁵ That warning was made by the judge at the end of every hearing, either on lunch breaks or intervals, or at the end of the day's session.

¹⁶ Penal Code, §§ 1192.1-1192.4, 1192.6-1192.7.

¹⁷ Penal Code, § 1192.5.

¹⁸ A fraction of this argument was also obtained at the workshop *The Plea Bargain Machine*, presented by George Bisharat, at the III Seminário Internacional do Instituto de Estudos Comparados em Administração Institucional de Conflitos, on the Universidade Federal Fluminense (UFF), Niterói, Brazil, on February 27, 2013.

¹⁹ Constitution of the Federative Republic of Brazil, 1988, art. 5º, LVII – LVII – no one shall be considered guilty before the issuing of a final and unappealable penal sentence.

²⁰ N.T.: The reference to the police stands for the *Polícia Militar* (PM), which is part of the law enforcement with both military and civil obligations and a hybrid formation.

²¹ N.T.: *Delegacia de Homicídios do Estado de Minas Gerais*, which stands for police station specialized on felonious homicide cases from Minas Gerais state.

²² N.T.: From the military police, which we call PMs from now on, to establish a difference from the Army and other fully military forces.

²³ N.T.: There are hospitals specially built to assist cops and their families, provided by the state.

²⁴ The display of motives on our Code of Criminal Procedure says: "if it is correct the judge is restricted to the evidence on the records, it is not less certain that he is not subordinate to *a priori* criteria when ascertaining, through them, the material truth".

²⁵ Article 5, *caput*, of the Brazilian Federal Constitution states that: "All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property". Our police and judicial system was legally elaborated to be egalitarian, determined to treat people and judicial cases on equal conditions. On the judicial discourse, the expression "firepower equivalence" disposes on the concession of equal opportunities of manifestation and actions performed by both the defense and the accusation on judicial procedures. Vera Ribeiro has an interesting debate on the questions around the demonstration of this category's placement in a judicial system where hierarchical structures prevail along with institutes that perpetuate dissent and juridical inequality (see ALMEIDA, 2014). It is worth mentioning there are legal estimates on dealing with unequal treatment of cases, as the article 429 on the Criminal Code: "Except a relevant motive to authorize the changing in the order of trials, preference will be given to: I – the incarcerated accused; II – among the incarcerated accused, those who have been in prison for a longer time; III – on equal conditions, the ones previously pronounced".

²⁶ There is an increasing number of empirical researches on this field, on the part of social scientists and public security or criminal justice operators, from a variety of ranks and occupations. See: Kant de Lima (1994), Vidal (2013), Teixeira Mendes (2012), Figueira (2008), Ribeiro (1995), Lima (2021), Soares (2008), Amorim, Lima M. e Lima R.K. (2020); among many others.

²⁷ See more in Mitchell (2010) and Lima (2017).

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