

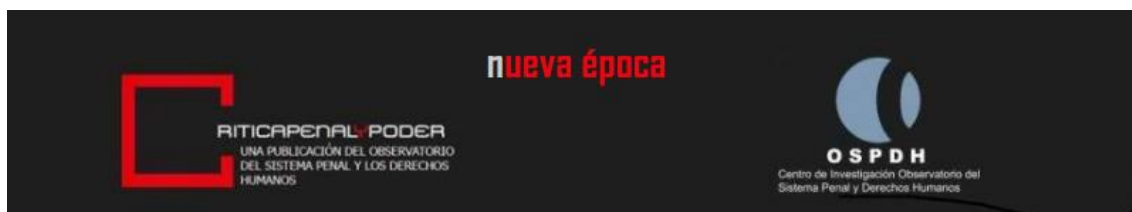
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## THE BOLOGNA-BARCELONA AXIS BETWEEN CRIMINAL LAW DOGMATICS AND CRITICAL SOCIOLOGY OF PUNITIVE CONTROL. HIDDEN CONTINUITIES AND APPARENT OVERCOMINGS<sup>1</sup>.

*L'EIX BOLONYA-BARCELONA ENTRE DOGMÀTICA PENAL I SOCIOLOGIA CRÍTICA DEL CONTROL PUNITIU. CONTINUÏTATS AMAGADES I SUPERACIONS APARENTS*

*EL EJE BOLONIA-BARCELONA ENTRE DOGMÁTICA PENAL Y SOCIOLOGÍA CRÍTICA DEL CONTROL PUNITIVO. CONTINUIDADES ESCONDIDAS Y SUPERACIONES APARENTES*

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### ABSTRACT

*This article aims to highlight the importance of the link between Bologna and Barcelona, consisting of an epistemic and methodological convergence in the approach to the criminal question and, in particular, to the problem of penal selectivity. If on the one hand this link cannot be eliminated, on the other it is exposed to a series of attempts at obfuscation by the dominant legal and criminological ideology, which is even reflected in autobiographical contingencies that add an anecdotal dimension to the discussion. At the same time, the recovery of this link imposes a reflection on the contemporary criminological debate, since the distinctive features of Italian-Iberophone critical criminology clash with some premises of the most recent and advanced trends in terms of critical potential, in particular the zemiological approach. One example is the role that criminal dogmatics plays within the*

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<sup>1</sup> This essay is the result of a long-lasting dialogue with Juan Manuel Ternero, which has uninterruptedly hogged our last five years of conversations, about the theoretical significance and the current role of critical criminology. For this reason, although the contingencies of life have led me to be the only author of this specific article, I often resort to the first-person plural in articulating the thesis defended here. The occurrence that persuaded us to put in a written form these reflections was the Conference "Meridian Perspectives on the Criminal Question" held in Bologna on 11-12 September 2023.

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*sociological analysis of the penal system following Franco Bricola's lesson, and the meaning of this methodological choice in terms of transdisciplinarity and political radicalism. Our conclusion is that a better coordination between critical traditions is needed: one that aims at overcoming linguistic barriers and starts with a systematic review of the existing critical arsenal before any headlong rush.*

**Key words:** *Critical sociology of punitive control, critical criminology, criminal law dogmatics, Bologna and Barcelona, Franco Bricola.*

## RESUM

*El present article pretén ressaltar la importància del nexa entre Bolonya i Barcelona, consistent en una convergència epistèmica i metodològica en l'abordatge de la qüestió criminal i, en particular, del problema de la selectivitat penal. Si d'una banda aquest llaç no pot ser eliminat, per l'altre queda exposat a una sèrie d'intents d'ofuscament per part de la ideologia legal i criminològica dominant, la qual cosa resulta reflectida fins i tot en contingències autobiogràfiques que afegeixen una dimensió anecdòtica a la discussió de fons. Al mateix temps, la recuperació d'aquest vincle imposa una reflexió sobre el debat criminològic contemporani, ja que els trets distintius de la criminologia crítica italo-iberòfona xoquen amb algunes premisses de les tendències més recents i avançades quant a coeficient crític, en particular l'enfocament zemiològic. Un exemple és el rol que la dogmàtica penal exerceix dins de l'anàlisi sociològica del sistema penal a partir de l'ensenyament de Franco Bricola, i el judici d'aquesta elecció metodològica en termes de transdisciplinarietat i radicalitat política. La nostra conclusió és la necessitat d'una millor coordinació entre tradicions crítiques que aposti per la superació de barreres lingüístiques i comenci per una revisió sistemàtica de l'arsenal crític existent, abans de qualsevol fugida cap endavant.*

**Paraules clau:** *Sociologia crítica del control punitiu, Criminologia crítica, dogmàtica penal, Bolonya i Barcelona, Franco Bricola.*

## RESUMEN

*El presente artículo pretende resaltar la importancia del nexo entre Bolonia y Barcelona, consistente en una convergencia epistémica y metodológica en el abordaje de la cuestión criminal y, en particular, del problema de la selectividad penal. Si por un lado este lazo no puede ser eliminado, por el otro queda expuesto a una serie de intentos de ofuscamiento por parte de la ideología legal y criminológica dominante, lo que resulta reflejado incluso en contingencias autobiográficas que añaden una dimensión anecdótica a la discusión de fondo. Al mismo tiempo, la recuperación de este vínculo impone una reflexión sobre el debate criminológico contemporáneo, ya que los rasgos distintivos de la criminología crítica italo-iberófona chocan con algunas premisas de las tendencias más recientes y avanzadas en cuanto a coeficiente crítico, en particular el enfoque zemiológico. Un ejemplo es el rol que la dogmática penal desempeña dentro del análisis sociológico del sistema penal a partir de la enseñanza de Franco Bricola, y el juicio de esta elección metodológica en términos de transdisciplinarietà y radicalidad política. Nuestra conclusión es la necesidad de una mejor coordinación entre tradiciones críticas que apueste por la superación de barreras lingüísticas y empiece por una revisión sistemática del arsenal crítico existente, antes de cualquier huida hacia adelante.*

**Palabras clave:** *Sociología crítica del control punitivo, Criminología crítica, dogmática penal, Boloña y Barcelona, Franco Bricola.*

## **Baratta's "miracle"**

*"If today in Italy, Spain and in the immense Latin America a critical criminology exists which is neither clinical nor administrative, but rather – although minoritarian -proudly critical in the strict sense, this is solely to be ascribed to the role played by Sandro, only to that" (Pavarini, 2022: 9)<sup>2</sup>*

Pavarini's exergue allows us to establish a premise, certainly not surprising, about the route proposed here: if the subject to be dealt with is the history of the entanglements between Bologna and Barcelona, the gravitational centre of this history can only be Alessandro Baratta. Indeed, Pavarini's words shed light on two crucial aspects: first, they confirm the authorship of one of the most decisive contributions to the intellectual operation that we designate today as 'critical sociology of penal control'<sup>3</sup>, whose meaning should be more restrictive ("*critical in the strict sense*", as Pavarini states) than the generic one progressively acquired by the syntagma 'critical criminology'; second, this is a clarification about the methodological and epistemic convergence among the critical criminologies from Italy, Spain and Latin America.

It is necessary, however, to make a few clarifications about Pavarini's phrase, which also serve as a warning for further assertions and references emerging throughout the text, so that the need for expositive simplification does not leave room for misunderstandings. In fact, the need to treat at times the Bologna and Barcelona schools as a 'single block' with a view to build a critique based on this common theoretical ground and pointing to the premises of the zemiological approach (which is the real core of the essay), combined with categorical statements such as Pavarini's one, can make the reader feel that not only the Bologna and Barcelona schools are being assimilated in contents to corroborate the strength of this axis, but even that the latter - and even critical criminology in Latin America, if Pavarini's words are taken literally - derives from the former. Beyond the rhetorical charm of Pavarini's excerpt and his deep admiration for Alessandro Baratta, when Bergalli arrived in Barcelona in 1980 he was an Argentinian scholar not yet influenced by Baratta. At the same time, he was already trained in other Italian and German legal sociologists, American and English sociologists, as well as Latin American circles that had already undertaken the development of a Critical Criminology of Liberation. This is to clarify that, despite the schematisations required by the need to keep the main focus on the differences between the materialist sociology of punitive control (Bologna and Barcelona), on the one hand, and the zemiological approach, on the other, the assimilation of

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<sup>2</sup> Translated by the author, as are all the other direct quotes throughout the paper, with the only exception of the excerpts from works whose title appears in English in the final list of references.

<sup>3</sup> To refer to the same concept, in this text I will employ a range of expressions used as synonyms. In fact, even if some of them put more emphasis on the linguistic aspect (literary output prevalently in Italian and Spanish), while others emphasise more the distinctive content of this critical criminology in the strict sense (i.e., a critical - materialist - sociology of penal control), they all designate here the same intellectual experience. These nominal variants will be: '*critical sociology of penal control*', '*materialist sociology of penal control*', '*critical sociology of punitive control*', '*critical Italian-Hispanophone criminology*', '*critical Italian-Iberophone criminology*'. Baratta's term '*integral model of penal science*' will be also used with the same meaning.

positions within the first term (as Bologna and Barcelona are practically interchangeable in this broader differentiation with the zemiological approach) does not hint at any relationship of derivation or dependence between them. In other words, insisting on their common ground - which has been the precondition for the extraordinary convergence built throughout the last four decades - is by no means positing an historiographic hierarchy between them. Likewise, the reference to my landing in Barcelona as a result of my ‘discovery’ of the Bolognese circle only reflects a concatenation of events that have marked my own biographical journey, without this contingency implying any metaphor with a wider scope.

### The 'invisible' persistence of the bond today: notes from a direct experience

Acknowledging Baratta’s historical and theoretical centrality does not detract from the importance of other contributions, and it is precisely on these more 'peripheral' aspects that we want to focus here by drawing a transmission chain that, springing from the original impulse of Franco Bricola, passes through Baratta, nourishes several generations of Bolognese scholars and paves the way for the creation of indelible links with Barcelona through biographical, editorial and institutional vicissitudes that coalesce around the figure of Roberto Bergalli in the Catalan capital from 1980 onwards and which we have tried to summarise briefly in the chronogram below, in an attempt to provide minimum temporal coordinates, without any pretension of detailed reconstructions or genealogies of schools:

<b>Decade 1957 – 1967</b>	After the Law Degree in Rome (1957), Baratta moves to Freiburg, where he meets Bricola at the <i>Max Planck Institute for the Study of Crime, Security and Law</i>
<b>1967</b>	Both of them get full professorship: Baratta in Camerino, Bricola in Sassari
<b>1967-1972</b>	First Seminars in Bologna, where Baratta is invited by Bricola and first introduced to the Bolognese circle.
<b>1972</b>	First Project financed by the CNR and directed by Baratta and Bricola (Thomas Mathiesen, Jock Young, David Greenberg, among others, collaborate in the project)
<b>1973</b>	First Annual Conference of the <i>European Group for the Study of Deviance and Social Control</i> in Florence.
<b>1974</b>	Baratta returns to Saarbrücken
<b>1975-1980</b>	Publishing life of ‘ <i>La Questione Criminale</i> ’ in Bologna (joint direction by Baratta y Bricola)
<b>1980</b>	Bergalli arrives to Barcelona
<b>1983</b>	- In Bologna the journal <i>Dei Delitti e delle Pene</i> is launched (first under Baratta’s direction and in a second step under the joint direction of Baratta and Pavarini). - Bergalli’s <i>Critica a la Criminología</i> is published as an epilogue to the Spanish version of Pavarini’s <i>Control and Domination</i> .

	- <i>El Pensamiento Criminológico. Un análisis crítico</i> , under the direction of Bergalli, Bustos and Miralles is published in the hispanophone countries
<b>1984-1985</b>	Start of the <i>Common Study Programme in Critical Criminology</i>
<b>1986</b>	- First translation (from Italian to Spanish) of Baratta's <i>Criminología Crítica y Crítica del Derecho Penal</i> (by Alvaro Bünster) - The journal <i>Poder y Control</i> (in a way forerunner of <i>Crítica Penal y Poder</i> ) is launched in Barcelona

Establishing this reference time span allows to add that although, as we have said, Baratta is the main character of the plot that leads to the creation of the critical criminology having in Bologna its epicentre, Bologna cannot be understood without taking Franco Bricola as the starting point.

Bricola's work has been the starting point also in my own personal experience. However, everything happened without receiving any external suggestion to engage in Bricola's reading and ignoring the consequences for me of that 'encounter' in the long run. In referring to biographical contingencies, I am not trying to overstate and give them any significance that they do not have at all. The point is rather to provide a reconstruction from a standpoint, although anecdotal and autobiographical, able to express something about the Bologna-Barcelona axis. It is an experience, in fact, that demonstrates the coexistence of two tensions, apparently contradictory, that traverse this nexus and the way it is (not) narrated: on the one hand, my story proves the extraordinary strength of the Bologna-Barcelona link; on the other, it also speaks volumes about the academic-institutional attempt to obfuscate it. The combination of these two tensions is probably the cause of what could be defined an 'invisible force', yet not exhausted; the same force that led me to Barcelona at the end of summer 2016 as an unexpected effect of having started to deepen, a couple of years earlier, Franco Bricola's theory of crime. I go back to the period of the fieldwork for my Master's thesis in Law. At that time, I was struggling to transpose two key principles, learnt by my professor of Public Law Giuseppe Ugo Rescigno<sup>4</sup>, into the sphere of criminal law: 1) a theory of the State based on the dialectical method which, in my opinion, should be crucial to the study of any articulation of State power; 2) a methodological commitment whereby the jurist is a scientist who, when addressed with a question, has to seek an answer, not just any answer, but rather one grounded in positive law. This aspect marks

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<sup>4</sup> To my knowledge - and to my great regret - Giuseppe Ugo Rescigno never came into direct contact with the Bolognese circle. In part, the lack of documented contacts can be explained by the fact that Rescigno, in his lectures or writings, never delved into specific questions regarding the punitive system. It is also true, however, that he did have public disputes with Luigi Ferrajoli over the theory of constitutional democracy of the latter (Rescigno, 2008). Ferrajoli, for his part, has regularly collaborated with the Bolognese circle and has always maintained a direct relationship with the figure of Baratta since the 1960s, when they both worked at the Institute of Legal Philosophy at the University of Rome "La Sapienza" (Ferrajoli, 2014, 13). This has not prevented very different positions between Ferrajoli and Baratta on the prospects for reform of the penal system and on questions of general theory of law and the state. In fact, Baratta's positions on these last issues appear much more akin - being virtually identical in matters of state theory - with Rescigno's ones (Baratta, 1986; Rescigno 2006).

a fundamental difference between the jurist (understood as the legal scholar) and the judge. Indeed, according to Rescigno (2011, 6):

*"When examining a question, the jurist always assumes that the facts comprising that question have already been proved. The judge's task, on the other hand, is primarily to verify the facts, and it is precisely here that the hardest problems and controversies arise for the judge in the eyes of ordinary citizens who evaluate the judicial decisions. This is, in my opinion, the most important difference between the judge and the jurist, which is hardly ever highlighted and thematised (it is worth noting how in law faculties students are not taught how to carry out fact-finding research, but rather law is taught as a set of rules to be applied to facts described in abstract terms)".*

It is only in this sense that the jurist's commitment is to be understood as a scientific one according to Rescigno, that is, the interpretation of an empirical object - the positive law - guided by predetermined rules which are delivered to the jurist as an objective element. Not at all 'scientific' in the sense of a metahistorical naturalisation of the data objectified in the legal statements. In fact, while overtly clarifying his position as a revolutionary Marxist, Rescigno explained that his main conflict was not with interpreting rules written by others (ibidem, 9). In fact, he specified:

*"What rules will my ideal jurist of an ideal communist society apply? Of course, not those arbitrarily invented by him/her, but those established by the constitution and the laws of the communist society as the binding rules for him/her as well as for others [...]"*

The point of irreducible tension between his scientific role as a jurist and his political stance had rather to do with other substantive aspects:

*"Starting from the premise that revolutionary practice (making the revolution) and revolutionary politics (that is, preparing for the revolution in non-revolutionary times) are two different things, revolutionary practice and law are incompatible. I have always thought, and still think, that they are irreconcilable, since if I succeeded in making the revolution, I would necessarily run afoul of established law. [...]"* (ibidem, 1).

And yet:

*"I do not live in a communist society, and the task of the jurist is not to invent rules that seem fair to him/her, but to answer questions in a pertinent and well-argued way on the basis of the law in force"* (loc. cit.).

*"The dramatic point for me is that these laws can be unjust with respect to my criteria of justice and injustice, as unjust can be constitutions, starting with the Italian one. [...]"* (loc. cit.).

*"I have already explained elsewhere that the Italian Constitution is a bourgeois constitution, which in no way opens the way to socialism as some have claimed, but I have never considered the Italian Constitution morally intolerable. Indeed, in moral terms, and without any irony, it is a constitution full of good intentions [...] I can of course participate in the game of interpretation, but I have to do so in good faith, following the conviction that legal provisions and constitutions, as empirical data, communicate something"* (ibidem, 12).

Armed with a dialectical theory of the state and a conception of positive law as an empirical datum subject to the "game of interpretation" in the terms outlined by Rescigno, I had begun to project this

baggage into a field of the penal system particularly conducive to technical disquisitions being, at the same time, profoundly political and contiguous to the state theory: crimes against public order. My way of following Rescigno's teaching unfolded in two fundamental guidelines that I considered the most appropriate ones for putting my purpose into practice: the inquiry into the historical-political meaning of the principle of harmfulness in the Criminal Justice System (*nullum crimen sine iniuria*) and, correlatively, the critical reconstruction of the so-called - in the Latin-Germanic countries - *legal interests protected under criminal law* ('*Rechtsgut*' in the German tradition)<sup>5</sup>.

While starting to organise the first selection of bibliographical materials, I discovered that, actually, a rich output based on the same pillars that I was following in my own work already existed. Deepening the research into the core themes taken as the backbone of my thesis, I thus began to familiarise with the names of Manes, Donini, Mazzacuva, Pavarini, Sgubbi, Melchionda, Canestrari, here listed in a merely chronological order of discovery. Their reading soon led me to the unifying factors of all of them: Bologna as the geographical setting and Bricola's theory of crime as a common theoretical anchor.

The work for my thesis thus began to be enriched by readings, searches for new materials and intellectual detours into areas not directly related to the curricular completion of the Master's degree in Law. One of these 'drifts' was about exploring Bricola's biography, which inevitably led me to Baratta's life story because of the many initiatives they engaged in together, in particular the founding of the journal '*La Questione Criminale*' in Bologna in 1975. The impact with the latter was so disruptive that, in parallel with my thesis, I came to establish a new workstream - outside of any academic bureaucracy - on what I was probably pursuing more than anything else: a Marxist philosophy of law declined as a sociology of penal control. However, I got very disappointed when my venture was abruptly interrupted by the discovery that Baratta's major work<sup>6</sup> was not available

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<sup>5</sup> I'm here referring to the legal concept of 'Bien jurídico' (in Spanish) or 'Bene giuridico' (in Italian). The literal translation into English would be 'legal asset', but such an expression risks being too evasive and scarcely indicative of the real semantic scope of the concept of origin. Indeed, in the legal systems resorting to it, the concept is closely linked to the theory of crime and functions as the main rationaliser of criminal law protection. Requisite of the legal interests at issue is their social relevance, which is precisely what justifies the recourse to criminal prosecution and the intervention of the State in the event of their infringement. Therefore, more than 'legal asset' a more appropriate translation, reflecting the substantive contents, should be '*interests/situations secured or protected by means of criminal law*'. This seems confirmed by the fact that in their countries of origin, they are also referred to as 'criminally relevant interests within the legal system'. The last definition has the merit of bringing out the historical significance of the theoretical elaboration of this concept, that is, overcoming the Enlightenment's conception of criminal Law as a merely punitive branch of individual rights laid down in other spheres of the legal system (Civil law, Administrative Law, Trade Law etc.) and recognising a qualified status to those legal interests deserving the maximum possible protection within the institutional architecture. For the sake of brevity, the German term *Rechtsgut* will be frequently used throughout the text to refer to the same concept. Analogous notions employed in other legal traditions are 'Oikeushyvä' in the Finnish context and 'Dobro prawne' in the Polish one.

<sup>6</sup> While for an Italian or Spanish speaker the clarification might be superfluous, the reference is to the work: Baratta, A. (1986), *Criminología crítica y crítica del derecho penal. Introducción a la sociología jurídico penal*. Buenos Aires: Siglo XXI. This text is the fundamental book where Baratta's materialist sociology of penal control and critical criminology are deployed through the scrutiny of the main steps in the history of criminological thought. The literal translation of the title would be: '*Critical Criminology and Critique of Criminal Law. Introduction to Criminal-legal Sociology*', but, to my knowledge, no English version of the book has ever been edited.

either in the commercial circuits or in any public library of my city (Rome). The circumstance that both my hometown and my *alma mater* were exactly the same ones as Baratta added a touch of surreality to the situation, to the point that I became absolutely obsessed with finding out more about that story. I realised from the very first moment that the silence that condemned that literary filiation was not an unfortunate circumstance, but a calculated result. I then came to a decisive finding: some of Baratta's writings – including his main book - did exist and were accessible online for free, but, somewhat inexplicably, only in Spanish. What's more, that same Spanish version of his book was one of the cardinal texts of a Master's course taught in Barcelona. These two circumstances were clearly not mere accident, and I soon realised that the existence of that Master's programme and that of the Spanish version of Baratta's *Criminología crítica y crítica del derecho penal* were two facets of a single story. To sum it up in a sentence, this is how - starting from Bricola's theory of crime, and without forgetting the subterranean role that Rescigno's lesson had played in that - I ended up in the Master's course created by Bergalli in Barcelona.

### **The Bolognese legacy: what lesson for us?**

Any pretension to explain the Bolognese legacy in all-encompassing terms, rather than sticking to specific facets of that experience, is a daunting task which may only seem feasible to someone without the correct perception of the cultural phenomenon at issue. There is probably no question of criminal law doctrine – spanning from general theory to specific hermeneutic disputes over provisions of the Criminal Code or the Constitution - that since the 1960s has not passed through the lens of the Bologna School and on which Bricola and his disciples have not proposed an innovative reading, yet always technically meticulous and refined. The distinctive feature of the Bolognese intellectual production that we want to highlight here is the capacity for constant integration between hermeneutic-doctrinarian reflection, questions of legal theory, and openly political theses, sometimes more akin to revolutionary projects than to reformist positions. Our reason for highlighting this specific aspect of the Bolognese experience will become clearer later, when we will develop a critique of those refoundational theses within the field of critical thinking which advocate an "overcoming" of the narrowness of critical criminology itself through - among other lines of action - a preventive rejection of notions and categories coming from fields of knowledge historically subordinated to the official criminal policy, such as criminal dogmatics. The insistence on the figure of Bricola, while recognising Baratta's central role in the destiny of critical criminology for all the Ibero-Italian speaking world, responds to this same argumentative strategy. Indeed, while in this respect Baratta's role is unanimously recognised (at least in the Italian/Spanish speaking contexts), Bricola remains often in the background due to the mostly 'technical' nature of his contributions in the analysis of criminal policies and the systematic 'delegation' to Baratta of more philosophical duties. However, such an oversimplified account arbitrarily deprives Bricola's work of political significance – overlooking the fact that Bricola's positioning on dogmatic matters was often the prelude to a stronger and better-grounded questioning of criminal policies in their entirety - and hinders the understanding of the synergic action on two different flanks (legal technique and socio-philosophical reflection), each one indispensable to the other.

Thus, resuming the historical contextualization started above, it can now be added that, while it is absolutely true that Barcelona cannot be understood without Bologna, neither can Bologna and



Bricola's work (1973) be understood without considering the particular institutional setting of post-war Italy, marked by the strange coexistence of a pre-constitutional penal code (the Rocco Code) and a Constitution that was the product of a political process of violent suppression of the legal order under which that same penal code had been created. This explains both the prolificacy of the Bologna circle and the innovative nature of its contents, revealing a constant search for a hierarchical overturning of the classical categories of analysis of criminal dogmatics. The approach to the problematic coexistence between the Code and the Constitution relied on the acknowledgement of the primacy, in political-criminal terms, of the constitutional principles as the only condition for the substantial realisation of the principle of *ultima ratio* (Donini, 2011, 50). Therefore, the prominence of the Constitution in such an institutional scenario had to do, first and foremost, with the awareness of a political commitment springing from the experience of the anti-fascist resistance. However, this political awareness was not a clause to circumvent the need for a legal sustainability of the interpretative solutions given to dogmatic issues; it was rather integral part of legal hermeneutics, insofar as the primary function of the political mandates enshrined in the Constitution were the only possible basis for establishing – both in positive or negative terms - what could be subject of criminal law protection and under which conditions. In fact, the Constitutional Charter gave rise to a science of the limits to criminal intervention inspired by a radical idea of 'guarantism', not as a set of mere procedural limits, but rather as a substantial limit to the interests criminally prosecutable. Within this architecture, the Constitution was the only positive text in which the selection of these interests could take place and be based<sup>7</sup>. Otherwise, the historic and political process that had led to the establishment of the Constitution would have been emptied of any practical meaning.

In short, Bricola understood that the game would be played around the legal interests receiving criminal-law protection, more precisely the political selection of the interests that could be protected by means of criminal law. As mentioned above, adopting the Constitution as the technical tool for this operation never meant waiving sociological reflections on penal control and power relations in society. Indeed, even starting from a seemingly only 'technical' issue like the epistemological status of the constitutional principle of harmfulness (*nullum crimen sine iniuria*) – which was inseparable from the definitional problematisation of the legal interest subject to criminal-law protection - the political battle could penetrate and gain traction in a traditionally - and only illusorily - 'aseptic' terrain, such as legal dogmatics. The status of legal interests whose definition had always been extremely thorny and shifting even from a dogmatic perspective, like the notion of 'public order', was thus politically challenged first through technical-legal allegations. These counterarguments, even when could not become dominant doctrinal positions, were anyway effective in unsettling the

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<sup>7</sup> This is, in a nutshell, Bricola's (1973) thesis known as 'Constitutional theory of the legal interest protectable through Criminal Law', in Italian 'Teoria Costituzionale del bene giuridico'. As explained above, when jumping between different languages, the most arduous task is the translation of the concept of '*Bene giuridico*', which correspond to the German *Rechtsgut*. The core of Bricola's theory is that only those interests endowed with constitutional relevance can be object of penal protection. This never turns into any positive obligation for the lawmaker to introduce penal protections (it represents a necessary precondition, not a duty). Furthermore, it is a first-level enablement from a Constitutional point of view, which always needs to be accompanied by other legal requirements for a certain conduct to be Criminally relevant.

foundations of the traditional ideology of criminal law, systematically defeated on its own terrain by the exposure of a structural contradiction within the legal system underlined by both Rescigno and Baratta. They highlight, in fact, the structural necessity for the legal system to be sustained by (and feed back into) a permanent contradiction between the image that the system proposes of itself and its real functioning. This mismatch between stated principles (equality and defence of common interests) and their realisation (substantive inequality) is not, to a dialectical analysis of society, an unfortunate and contingent discrepancy, but a necessary condition for the system to keep functioning exactly in this unequal and selective way. Indeed, without this contradiction between ‘declared form’ and ‘actual content’, the law could not perform its real function of producing and maintaining inequality in the social system, since its existence - if its real purposes were overtly declared - would be continually threatened by crisis of legitimacy. Therefore, questioning the effective receptiveness to constitutional precepts of the dominant doctrine and jurisprudence, as well as denouncing their substantial circumvention by the retention of criminal offences breaching minimum requirements of harmfulness and materiality according to Constitutional standards, was a prodromal moment to the study of structural contradictions within society.

In fact, although criminal dogmatics is not enough in itself to grasp the structural contradiction described by Baratta and Rescigno, which always requires an empirical survey beyond positive law, nevertheless, Bricola’s technical-legal operation has a double potential. *First*, it proves the existence of a first contradiction, internal to the positive law system, between different levels of the legal system (the Constitution and the criminal legislation in force). This denotes how the contradiction between ‘form and substance’ tends to emerge already in form of a conflict between programmatic norms and applicative provisions, that is, a contradiction within the same formal dimension of the legal experience. *Second*, a legal dogmatic analysis is the only non-arbitrary way to fix the meaning of the first term involved in the structural contradiction, namely, the stated principles allegedly informing the legal system and the image that the legal ideology tries to convey about that. Put differently, only by establishing the meaning of the stated principles in a ‘scientific’ (in Rescigno terms) manner, can one then assess to what extent they are contradicted by the real functioning of the system itself and thus corroborate its structural nature in dialectical terms.

In this specific aspect, Bricola is the confirmation - even more than Baratta - of how criminal dogmatics can prepare the ground for a critique that transcends doctrinal diatribes and leads to a radically political confrontation: suffice it to remind, by way of examples, that the mandate of *La Questione Criminale* was the definition of a criminal policy of the working-class movement, or the fact that Bricola's analysis of law in force has been openly defined by his disciples as a Marxist critique of positive law (Donini, 2011, 46). The history of the Bolognese *Gruppo Penalistico* shows that the understanding of the systemic dimension in which penal control is inscribed can perfectly encompass a first hermeneutic-textual step, without this implying any ‘subscription’ by the interpreter to the Criminal Law ideology. Thus, the main epistemological transformation achieved by Bologna's critical criminology is the shift from a criminology synonymous with the aetiological theory of criminality to a criminology as a theory of the penal system, the latter being understood in a sociological and not a technical-legal sense. For Baratta (1980: 27), in fact:

*"The penal system is not only a static complex of rules, but rather a dynamic complex of functions (i.e., the criminalisation process) involving the activity of various official bodies, from the legislator to the criminal enforcement bodies and the informal mechanisms of social reaction".*

However, criminal law dogmatics remains an inescapable element of that system to be analysed, since only by scrutinising the textual result of the defining mechanism behind criminalisation (that is, the systematic study of what is selected as 'crime' and the reason for the inclusion/exclusion in it of certain spheres of life) can the informal operators and the official agencies that administer criminalisation be detected and their role understood in light of the patterns of exploitation and subordination in capitalist society. Moreover, following Baratta (1980: 31), it is precisely dogmatics that "*provides the conceptual tools necessary to convert the decisions of the legislator into the programmatic decisions of the judge*"; in addition, dogmatics represents an "*important factor in the professional training of the judge and of the cadres who act in other sectors of the system*" and "*directly influences criminal legislation, to which dogmatics provides not only the logical categories that contribute to rationalise official decisions, but also intervenes directly in the Criminal Policy orientation of these decisions*" (loc. cit.).

The development of a sociological analysis, therefore, does not entail any preventive rejection of legal dogmatics as a condition for overcoming criminal law; it rather builds on analysing the official legal system as a subsystem embedded within a broader mechanism of selectivity and social control, with the first being inexplicable in isolation from the latter. In short, if the analysis of an object is a necessary condition for overcoming it, criminal dogmatics is an essential tool required to organise part of the knowledge of this wider object of study corresponding to the penal system in the sociological sense. This is the teaching of Bologna's circle and the cultural background that fostered the emergence of Alessandro Baratta's Marxist sociology of penal control.

### **Current criminological debates and new headlong rushes**

In the previous pages, we have traced a route that, starting from the recovery of the link between Bologna and Barcelona, has sought a historical, theoretical, and also anecdotal foundation of this connection from the personal point of view of someone who, generationally, has neither contributed to nor assisted in its construction, but still has been able to directly experience *a posteriori* the persisting effects of this nexus. The history of this bond reveals the existence of two apparently divergent tensions, also traceable in my personal experience: on the one hand, the persistent strength of the link; on the other, various attempts – even at an institutional level - to occult its visibility. This latter aspect is mostly the result of intentional operations of obfuscation conducted by declared political adversaries, inside and outside academia. However, in the current scenario, further tendencies, even internal to the critical thinking, may contribute, unintendedly but not for this ineffectively, to make the situation even more complicated when it comes to push aside the legacy of the Bologna School and its role in the foundation of a "*critical criminology in the strict sense*", to use Pavarini's expression. Consequently, also the 'Bologna-Barcelona' line runs the risk of being obfuscated by possible misunderstandings and lack of (also linguistic) coordination among critical sectors of criminology. In fact, one distinctive argument of the currently most progressive proposals - precisely lamenting the narrowness of any criminology - is that a full emancipation can only be

achieved with the abandonment of the criminological field and the subsequent foundation of new fields of knowledge (such as 'zemiology').

In addition, the current linguistic monopoly of English, which operates both in contemporary output and, retrospectively, as regards historiographical selections, means that the Italian-Iberophone critical tradition (*i.e.*, the materialist sociology of penal control), if not outright unknown, is often not recognised in its historical significance as the carrier of a theoretical baggage of its own. In this way, by ignoring the historical context that led to its emergence and the characterisation of its contents, the tradition at issue is 'forcibly' subsumed under the historical vicissitudes of the 'only' critical criminology that Anglophone operators recognise as such: merits and limits of the latter are then mechanically extended to the former and both end up being united under a common narrative and subjected to a single historiographic accounting.

As outlined above, the progressive and emancipatory potential of cutting-edge approaches like 'zemiology' builds on premises somehow antithetical to the Bolognese lesson. More precisely, these trends tackle the problems of the selectivity of crime management, and the consequences that the punitive apparatus entails for society, from the questioning of the very idea of crime, since the mere fact of keeping the word "crime" implies the validation of the process whereby certain social acts are defined and labelled as criminal. Thus, keeping the lexical reference to 'crime', even in critical analysis, reveals an insufficient problematisation of the conventional nature of criminal law, while at the same time contributes to cover up a vast range of actions which, without receiving any qualification of criminal disvalue by the legal system, produce harmful effects for society on a much larger scale than any inter-individual conduct qualified as criminal. On this basis, arguing for the need to abandon the idea of criminology, Hillyard & Tombs observe that: "*criminology perpetuates the myth of crime*" (2004: 11). Indeed, in their words:

*"...no matter how deconstructive, radical or critical a criminology is, in the very fact of engaging in criminology, this at once legitimates some object of 'crime' [...] While criminology may have, and criminologists certainly have been, responsible for important and progressive theoretical and practical work, the efforts of over 100 years' focus on the object of crime have been accompanied by a depressing and almost cyclical tour around a series of cul-de-sacs in search of the 'causes' of crime"* (ibidem, 28).

Hence the need to adopt as a unit of analysis the concept of 'social harm' and the consequent need to establish a new field of study: 'zemiology', which is detached, also in its name, from any reference to the legal concept of 'crime'. It is not coincidence, moreover, that one visible effect of the success of the zemiological paradigm is the progressive discursive rejection of categories of analysis proceeding from fields of knowledge that, in representing 'disciplinary cages', hinder a comprehensive understanding of social reality (criminology, criminal law, and positive law in general).

But do these proposals represent an overcoming of criminology limitations? Our answer is that they do not, at least if we include in the reasoning the Italian-Hispanophone critical criminology. In fact, the criticisms made from zemiology hold validity on condition that 'criminology' is used there as a synonym for the 'aetiological paradigm'. This is not to deny the great value of the concept of 'social

harm' as a descriptive and methodological resource to establish an approach opposed to that of aetiological criminology. Moreover, precisely from a materialist sociology of social control, we consider that talking about *social harm* is nothing more than talking about capitalism and its (apparently only) collateral effects. However, precisely for this, the idea of 'social harm' is not a break with the past in organising knowledge about social phenomena: what our perplexity is about is precisely this basic misunderstanding, not the very idea of 'social harm' or its valuable use as a descriptive tool.

At the same time, it has been made clear above how the fact that Bricola and Baratta's operation was routed by delimiters proper to positive law has a meaning totally opposed to the legitimisation of criminal law ideology, being simply a condition for a methodological foundation of the sociology of penal control. At no point do these authors endorse the official justifications for the mechanisms of criminal definition; nevertheless, the sociological study of the penal system cannot ignore what the penal system considers worthy of punishment, nor the steps and arguments through which this selection takes place.

Likewise, the analysis of positive law does not imply the ascription of ontological consistency to crime. In this respect, we want to draw special attention just to Baratta's critique of the fallacies of positivist criminology. His argument, even nowadays, seems to us somehow more incisive and exhaustive than those raised by zemiology towards 'criminology' thought as one undifferentiated whole. Baratta (1989: 16) reminds us that traditional criminology's claim to elaborate a theory of the causes of crime is "*epistemologically unjustified*", since "*a search for causes is not possible with respect to objects that are defined through social or institutional norms, conventions or evaluations*" (loc. cit.). Applying the causal-naturalistic method of knowledge to such objects produces a reification of the results of these normative definitions. Thus, the results of normative definitions are artificially converted into a datum pre-existing those definitions and the social and institutional reaction, whereas ideas such as 'criminality' or 'criminal' are not possible without the intervention of institutional and social processes. It is precisely within this instrumentality vis-à-vis official criminal policy that etiological criminology plays an "*auxiliary function also vis-à-vis criminal law dogmatics, to which the first provides the anthropological and sociological notions necessary to give an ontological and naturalistic foundation to the conceptualisations which, starting from the positive penal law, are carried out by legal dogmatics*" (Id., 1980: 16).

However, outside the positivist framework of etiological criminology, the allegation of 'subjugation to legal dogmatics and official criminal policy' levelled against any intellectual operation that does not preventively get rid of legal concepts - and for that very reason - does not seem to us a solid argument. Indeed, such an assumption would conceal the emancipation that, precisely in this respect, the critical sociology of penal control achieved with respect to traditional criminology. Nor does the integration of dogmatics as a 'subsystem' in the analysis of the penal system in a sociological sense mean a denial of the purely conventional nature of legal definitions or a validation of their results as ontological realities.

Returning to the supposed 'disciplinary closure' of any criminology and the proposal to overcome it through 'post-criminological' refoundations, it should be also clarified that starting from criminal law categories does not imply either that the analysis begins and ends necessarily within the boundaries

of the penal system or that legal notions are taken as scientific descriptions of reality. In fact, such a methodological step does not deny the existence of a network of power relations that transcend the penal system, even taking logical and functional priority over it; nor is it a way to cloak structural problems of society - poverty, unequal access to primary resources, unemployment, pollution by large companies, illnesses induced by precarious living conditions, forced migrations, evictions as a result of financial speculation, etc. - which normally evade the radar of the criminal justice system and which are likely to cause far more damage to society than the majority of acts legally defined as crimes. These phenomena, it is true, are not thematised as specific objects of study by the critical sociology of penal control; however, they are dissimulated, nor the analysis is abstracted from them. Every phenomenon symptomatic of the injustice of capitalist society, as well as the shape assumed by power relations beyond the content of legal provisions, is rather a premise and a background knowledge which does not need to be enunciated insofar as obvious. Consistently, critical sociology of punitive control does not consider the denunciation of structural mechanisms of exploitation, accumulation, and production of inequality as any new finding or further inputs to what Marxist analysis already highlights. Instead, its real task is to explore the specific function of the penal system within the gears of capitalist society, in the full knowledge that the latter are based on processes that primarily occur at the economic base of society and that, of course, are not exhausted in the mechanisms of criminalisation.

Even so, the role of the punitive system and its formal and informal operators can only be understood as part of a social control mechanism whose main purpose is not the repression of illicit acts, but the management and reproduction of class conflict. This approach does not exclude inroads in issues external to the penal system (the same issues taken as implicit premises of the analysis): however, this only happens after surveying how the penal subsystem is grafted and contributes to the functioning of the system as a whole, thus enabling a more exhaustive and enriched understanding also of those social phenomena invoked in social harm theory as objects of study culpably concealed by the criminological tradition. It is worth remembering, in fact, that the ultimate benchmark of Baratta's 'integral model' of criminal science is not individual rights, but the study of the practical needs that underlie them (Baratta, 2001), as well as the way the satisfaction of these practical needs is organised in a given society according to its relations of production and distribution. Only on this basis does it make sense to examine how law intervenes, directly or indirectly, in that provision.

What we have in the critical sociology of punitive control is then a different transdisciplinarity, perhaps less apparent, insofar as 'mediated' by the scientific tension towards the understanding of the specific role of the penal system within the overall goal of social control in class society. And yet, despite its less flashy character, the transdisciplinarity of the 'integral model of penal science' (Baratta, 1980) seems to us more effective than that of the zemiological critique, which instead builds on a preventive 'escape' from certain terms or categories to be rejected in order to transcend legalistic or criminal-positivistic limitations. However, this represents an 'aprioristic' transdisciplinarity, whose greater breadth of vision is presented as self-evident in the discursive abandonment of notions and concepts coming from legal ideology; at the same time as it brings together, in the same cauldron, any tradition of thought that has previously used these concepts, even when the purpose was exactly to delegitimise – also epistemologically, like in Baratta's case - the object of official criminal policy.

In order to compare the different transdisciplinarity of the two approaches, one could resort to the metaphor of a torch. Taking the aetiological paradigm as the reference object to be challenged, this could be represented as a torch that points towards the legally defined crime with the pretension to reconstruct its causes. In doing so, under the aetiological paradigm the conventional nature of 'crime' is concealed, while the naturalistic laws of causality artificially applied to the outcome of such a merely definitional operation. A first possible opposition to such an aetiological bias is the 'social harm' approach, whose guiding principle, in this specific matter, consists in questioning the light perimeter of traditional criminology and seeking new delimiters alternative to legal definitions. These definitional parameters are meant to centre, rather than on legal categories, on the harmful consequences of a variety of actions regardless of their legal qualification or the legal status of their perpetrators (that is, individual or corporate actors). In this way, phenomena traditionally beneath the legal – and hence the criminological - radar can be highlighted.

On the other hand, a different path is the strategy of the Italian-Hispanophone critical criminology, which, metaphorically speaking, consists in taking the torch and overturning the directionality of the light beam. More precisely, with the materialist sociology of penal control, what happens is not a 'progression by expansion', but an overcoming by dialectical opposition. Indeed, the final enlargement of the light beam is only a mediated result of the initial overturning, which transforms those traditionally considered the 'natural administrators' of this light (i.e., the agents of the penal system) into the ones towards whom the light is now directed. It is through this dialectical path that the materialist sociology of penal control emancipates itself from the legalist horizon and comes to eventually integrate the understanding of the punitive system into the broader analysis of the material and ideological power structures of capitalist society.

At a closer look, the transdisciplinary 're-foundation' of zemiological critique, which promotes a flight from anything that refers to legal categories, confuses the need for an initial semantic delimitation of the object of study with a supposed moral endorsement to the definitional mechanism of crime and the 'solutions' offered by official criminal policy. However, such an assimilation of positions is somehow arbitrary, since it automatically attributes to any use of the term 'crime' also the judgement of disvalue embedded in the institutional use of it made by the formal and informal agents of the Criminal Justice system. After all, resorting to the term 'crime' to refer to the material substratum receiving criminal qualification by the legal system is the only coherent way to analyse the institutional mechanisms that target and intervene on that substratum, as well as the model of social control inherent to the institutional countermeasures designed for that purpose. If Bologna teaches us anything, it is that it is not the greater discursive remoteness from criminal dogmatics what ensures a more radical political positioning.

### **Social harm: a real way out of criminal law?**

Besides the questionable nature of the basic thesis whereby any criminology would be inevitably 'complicit' with reinforcing an aetiological approach to crime, another perplexity of ours has to do with the specific path followed to theorise zemiology's emancipation from any previous criminological rationality, that is, the assumption of the idea of 'social harm' as the decisive argumentative keystone. Leaving a more detailed discussion on the subject for future occasions, it is worth making a few observations that we feel the need to put forward, even at this stage. Our feeling,

in fact, is that the attractiveness of the notion of 'social harm' as the leverage point for a full emancipation from legal-criminological bottlenecks can only take hold in a cultural context, such as the British one, which historically has not rationalised criminal protection – nor the realisation of the *ultima ratio* principle - on the basis of a concept analogous to that of '*Rechtsgut*'<sup>8</sup>.

We state this because 'Social harm', as conceptualised by the theorists of zemiology, is in fact a conceptual container structurally analogous to that of '*Rechtsgut*' or 'legal interest/asset'<sup>9</sup>, whose key elements are precisely high social relevance - indispensable for a sanction to have criminal nature – and the occurrence of a provable substantial injury. The analogy has to do with the fact that the *Rechtsgut* in criminal-legal dogmatics, like 'Social harm', is a conceptual envelope that can be filled with very different contents, as historical experience shows. For its part, the social harm approach does not outline criteria for a systematic definitional distinction between 'social harm' and the interests that traditionally fall under the penal system protection. We are not alluding here to exemplary lists of phenomena qualified as social harms, which do appear extensively in zemiological literature. We are rather wondering what the reason should be - if not mere criminal policy decisions - why these same phenomena could not be object, in different circumstances, of legal-criminal protection in the traditional sense. Indeed, drafting a phenomenology of differences between different classes of phenomena does not equate, at a logical level, to have provided the explanation why a certain item should be put by definition in one of two mutually exclusive classes.

To express it in form of questions: *is there any structural characteristic in the phenomena presented as examples of social harms ruling them out, by logic and rational necessity, from the possibility of being objects of criminal law protection in a conventional sense? Is there actually an insurmountable limitation intrinsic to the categories of criminal-dogmatics or does the selection of what is to be prosecuted is rather the result of decisions based on political convenience?* Far from being an academic rhetorical exercise, these questions seem to us crucial to locate the problem and thus elaborate practical and political countermeasures. In fact, the traditional justification of criminal protection lying in the injury of a legal interest qualified by its social relevance (*Rechtsgut*) does not present - in its own conceptual architecture - intrinsic or otherwise insurmountable limits that would

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<sup>8</sup> In this respect, it must be recalled that the thematization of the *Rechtsgut* expressed the historical need, in the 19th century, to overcome the Enlightenment's concept of 'crime' as a one-to-one correspondence with the violation of subjective rights. This theoretical shift was necessitated by the impossibility to subsume under the Enlightenment's paradigm criminal offences established to protect situations not ascribable – even *pro parte* - to subjective rights owned by the individual (e.g., offences against religious sentiment or public morality). At the same time, such a reconceptualization was needed to justify the qualified status of the interests secured through criminal sanctions, and in view of which the punitive action of the State should be activated. Indeed, the Enlightenment's argument relegated criminal law to a purely sanctioning branch of precepts laid down in other areas of the legal system. In outlining one of the first definitions of *Rechtsgut*, Binding (1890: 357) relates this to “*everything that the legislator considers valuable as a prerequisite for the healthy life of the legal community, in whose unchanged and undisturbed maintenance the community has an interest in the opinion of the legislator, who intends to protect it by means of his rules against undesired damage or endangerment*”.

<sup>9</sup> The reference is, of course, to the legal 'asset'/'interest'/situations' corresponding – in terms of same rationalising function - to the German *Rechtsgut* in the Spanish and Italian-speaking traditions. For more details, See footnote 5.



invalidate *in abstracto* the inclusion of virtually all 'social harms' in the area of criminal law protection. Are we thereby arguing that criminal protection is the most reasonable and desirable solution? We are definitely not, and in fact this has never been the sense attributed to the study of penal dogmatics by authors such as Rescigno and Bricola. What we are questioning is the actual emancipatory potential of the idea of 'social harm' as a qualitatively novel way to overcome the rationale for the selection of the phenomena worthy of protection.

In this respect, it can be very illustrative to quote Baratta's words when denouncing the contradiction of the ideology of Criminal Law (that is, to demonstrate how, even when reasoning from the official categories of the legal system itself, a fundamental contradiction emerges): "*The effective degree of protection and the distribution of criminal status is independent of the social harm of the actions and the seriousness of the offences, in the sense that these do not constitute the main variables of the criminalising reaction and its intensity*" (1980: 29). It should be noted that what is being disputed here by Baratta is the illusory (ideological) correspondence between the social harm caused by certain conducts and their actual criminal prosecution; however, the fact that social harm is already one of the official justifications to which the system resorts to rationalise its intervention is not questioned. The real question is what should be considered harm to society and why, which Bricola had probably already grasped in focusing so much on developing the 'Constitutional theory of the legal interest protectable through Criminal Law' (see footnote 7). Put differently, the problem here is not the nominal label of the container ('Social harm' or '*Rechtsgut*/legal interest worthy of penal protection'), but rather the definition of the content, since the very concept of legal interest worthy of penal protection already encompasses a judgement of disvalue based, *in abstracto*, on social harmfulness. At the same time, the appeal to social harmfulness alone does not guarantee anything in terms of more democratic consequences, as demonstrated by the ease with which the concept of *Rechtsgut* thematised by the neo-Kantians in the 1930s could be placed at the ideological service of even the Nazi regime<sup>10</sup>.

There are, however, two areas that at first sight seem to highlight some differences at the abstract-definitional level between the idea of *Social harm* and the *Rechtsgut/legal interest secured under criminal law*. These two areas bring out features apparently proper to the radar of social harm and correspond respectively to: 1) the production of harm related to the functioning of the penal system itself; 2) an array of actions/situations only traceable thanks to the zemiological prism, whose authorship could not be reconstructed according to the traditional scheme of the causal link of criminal responsibility, and whose harmful effects for society could only be fully understood when thought on a collective scale.

As for the *first range of situations*, apparently exclusive to social harm, a distinction should be made between individual actions of institutional operators who abuse their legal prerogatives and the harm production, at a systemic level, related to the ordinary functioning of the penal system itself. In the

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<sup>10</sup> In this regard see: Schwinge, E. (1930) *Teleologische Begriffsbildung im Strafrecht*. Bonn: L. Rohrscheid.

first subcase, needless to say, the extant legal tools lend themselves perfectly to tracking individual responsibilities; plus, in terms of legal rationality, no conflict arises for a legal system wishing to pursue personal abuses by those who hold qualified positions in it. The experience of several legal systems in fact demonstrates the perfect viability of regulatory provisions addressing these situations, as long as the political intention to establish them exists. A separate issue – which however is not the point in this subcase - is whether such conducts are systematic or episodic in nature, or whether they are effectively denounced, investigated, prosecuted, punished, etc or not in a given system. The real point here is whether or not legal measures of this kind may have a rational place in a legal system and be fully justifiable from an intra-systemic perspective. Moreover, the formal prosecution of these conducts, which do not feature structural differences - at the abstract dogmatic level - with other criminal offences (except for the subjective condition of the perpetrator, qualified by the exercise of public functions), is a condition for the credibility of the criminal justice system and the legal system as a whole. As for the second subcase, namely, the systemic damage caused by the ordinary and law-compliant functioning of the punitive mechanisms<sup>11</sup>, it is obvious that Law cannot, so to say, prosecute itself. In other words, at the same moment as the criminal justice system is construed as a producer of harm in itself, a position of frontal opposition to positive law is taken. In fact, the legal system could never consider its own institutional ‘reaction’ to what the same system classifies as unlawful, as ‘illegitimate’. In order to get out of this impasse, we reiterate how it was precisely Baratta’s *critical sociology of penal control* the one that analysed the functioning of the penal system (in a meta-legal sense) as its specific object of its study, in accordance with a dialectical analysis of society. Therefore, the decisive issue is not so much the possibility for a legal definition and prosecution - under the same legal order - of these harm-producing institutional practices. For the reasons already mentioned above, a speculation of this kind would make very little practical sense. Nevertheless, once again, is the Bolognese-Barcelonian tradition the one which shows how this acknowledgement does not preclude centring the analysis on the structural contradiction between officially declared and actually performed functions of the penal system, consisting in the perpetuation of the inequalities of capitalist society and, needless to say, in the related production of harm and suffering. Note however, that the structural production of harm is a fundamental premise rather than a finding proceeding inductively from a universal category (like ‘social harm’), whose recurrence is to be checked on a case-by-case basis and converted in the culmination of the reasoning. What is more, such a premise is a necessary condition for a full overcoming of the technical-legal horizon, whose categories are thus exposed as tools of ideological domination within a broader conflict involving public and private powers, class dialectics and state dialectics. All this means that the ordinary functioning of the penal system can be perfectly construed in terms of deliberate factory of pain, suffering, affliction, desocialising segregation and exclusion - which blatantly contradict the objectives the system claims to pursue - even without starting from any general idea of social harm, focussing instead on the penal system as one concrete mechanism of harm production. In this sense and leaving out further nuances that would transcend this essay, it can be affirmed without fear of

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<sup>11</sup> Christie (1981) already speaks in this sense of the crime control system as a deliberate pain-delivery process.

contradiction that the framing of the penal system as a mechanism of harm production on a macro-social scale was not made possible for the first time by the social harm approach. Nor is it historiographically correct to accuse of short-sightedness, or even active legitimization of the same object of aetiological theories, all previous theoretical production for the mere fact of being formulated under the name of 'criminology'.

As for the *second area of phenomena*, these are instead situations that, due to their collective scope, cannot be reduced to violations occurring in the private sphere of specific individuals. This is also why the traceability of these situations would be exclusive to the zemiological prism. However, the structural analogy mentioned above between 'social harm' and 'legal interest secured through criminal law' proves crucial here. We are dealing, in fact, with actions that tend to elude the traditional scheme of the causal link in criminal law and whose harmful effects can only be grasped by looking at society as a whole, rather than at specific victims. At the same time, there is no doubt that the fundamental structure of criminal offences continues to reflect, in most cases, the inter-individual archetype of crime, while anything deviating from this framework encounters major obstacles to be formally detected by the legal system. However, the same question raised above should be reiterated: *is this really an intrinsic limit to the ideology of criminal law?* If this were the case, one could easily justify re-foundational projects - such as zemiology - basing the solution to situations otherwise 'undetectable' on getting as far away as possible from the formal categories of law. In raising this point, we are not implicitly taking the side of penal legalism as the most desirable solution: we only want to investigate to what extent the fragmentariness of penal protection is to be traced already in the theoretical construct of criminal law, or whether the reasons for this asymmetry of protection should be found outside the abstract sphere of legal reasoning. The point, again, seems decisive to us, as opting for one conclusion or the other inevitably determines the assessment on the different emancipation proposals and the different solutions promoted by these.

In this respect, we would like to recall a famous dispute, all internal to penal doctrine, between Luigi Ferrajoli, on the one hand, and the criminal law professors Giorgio Marinucci and Emilio Dolcini, on the other. The explanatory power of their discussion lies in the fact that none of the actors intends to disavow legal dogmatics. In fact, in going through this dispute, our intention is not to adhere to the content of Ferrajoli's theory of rights. The point is, rather, to observe how a staunch defender of the thesis whereby the content of rights is the historical expression of the 'weakest' as opposed to the 'law of the strongest' characteristic of the state of nature<sup>12</sup> (Ferrajoli, 2012: 106) advocates criminal

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<sup>12</sup> This is a totally opposite view to the Marxist reconstruction of Baratta or Rescigno (2008). According to Marxist theory, any right comes to be established only at the moment when its contents are the expression of a position of force. In other words, contrary to Ferrajoli's assertion, law always crystallises situations of established supremacy and can only be modified by changing the composition of the latter. Recounting law as an expression of the voice of the weak who achieve formal protection is a purely ideological and anti-historical operation. In this sense, see Rescigno's (2008) reply to Ferrajoli himself on the historical meaning of fundamental rights and the latter's theory of constitutional democracy. For his part, Baratta (1980: 38) affirms that "criminal law is, like all other fields of law, not only the concrete result of mediation, but also of the conflict between material interests and not very rarely of the preponderance of the particular interests of powerful groups over general interests".

protection against new forms of criminality that no longer correspond to the old subsistence criminality. Interestingly, he justifies this position precisely on the grounds of the idea of 'legal interest' to be protected under criminal law, while clarifying his distance from Baratta, defined as "abolitionist" (Id. 2000: 126). This last cue further demonstrates how even positions absolutely consistent with the tradition of formal-legal reasoning – and actually criticising Baratta from that standpoint - comes to justify the protection under criminal law of new areas of social life by leveraging the very idea of legal interest (*Rechtsgut*) and the related principle of harmfulness.

The crux of the dispute between the aforementioned professors is, in fact, the accusation by Marinucci and Dolcini that the Ferrajolian position of 'minimum criminal law' could not ensure sufficient protection in the face of new forms of crime that have led to a "*mutation of the criminal question*" (Ferrajoli, 2000: 125), such as environmental crime, crimes of public authorities, and major economic and financial crime. According to Marinucci and Dolcini, the weakness of Ferrajoli's position lies in Ferrajoli's own passage from his masterpiece '*Diritto e Ragione*'<sup>13</sup> where the Florentine professor affirms that "*our principle of offensiveness*"<sup>14</sup> allows us to consider as 'goods' – here in the sense of *Rechtsgut* [note of the author] - *only those interests whose injury is realised in an offence to other persons in flesh and blood*" (Ferrajoli, 1989: 481). Ferrajoli's reply, for the purposes relevant to us, is very revealing, as he claims that in no way the statement at issue means that, according to his theory of 'minimum criminal law', legal interests worthy of penal protection would be only individual interests and not, for example, collective and social rights (Id. 2000: 127). Ferrajoli adds, without leaving any room for misunderstanding, that the real issue is precisely about an overly restrictive conception of the *Rechtsgut* inherited from the Enlightenment tradition and inadequate to justify the criminalisation of conducts offending public and collective goods. In rejecting the alleged argumentative impasse attributed to him, Ferrajoli recalls how his interlocutors speak about economic and environmental crime as characterised by a mass victimisation that directly or indirectly offends very large groups of people, to the point that these crimes:

*"undermine the very conditions of physical and economic survival of more or less large groups of people, if not even of the whole human race"* (Marinucci & Dolcini, 2002:161).

Without devaluing the content of this assessment, Ferrajoli comes to raise the following question:

*"And what are these people if not real people of flesh and blood, whose immunity from such offences is what I indicate, in the first criticised definition, as a legal interest worthy of criminal law protection?"* (Id. 2000: 127).

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<sup>13</sup> Ferrajoli, L. (1989), *Diritto e Ragione. Teoria del Garantismo penale*. 5ª ed. (1998). Roma: Laterza. The translation of the title would be 'Law and Reason. Theory of penal Guarantism (*Garantismo*)'. The book is an encyclopaedic work comprising more than 1000 pages and, as far as we know, has never been translated to English.

<sup>14</sup> The 'principle of offensiveness' (*principio de ofensividad* in Spanish) is synonymous with the principle of harmfulness (*principio de lesividad*) mentioned above.

The interesting thing about this exchange - for what concerns us here - is not so much to advocate one or other of the disputing parties, but rather to recognise the clear rationalisation, in light of criminal law categories, of phenomena analogous to those referred to by the theorists of social harm. Nor is this a subject that has never been dealt with before, since it was the same Bologna school, in several issues of *La Questione Criminale*, that already in the 1970s began to raise the question of 'actions to protect collective interest' (Bricola, 1976) and 'the penal protection of diffuse interests' (Sgubbi, 1975). From a legal logic standpoint, these questions do not determine *per se* any departure from - or overcoming of - criminal dogmatics, nor necessarily lead to the 'creation' of new fields of knowledge in order to make those phenomena visible and thinkable in their real magnitude. Moreover, the solution here takes place within penal dogmatics itself, without any reference to disciplines such as critical sociology of punitive control that, while referring to legal categories in specific aspects, are meta-legal in scope. What is more, not only Baratta's theory is not endorsed to support Ferrajoli's point, but also it is overtly dismissed as "abolitionist". In this sense, legal dogmatics asserts its own self-sufficiency for substantiating the relevance and traceability of these, so to say, *collective Rechtsguts*. Moreover, the chronological element provides us with multiple indirect information: first, the dispute took place between 1999 and 2000; second, even more significantly, Ferrajoli refers to theories of his own developed in 1989, a highly prolific moment for the entire critical sociology of penal control of Italian-Iberophone inspiration, well before the debate on the zemiological approach had even begun and, as already mentioned, with the Bologna school having raised the issue in doctrinal terms as early as in the 1970s.

We just want to put out again, to conclude, that in recognising the capacity of legal dogmatics to subsume also these kinds of situations under its logical scaffolding, we are not championing penal dogmatics and criminal law ideology as fair representations of the social reality, nor are we supporting their solutions to the social phenomena discussed in this doctrinal dispute. We are just pointing out to an epistemic and practical problem: if the internal logic of penal dogmatics is not the obstacle, then the crux of the matter is not the lexical reference *per se* to categories coming from criminal law or the dismissal of any theoretical production that did not preventively reject the term 'criminology'.

### **Closing Reflections**

The reason why issues like the ones discussed in the previous section can be brought back into penal dogmatics is precisely the structural analogy mentioned above between the idea of '*Rechtsgut*' and that of 'social harm'. It has already been pointed out that in those legal experiences where a qualified notion of legal interest is the basic rationaliser of criminal law protection, the high social relevance of the interest at issue and the provability of a substantial harm to it (*i.e.*, not a mere formal correspondence between the prohibited conduct described *in abstracto* and the empirical fact under assessment) are essential requirements for substantiating a criminal prosecution. At the cost of being repetitive, our intention is not to defend the ideology of criminal law as the 'lesser evil', but to question, by tabling pre-existing theoretical developments, the real scope of those tendencies that are nowadays asserting themselves as the dominant ones on the critical criminology (or the 'postcriminological') scene.

The starting point for this questioning has been the recovery of the historical link between the Bologna and Barcelona circles, by virtue of which the second experience cannot be understood without

investigating the first one, in particular the historical, biographical and intellectual circumstances that made possible its appearance in Italy in the period between the 1960s and 1970s. The symbiosis between Bologna and Barcelona, attested by increasing synergies and interchanges from the 1980s onwards, is nourished by a common epistemological and methodological basis in approaching 'the criminal question'. This common ground justifies the use of the expression 'Italian-Hispanophone critical criminology' as a synonym for 'critical sociology of punitive control', which both Bergalli and Baratta considered the most accurate definition of their own field of study. An indisputable merit of the Barcelona experience, moreover, is having allowed, through an accurate translation work, the survival of the Italian production, which after its heyday in the phase of maximum prolificacy of its leading authors had suffered a progressive 'burial' by local academia. This has been indirectly attested by the circumstance that my first contact with Italian masterpieces like Baratta's work was only possible thanks to Spanish translations made by personalities connected to Roberto Bergalli's circle, which was also the reason for my subsequent move to Barcelona.

The anecdotal recourse to my personal experience is just a small, further demonstration of the legacy of this interconnected history, which tends progressively to emerge even when those who end up 'trapped' there have no prior knowledge of its existence. Indeed, my only initial impulse consisted in trying to transpose into the analysis of the criminal law system the teaching of my professor of public law Giuseppe Ugo Rescigno, whose theses on the theory of the state - I would later discover - coincide with those of Alessandro Baratta. My personal trajectory, among other things, summarises two essential features of the fate of the Bologna-Barcelona symbiosis: on the one hand, a series of obvious attempts to conceal it, perfectly understandable from the point of view of the dominant ideology; on the other, the persistence of an unbreakable chain whereby if only one of the pieces is discovered, it is inevitable, sooner or later, that the whole mosaic is re-created again.

However, the reconstruction of this link is not intended to be any posthumous tribute. Bringing it back to light is rather a way to orient the positioning in the current criminological debate by reordering our own cultural baggage. In fact, if on the one hand, the same old confrontation with declared political adversaries striving to silence any critical voice is inevitable, on the other hand, we consider it necessary to work towards a better coordination with friendly theoretical currents, undoubtedly animated by converging intentions to question and demystify the criminological-positivist ideology, as well as the legal officialdom. Among the various aspects that have marked the activity of the Bologna's '*Gruppo Penalistico*', this brief essay aims to highlight the methodological function that criminal dogmatics always played in its production, both in those authors who never abandoned liberal-democratic positions, but also in other exponents of the Bolognese circle who stood out for an avowedly Marxist and revolutionary political commitment (in the same terms as Rescigno affirmed the compatibility between revolutionary politics and the scientific role of the jurist). Retracing the key steps in this history also allows us to question the supposedly novel character - and the promises of intellectual emancipation - of theoretical tendencies that are gaining increasing strength until having become *de facto* the paradigm of reference for anyone to be recognised as a critical scholar. Among these tendencies, zemiological critique is undoubtedly the most radical current in terms of political stance. Its open rejection of the recourse to concepts historically ancillary to official criminal policy, as well as a transdisciplinary vocation reflected in the analysis of macro-social phenomena beyond legal definitions and whose relevance is not determined by legal categories but by harm

production on a social scale, are certainly suggestive and captivating. The same applies to the claim of more progressive contents with respect to any previous 'criminology' which - however critical it might be - in not rejecting the linguistic use of the notion of 'crime' would legitimise the same object of study of positivist criminology.

However, reviewing the main theoretical crossroads that have marked the foundations of Italian-Hispanophone critical criminology is an intellectual exercise that brings to light at least three misunderstandings, which we consider historiographically necessary and strategically urgent for the articulation of a self-conscious critical movement.

The *first misunderstanding* concerns the solidity of the arguments mobilised by the zemiological critique against criminology as an undifferentiated whole. Here is a twofold misrepresentation: first, many of the crucial arguments put forward to distinguish in qualitative terms zemiology from 'criminology' (e.g., the subordination of any criminology to official criminal policy, the complicity of any criminology with the ontologisation of crime, etc.) prove absolutely inappropriate when applied to the Bolognese-Barcelonian critical criminology; second, somewhat curiously, the crux of these criticisms levelled by zemiology at positivist criminology actually reiterates the arguments that Italo-Hispanophone critical criminology already made against the fallacies of the aetiological paradigm.

The *second misunderstanding* has to do with the specific path chosen by social harm approach to achieve the emancipation from criminology; more precisely, this is an overestimation of the heuristic value of the very concept of 'social harm'. Indeed, for legal cultures that construct the rationalisation of criminal law protection on the basis of the *Rechtsgut*, it is nothing new that the assessment of criminal relevance is gauged on harmfulness to society as a whole and the recurrence of a substantial offence to the protected interest in each case. The real question, in any case, is what is to be considered harmful to society and why, which Bricola had already fully understood in his critique of positive criminal law and in his theorisation of the constitutional status of the legal interest worthy of penal protection.

The *third misunderstanding* (corollary to the previous one) is the consolidation of the belief that a greater degree of transdisciplinarity is automatically obtained through the discursive rejection of concepts or definitions coming from criminology or penal dogmatics: 'disciplinary cages' by definition. However, if on the one hand, Bologna's experience denies that the radicality of the political positioning or the transdisciplinarity of the analysis has to do with the distance kept from criminal dogmatics, on the other hand, many of the questions brought up to justify the need for 'post-criminological' fields of knowledge can nevertheless be perfectly framed as legal dogmatic questions. The same goes even for those cases that are apparently more problematic with respect to the traditional structures of liberal criminal law. Special mention deserve the production of social harm as a result of the ordinary functioning of the legal system: if it is obvious that in such cases it does not make sense to wonder about the possibility of framing the reflection within the categories of legal dogmatics (which would be an inherent contradiction), it is precisely for these cases that we claim the specific value of the critical sociology of penal control for being a more exhaustive tool.

Unfortunately, the price of all these misunderstandings ends up being very high. Experiences such as the history of Bologna, and the 'Bologna-Barcelona' symbiosis, are thus overshadowed by

theoretical proposals which, although motivated by a genuine desire to challenge traditional criminological knowledge, are based on premises that are antithetical to those of the Italo-Hispanophone tradition (the role of dogmatics, the way in which multidisciplinary is founded, the misinterpretation of the idea of social harm as already integral to the ideology of criminal law, etc.). All this inhibits the appreciation of what pre-existing intellectual movements can still contribute to the current criminological debate through insights that, in our opinion, are still unsurpassed in terms of explanatory potential; at the same time, it corroborates indirectly the basic fallacy that the epistemological status of very different theoretical traditions is to be assimilated on the basis of common definitional labels (i.e., the name 'criminology').

The fact that avowedly refoundational paradigms - as is the case with the zemiological perspective - have become the benchmark for gaining a plausible critical status in nowadays academia inevitably makes the task more difficult, as besides lodging the misunderstandings mentioned above, social harm approach is also the yardstick against which the theoretical and political profile of other perspectives tends to be defined. In this framework, the English-speaking monopoly in current scholarly production and historiographical reconstructions further contributes to obfuscate the appreciation of theoretical outputs prevalently elaborated in other languages, as well as the reconstruction of the possible connections between them. Considering all the factors at play, we must ask ourselves about the most efficient way to defend a tradition of thought that seems to end up absorbed in refoundational operations, undoubtedly praiseworthy for their inspirational ideas, but unable to clearly identify the target. While, on the one hand, continuing to apply the paradigm of the critical sociology of penal control is for us a 'minimum duty', on the other hand, there is a risk that it may not be a sufficient effort in the light of the most recent trends within the agenda of critical studies. Convinced that the convergence on substantive political objectives represents a great opportunity to benefit from, and not an obstacle to this coordination, we want to lay the foundations for a progressive rapprochement between critical traditions based on a much denser and more active communication, so that the articulation of a critical response can take advantage of the whole arsenal at its disposal, while we need to play our part in taking on tasks of translation and dissemination of productions otherwise destined to a silenced and ineffective storage.

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