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## THE CONFESSION IN MICHEL FOUCAULT: INQUISITORIAL GENEALOGY OF CONTEMPORARY JUSTICE

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**ABSTRACT:** A privileged element of contemporary law, confession as a means of proof in criminal proceedings is the object of analysis in this research. Based on a bibliographic review, the study will seek to decompose and reorganize the object on two fronts, constructing a theoretical hypothesis that proposes to observe confession as an inquisitorial practice of an institution, but which also has a traceable genealogical depth in the modulations of subjectivation techniques. The notion of the care of the self that Michel Foucault referred to unfolds in Christian ethics and asceticism, reorganizing the sense of care of the self and slowly, as Christian philosophy developed and the influence of the Catholic Church in the state grew, loaded the act of confession with an institutional-subjective double, elements that allow Zaffaroni to observe the apparent neutrality of contemporary justice as a facade for an authoritarian state, adept at inquisitorial practices, especially in matters of criminal justice.

**KEYWORDS:** Confession; Subjectivation; Criminal justice.

### 1. Introduction

Far from constituting some kind of story, or rhetorical expression with a performative purpose, the words of Zaffaroni, who repeatedly emphasizes that “the Middle Ages are not over” (2013, p. 42) are actually a precise analysis of the contemporary and its relationship of continuity with the medieval period. Such comparison, in the object that constitutes this work, will be given by the function of the confession in a contemporary criminal process, observing its historical dimensions and constituent elements.

Among some discontinuities, to say that the Middle Ages is not over does not mean only to affirm some residual conservatism, but, specifically, to observe the historical constitution of some modern practices, verify their articulations and

configurations that adapt to current languages. The relevance, especially in the case of Brazil, is that it is convenient to philosophically rethink judicial practices that claim to represent justice when, in fact, they organize and put into operation a whole machine of producing real injustices, supported by medieval practices that get cover in state.

To this end, the present research aims to explore the similarities between the two times – the middle age and nowadays -, in a twofold way: (1) the current criminal-procedural practice not as accusatory, but inquisitorial; and (2) confession as a technique of constitutive power of the subject's subjectivity (studied in the first and second sections, respectively), both going back to their historical becoming, and verifying the continuity of the elements.

Genealogy of confession as a technique of subjectivation (Foucault) and inquisition as a current institutional practice (Zaffaroni), both originating from a religious-state matrix, are the ground under which modern judicial practice unfolds.

The linking of the act of confession to the truth, as a series of long modifications that start from a care of the self, a Greek ethical idea, modifying the requirement of a third person, the conscience guide, the priest, were, over time, assuming institutional forms, reaching the apex of its development with the dogma of confession in the XII century, with the inquisitorial practice in XIII century; articulated elements that until today imply and organize our idea of justice within a criminal process.

## **2 .Criminal law and inquisitorial procedure**

Contesting for first place, Antílochus and Menelaus were around the final lap of the circuit when, after an irregularity, Antílochus finally surprised, and conquered the first place. He immediately questions the rival about the irregularity and demands reparation - justice, if you will - appealing to the one who should restore the truth.

There was at the time an unnamed person positioned next to the final mark, also of imprecise characterization, but who in any case was in the possible role of witness. Menelau, completely ignoring the witness, immediately challenges the rival directly, who also promptly replies “I did not commit any irregularities”. Then the rejoinder: “Put your right hand on your horse's forehead; hold your whip in your left hand and swear by Zeus that you have done no wrong.” Finally, giving up, Menelaus consecrated himself the winner.

From this story told by Homer, Michel Foucault seeks to take in Greece a first model of justice, or rather, a way of producing a legal truth, (a) a game, conflict, a test,

a challenge launched by one competitor to the other, a dispute, under penalty of divine punishment as a ray of truth. This is the first practice of judicialized truth production, common in Ancient Greece and in the High Middle Ages (FOUCAULT, 2014, p. 159).

In the same way, when Zaffaroni traces a history of the verticalization of punitive power, in the period before the *Digestus* – Roman codex -, he also establishes the duel as a way of obtaining legal truth. God is invoked for judgment – the “judge” here is almost like a mediator of the truth established by God: the witch is thrown with her feet tied to weights at the bottom of the sea, if she survives, it is proved that she was a witch and the pact with devil made her survive; if she died, it was also proof that she was a witch and was punished by God (ZAFFARONI, 2013, p. 27).

Then, advancing not only chronologically, but establishing a second method of producing judicialized truth, Sophocles’s famous tragedy, *Oedipus-Rex*, serves Foucault as an example of the establishment of **(b)** inquiry as a judicial investigative procedure, a history of power<sup>1</sup>

Namely, in the story, Oedipus is the abandoned son that Jocasta and Laius thought was dead, and who was adopted by the King of Corinth. The young Oedipus, seeking to unravel its mystery, learns about a prophecy from the Delphic oracle that condemns him to become a parricide. Seeking precisely to escape from it, wandering through Thebes, Oedipus ends up getting involved in an altercation with a foreigner, and killing him. Later, at the end of the tragedy, Oedipus discovers that the foreigner was King Laius, also his father.

What matters in this tragedy is the procedure used to seek the truth, as Foucault calls it, a system of halves. What did the kings (fathers) know? What did the servants know? They are sides of the truth that complement each other in order to compose the whole of the truth<sup>2</sup>, which is finally brought to light by a nobody, by a slave who serves as a witness. This slave is said to have received Oedipus from the arms of Jocasta as a newborn. Finally, the great absence of testimony in Homero's tale now shines through in the establishment of Greek truth: investigation and witness.

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<sup>1</sup> The interpretation of tragedy is given to Foucault under a different prism from psychoanalysis. Following the recent line, at that time, proposed on “Anti-Oedipus” by Deleuze and Guattari, the author explains: “The title of Sophocles’ tragedy is interesting. Oedipus is Oedipus the King. It is difficult to translate the word. The translation does not account for the exact meaning of the word. Oedipus is the man of power, the man who wields a certain power. It is characteristic that the title of Sophocles’ play is neither Oedipus the incestuous nor Oedipus the murderer of his father, but Oedipus the King (Foucault, 2014, p.157.)

<sup>2</sup> In this regard, check the Greek procedure of the truth in halves, carried out by the messengers: a vase, or ceramic object, was broken, which the bearer of the message carried with him to attest to the truth. It was not a seal, or insignia, but an object that only gathered from its other half (the original fraction) will come to be complete (FOUCAULT, 2014, p.154).

Comparing the two systems, Foucault (2014, p. 172) says that

This system of judicial practices (first listed) disappears at the end of the twelfth century and during the thirteenth century. Throughout the second half of the Middle Ages, we will witness the transformation of these old practices and the invention of new forms of justice, new forms of practice and judicial procedures. (...) What was invented in this re-elaboration of law is something that does not concern so much the contents as the forms and conditions of possibility of knowledge. What was invented in the law of that time is a determined way of knowing, whose destiny will be capital in the western world. This form of knowledge is the inquiry, which appeared for the first time in Greece and which remained hidden after the fall of the Roman Empire for several centuries. The inquiry that reappears in the twelfth and thirteenth centuries is, however, of a quite different type from the one we saw in Oedipus as an example.

What happens between the two models of truth through juridical forms is, in essence, the unfolding between the model of Germanic and direct Roman law, roughly speaking, the first characterized by a kind of regulation of private revenge, the lines drawn by the test-dispute system, while the second works from a modulation of the Greek inquiry, to eventually unfold into a new inquisitorial system, different from the Greek and Roman (FOUCAULT, 2014, p. 174).

This “third model” will be taken up again later, by joining the subsequent lines that Foucault and Zaffaroni trace from the Inquiry. However, to this end, it is observed: the text used until now by Foucault, *Truth and juridical forms*, was taught in 1974 and was part of a cycle that contains the works *Punitive Society* (1973) and also *Discipline and Punish* (1975); ends up in the infamous disciplinary society, in a relation of the Inquiry religious procedure - as will be seen below- with the Exam, a disciplinary technique, a line that can be perfectly aligned with the constructions of Critical Criminology about the enemy and the delinquent/abnormal, here using Foucaultian and Zaffaroni terminologies, respectively.

However, the interpretation of this study is guided by another line within the French author himself. In 1981, he taught a course called “Wrong-Doing, Truth-Telling”, aimed at jurists and criminologists in Belgium. This course, together with *On the Government of the Living* (1981) and *The Courage of Truth* (1984), allow another approach to the inquiry, linking it to confession, the truth, and the contemporary populist punitive system.

Returning to the criminological perspective, Zaffaroni recognizes the inquiry model imbricated in a state form<sup>3</sup>. He establishes the focus of how the inquiry model

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<sup>3</sup> See: “According to Foucault, all knowledge adopted the method of violent interrogation. There seems to be  
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functioning mainly as a structure, as a program, as a discourse of content that is always replaceable by the needs of creating a new enemy, this would be for Zaffaroni (here we baptize) the (I) demonological inquisitorial method: invention of an enemy, collective paranoia, centralization of the power to punish in the state and verticalization of this power/punishment relationship.

Far from constituting an anecdote, the emergence of a danger to be eliminated is a way of instilling a concern within the social body itself, a danger among themselves (retaken at the same time by a danger of evil inhabiting me) of someone being carrying the evil entity, the devil. Dwelling in me or in a member of the village, the devil is the evil that allows the Church (and also delimits only her) the power to purge him. It is the confiscation of the conflict and the verticalization of punitive power (ZAFFARONI, 2013).

The inquisition is a way and form for the expansion of punitive power. But why demonology? Demonology is the substrate of the inquisitorial method:

However, when the Pope made use of the Augustinian invention to persecute everything that did not submit to his power and consecrated the Inquisition to the fight against Satan, as he did not appear anywhere, he had to cling to it with some humans, and already that he had no heretics left. Therefore, he undertook it against half of the human species, against women<sup>4</sup> (ZAFFARONI, 2013, p. 28).

Sorcery and possession, synthetically, functioned and function as strategies of expansion and verticalization of punitive power, respectively (external enemy and internal enemy). The function of witchcraft (theory of the demonic pact) during the Inquisition is verified as something always practiced on the edge, on the periphery, outside the social body, in distant societies with diverse, alien cultures, which absolutely gives rise to their colonization; while possession is an internal phenomenon, the possessed person lives in the city and has his body taken over (read, not agreed upon, generally) by a demon in view of the individual's lack of purity, or for whatever reason the state sees fit to take. him as an enemy (FOUCAULT, 2010, p. 178)

In this sense, “The Hammer of Witches” (1494) was the first criminology book produced, also known as the official guide for women burners. How to identify, how to

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something of this if we compare the inquisition with vivisection, but let's get back to ours. The Roman Inquisition exercised the power to judge all over Europe because there were no national states and feudal lords could not prevent it, although this already bothered them. In Spain, where society already had the form of an army, the power of the Inquisition was not papal and, unlike the rest of Europe, it was at the service of the king. Therefore, the Spanish Inquisition has a separate history from the Roman one”. (ZAFFARONI, 2013, p. 27)

<sup>4</sup> See also the fruitful approach to the phenomenon of witchcraft from a materialist-historical perspective, proposed by Sivia Federici in “O Caliban and the Witch” (2017).

proceed, what are the characteristics of witches, what is their status; on the other hand, the infallibility of the inquisitors, the immunity of the inquisitors against evil, are aspects, or rather, they are discursive structures that foster a real and effective practice that allows us to say, as Zaffaroni (2013) does, that “the Middle Ages ” It's not over.

So far, it has been about criminal law and inquisitorial procedure. It could be objected, and with reason, regarding such reflection, approximation, between medieval and contemporary criminal law, the problem involving a Modern State Theory as radically different from Medieval, which in theory would make this entire investigation unfeasible.

On this point, the discussions are dense and require space that absolutely does not have in such a study, but to mention, it is about the hypotheses of Political Theology (Carl Schmitt) and Economic Theology (Giorgio Agamben), also taking into account the Pastoral Power (Foucault). In fact, the first two mentioned outline a complex theological legal discussion about the derivation of the modern concept of sovereignty from a religious matrix, while the last one proposes a game of religious techniques and practices incorporated into the secular world.

Answering the objection, it is not necessary to enter the discussion of Political Theology. Assuming the democratic rule of law and procedural guarantees as a basis for the critique of modern penal doctrine, Zaffaroni closes the question: how could a democratic state assimilate the figure of an enemy? Impossible, the enemy can only exist within an Absolute State. Strictly speaking, legally, the tradition of the enemy goes back not to the inimicus, the personal enemy, but to the hostiles, the other, the foreigner, the declared public enemy, the one who was outside the community (ZAFFARONI, 2007, p. 30).

Today's inquisitor, the judge, knows perfectly well the position he occupies. He knows that the democratic state of law cannot support the figure of the enemy, such a contradiction implodes the system that needs an even more intense demonization and verticalization to keep itself standing.

Dostoyevski's Grand Inquisitor<sup>5</sup> is nothing but an absolutely cynical judge<sup>6</sup>, aware of his position of domination over the naive, aware that not religion in its spiritual role will imprison Jesus, but religion as a Church, as a state, as an institution, it will do what has to be done to preserve the status quo (SLOTERDIJK, 2012, p. 260).

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<sup>5</sup> In *The Karamazov Brothers*, the return of a reincarnated Jesus takes place, who is immediately arrested by the bishop after he recognizes him

<sup>6</sup> The Greek Kynikos, the dogs of philosophy, is different, just like Diogenes, from the modern Cynic that Peter Sloterdijk differentiates and conceptualizes

He is a judge aware of his inquisitorial role (punitive practice) through inquiries (truth legal procedure leading to punitive practice) that are merely formal, protocol, absent from any *alethos*, serving not as an investigation into the real, but the construction of a true discourse<sup>7</sup>. Here, it is no longer possible to distinguish between the Grand Inquisitor and Judge Sérgio Moro:

In this Perspective, the grand Inquisitor becomes a typical figure of the time. His teaching is dominated by two opposing motives that at the same time clash and condition each other. As a realist (positivist), he left behind the dualism of good and evil; as a man of utopia, he adheres obstinately to it. One side is amoralist, the other hypermoralist. On the one hand, he is cynical, on the other, dreamy; here, free from all scruples; there, tied to the idea of the ultimate good. In practice, he does not shrink from any atrocity, from any infamy, from any deceit; in theory, he is guided by the highest ideals (SLOTERDIJK, 2012, p. 264).

The modern theory of criminal law assumes the accusatory law as a rule for democratic countries, placing an absolute inquisitorial model in the distant past. Despite this construction being fiction, the Brazilian reality and that of several other countries is the verification of the continuity of the inquisitorial/inquiry criminal law. Already in the disclosures of electronic wiretaps in 2016 between Lula and Dilma<sup>8</sup>, it was verified that the inquisitorial function of the inquiry, of a judge who long ago abandoned any pretense of impartiality and a democratic system of law.

### **3. Confession as a technique: from the truth of the facts to the truth about yourself**

What has developed so far is a brief recapitulation of justice systems, with a view to the transition to the inquisitorial method. Likewise, the state perspective implied in the adoption of such an inquisitorial method was observed, that is, verticalization of punitive power. In general, a (A) state, administrative perspective, regarding the use of the inquiry as a form of justice: to assume the conflict between the parties and decide it sovereignly.

If such a theoretical set is already consensus and historical, in the first section another face was privileged that complements the origin and foundation of justice, the

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<sup>7</sup> “Why, in addition to the real, is there the true?” (FOUCAULT, 2016, p. 212). It is observed that the discourse of totalizing presumption, the discourse as truth, has precisely the function of distancing the discourse from the real. The real, by itself, has no relation to the discourse of the true, the latter is, on the contrary, an entire discursive intention clad in truth that seeks to affect the real, concealing it, replacing its image.

<sup>8</sup> See in detail VECHI, Fernando. “Politics, Judiciary and Media: the disclosure of electronic interceptions between Luiz Inácio Lula da Silva and Dilma Rousseff”, 2018, Dissertation, Porto Alegre.

intersection between the state, the investigation and religion, a relationship that was observed by the criminological perspective of the enemy in criminal law: the devil, the witch, the possessed and, later, the delinquent, the drug dealer, etc.

Nevertheless, the history of the modern state is guided by the verticalization of punitive power, by the inquisitorial method. Its relationship with religion goes far beyond the institutional practice of confession. Confession, as it exists today, is the result of a long and complex system of changes that imply, in addition to an administrative dimension, a religious and spiritual foundation, in the sense of linking the subject to the truth through a technique.

The technique of confession, of telling the truth about oneself, assumes its first mutation when involved within a religious system. Well then, the habit of telling your faults, of verbalizing them or writing them down, even of saying them to a third party, is practically a tradition in the philosophical schools of the first centuries. Since the Pythagoreans, with the rule of listening, but especially with the Stoics, the idea of self-verification, the search for one's own faults - the examination of conscience - and the improvement under the guidance of a spiritual guide, is the core of such schools. philosophical (FOUCAULT, 2010, p. 135).

So, as something absolutely common, the technique for care of the self, the pedagogical method adopted by philosophical schools – the habit of telling the truth – has become such a legal institution of confession? For philosophers, it was a technique directly involved in the notion of care of the self, of vigil over oneself in search of good habits to achieve certain ends. In addition, it was also about a relationship of guidance, of mastery, of being guided by a master, an advisor of conscience, who would accompany the student during the process of recognizing one's own mistakes (FOUCAULT, 2010, p. 113).

Christianity, by incorporating a series of Greek elements into its philosophy, promoted some changes in this process. The habit of telling the truth about yourself, read confession, now implies not a process of maturation, but of purification, while the advisor is no longer here only to help you in this process, but to judge and decide, in addition to their guilt, about their possibility of reintegration into society. It will be seen that also through this (B) ecclesiastical technique, religious, spiritual path, the confession will be integrated within a juridical game of veridiction, organized in the inquiry.

Linking the inquiry to the confession as an organized practice of the church, a

model incorporated by the states, there was a practice, during the Middle Ages, which consisted of the visitation. It is, in the bishop's visitation to his diocese, its churches and neighborhoods, with certain periodicity, in order to to know what happened during your absence, upon arriving in the region, two procedures were installed: the *inquisitivo generalis* and the *inquisitivo specialis*, that is, in case something happened during his absence, a crime or something like that, the second part of the inquisition was triggered, the investigation by the discovery of the truth of the facts (FOUCAULT, 2014, p.178).

Such administrative function, of visiting spaces and resolving conflicts through an investigative process headed by a central figure of power who takes the conflict for himself, is directly complemented by the religious function. The bishop's inquisition process could be interrupted at any minute by the guilty plea. However, already in the late Middle Ages, visits to villages were also carried out in order to hear different confessions, to give the sacraments.

The history of confession is directly linked to investigative inquisitorial procedures, whether as an administrative practice or a spiritual technique. If in the administrative part it goes back to the role of the witness who must tell the truth about the facts, in the religious part it is the subject himself who must tell the truth about himself.

The philosophical technique of examination of conscience is incorporated into the Catholic system from a demonological perspective. This implies that the technique of examination of conscience in Christianity was aimed at the search for evil itself, surveillance over one's own thoughts in order to know its origin, if it would be a genuinely good desire or if for some reason it would be contaminated by the devil. Evidently, in such a system one finds the first difficulty of thinking: how do I know if I am being deceived by the devil? The role of the judge, or the confessor, appears here perfectly to resolve the impasse (FOUCAULT, 2018).

The inquisitor comes to replace the figure of the conscience advisor, that is, he works as an element outside the subject to validate the examination of conscience made by himself. However, in addition to judging what is said, the inquisitor has the function of seeking confession, of seeking the truth. Confession as a technique of government.

Two schemes of penance/confession can be traced back to antiquity, *exogoreusis* and *exomologesis*. The first consisted in the practice of reporting the faults committed during the day, a habit mainly incorporated in monastic communities, in which the principle of obedience to the spiritual guide figured mainly. The second consisted more

of a penitential practice, a kind of punishment that relegated the individual to the state of penitent for an indefinite period; this meant a series of abstentions from places, specific clothing and the like (FOUCAULT, 2018, p. 148).

The interpenetration of these two forms of penance, essentially religious/spiritual, went through a complex process of judicialization:

So there is a double move. In monastic communities, the difficulty of applying the rule of permanent confession led to the penetration of other techniques – in particular, some technique of individual punishment for the fault committed. Conversely, in non-monastic communities, it can be seen that the principle of exomologesis has been attenuated: the obligation of sinners to assume the status of penitent is gradually being replaced, accompanied by this obligation of another penance, which would be adjusted, adapted according to the needs of spiritual guidance, also adapted to the individual who had committed the discharge and the fault committed. Let's say that, roughly speaking, two major foci were constituted. One, the convent, the monastic community, a focus at the same time spiritual and economic, whose community structure became increasingly stronger and ended up receiving a strict regulatory organization: there, the practices of spiritual orientation were adapted in the sense of a kind of coding of conduct and punishments. Secondly, the other focus, that of the lay community under the direction of the bishop or priests, which was simultaneously a pastoral and administrative focus, whose community structure was not as strong as in monasteries: there, the practice of penance was judicialized. otherwise, by a kind of contamination with judicial and administrative procedures (FOUCAULT, 2018, p. 154).

Mainly for administrative reasons, these models of penance were contaminated with legal elements, which is why it was called the taxed penance system, that is, a personalization, an adaptation to each case, according to the offender's fault, a specific type of corresponding penance would fit. At this moment, the system of penances is much closer to the legal model adopted by the State.

However, it should be noted that confession and penance could be done by anyone for anyone. There was no question here, in the middle of the fourth century, of an institutionalization or a sacrament that would allow, by its statutory function, to resolve the situation. In order to verticalize power and make this system more manageable, the system of taxed penance will only be consecrated as a sacrament in the twelfth century. This implies not only taking taxed penance as a legal model of veridiction, which is obtained from confession, but also designating a figure responsible for promoting the process, exclusively the priest or the bishop. More concisely, the overlapping of confession (form of truth) as access to a legal system of truth with a transcendental background is resolved (FOUCAULT, 2018, p. 160-161).

It is in this system of truth in its legal form that the confession acquires its value. The confession, inserted in the system of penalized penance, is, transposed to the legal world, the value of the evidence within the system of legal evidence. In this system in which the truth would be decided according to the accumulation of evidence, each with its own weight, the confession functioned as an absolute element, with maximum value (FOUCAULT, 2018, p.178).

It is known that nowadays the penal system no longer works under the regime of legal evidence, which raises the question of the role of confession in court in view of the theory of free conviction, adopted in Brazil.

As a first function, confession works in order to (a) recognize sovereignty and break the social pact. It means not only saying that one is the culprit, but that deliberately, conscious of one's actions, asserting one's guilt and recognizing the legitimacy of the one who punishes, is to seal their segregation from the social body on the promise of resocialization after expiation of guilt.

In short, to sum it all up, confession first recalls and restores the social pact on which the sovereignty of the institution that judges is based. Secondly, the confession constitutes a kind of contract of veracity that makes it possible for those who believe to know with an indubitable knowledge. Third, the confession constitutes a commitment that gives meaning to the punishment imposed (FOUCAULT, 2018, p. 182).

However, although it is a central element, confession is above all a problem for modern procedural criminal law, it is an embarrassment, it is a trap that it has set itself. By needing confession, having it as a privileged way of triggering the whole system of truth and justice, any variation to the model implies embarrassment.

For this, Foucault brings a series of situations, of confessed crimes, in which the recognition of the truth is not enough for the functioning of the judicial state machine: crimes “without reason”. In general, murders confessed with absolute lucidity, as in the case of Henriette Cornier, who asks her neighbor's son to take care of her, kills him and throws his head out the window, or the case of Sélestat, in which a peasant woman kills her daughter and makes a cabbage soup with her leg (FOUCAULT, 2018,P. 185), or even the case of Althusser.

In these cases, confession is not sufficient for punishment. This is because the object of the relationship is no longer about the element of the truth of the facts, but rather about the truth of the subject. Confess who you are, confess the truth about yourself. The embarrassment that is subject to confession is precisely this, demanding

not only the truth about the facts, or about the validity of the social pact, it is telling the truth about oneself, which, in the cases mentioned, directly implies what today is modern to apply a penalty, to be imputable, to tell the truth about your conscience, about your reason, no longer about the facts (FOUCAULT, 2018, p. 190).

The problem within the penal machine is that the subject who committed the crime, or rather, the criminal subject, is no longer about punishing the crime, but treating, dealing, manipulating, somehow leading the criminal individual. Likewise, the idea of punishment should no longer correspond to a specific crime (as in the line of taxed penance, or the proposed legal systems), which deals not only with who is or is not responsible for a fact (see the question of non-imputability as excluding), but rather a system that must track which individuals are dangerous, it is about defending society (FOUCAULT, 2018, p. 194).

Evidently, at this moment we are absolutely close to the contributions of Critical Criminology, of talking not only about the criminal law of the enemy, but the criminal law of the author. The social defense theory, as organized by Baratta (2017), is the main framework that organizes a series of conditions for the functioning of the penal machine. Enemy in criminal law, pathologization of conduct, measurement by degree of dangerousness, are elements at the beginning of the law, but which go back to an intersection with the concept of truth and its relationship with religious and, more recently, medical systems.

In summary, the main mutations and contributions of the confession in antiquity are traced back to the Middle Ages:

- a) Confession is an **objective** element inserted within an inquisitorial procedure. The inquisitorial procedure is an administrative technique in which confession works as the main evidence within a justice system to establish the truth about the facts (the subject is his own witness);
- b) Confession, in its **subjective** aspect, has its foundation of truth inherited from the philosophical systems of examination of conscience, taken by the church in the archaic forms of penance of *exágoreusis* and exomologesis, and finally improved in the sacrament of penance;
- c) Inquiry is an administrative procedure of a state and

institutional nature of the church. The history of the verticalization of punitive power stands out, that is, the takeover of the conflict by the state, as well as the inquisitive processes carried out by the priests.

On the role of confession in modernity:

- a) The objective element of the confession is maintained, in the sense of functioning as a piece of truth within the investigation, as a privileged instrument of an investigative process. However, as the system of legal evidence is no longer adopted, the objective function of the confession loses strength and gives rise to a reformulation of the subjective element;
- b) The modern confession has its subjective element (I) the reaffirmation of the social pact, the affirmation of the legitimacy of the person who judges and the recognition of his position as an offender; (II) the establishment of the truth about oneself, the testimony about one's own rationality, which implies in non-imputability or not, that is, in a segregation between potentially dangerous individuals and others that are not, since the element of accountability is no longer in question.
- c) Finally, the inquiry as an administrative procedure maintains the verticalization of power. In addition, when inquiring, one no longer seeks only the truth about the facts, but the recognition of the objective and subjective elements of the confession in the modern subject. The relationship between the inquiry and the confession draws parallels with the hermeneutics of the subject in the Christian inquisitorial process (recognizing oneself not only as a sinner, but as a bearer of the devil, of danger); and today, to recognize its conditions of rationality, of imputability, but also its social conditions, its antecedents.

This series of elements came to complex the original question: are you guilty, is that right? And it substitutes a process of investigating the conditions of the individual,

his particularity. This process is what Critical Criminology calls secondary criminalization: which individuals are led to confession? Under what conditions does the hearing take place? Even more, to recognize in his conduct not only the breach with the social pact, from illegitimate means to legitimate ends, but to recognize himself as a subject of guilt.

## CONCLUSION

The work sought, through a bibliographic review, to take as an object of research the modern practice of confession within the criminal process, decomposing it and rearticulating the object into two parts, one more focused on confession as a practice of state, proper to the inquisitorial molds, and another focused-on confession as a practice of subjectivation.

The rearticulation proposed in the work starts from the contributions of the French philosopher Michel Foucault crossed with the contributions of the criminologist Eugênio Raúl Zaffaroni, in order to perceive a certain genealogical dimension of the practices of confession. Perceiving the modulations of the practices of the self, Christianity can, while strengthening its presence in the state, also invest in the population through ascetic, subjective practices, making the state inquisitorial practice reinforced, duplicated, and even to some extent conditioned to the practice of confession as a way of Christian subjectivation.

Briefly, the theme can be taken in three vertices: (i) the inquiry as a modern-inquisitorial procedure that aims to persecute parts of the population, witches, traffickers, pure and simple creation of the enemy in criminal law, only secularizing a primarily religious element. Then, (ii), the history of the religious confession is verified, a process of access to the truth through rules, these, institutionalized, acquire a legal tone, and become judicialized truths. Finally, the function of confession in what concerns not the truth of the facts, but the truth about the subject, that is, admitting his/her condition of delinquent, abnormal, criminal etc.

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