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THE SOCIAL PHENOMENON OF CRIMINALITY AND ITS IMPACT ON CRIMINAL LAW

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Crime is a relevant social factor that has repercussions in various areas of social sciences, of which Law and Criminology stand out.

In Law, criminality or crime, itself, is the subject of Criminal Law. Behavior contrary to the model of conduct defined by the State, roughly speaking, the practice of an act defined as a crime justifies the state's *jus puniendi*.

Within the scope of Criminology, crime is not directly its object of study. Criminology is concerned with the cause of crime and not the study of the crime itself, as Criminal Law does. Criminological science, of empirical study and diagnostic nature, seeks to understand the context of the practice of crime, analyzing the social model of criminal justice, the delinquent, the victim, the relationship between delinquent and society, social control and even the reflexes of criminal law in society.

In short, Criminal Law has crime as a legal fact and Criminology as a social fact. However, despite this distinction, crime as a social fact has had a direct impact on Criminal Law, creating what is conventionally called Emergency Criminal Law.

Miguel Reale, in his valuable "Preliminary Lessons in Law", introduced the brilliant and recognized Three-Dimensional Theory of Law. According to the late author "Law is, therefore, a social fact or phenomenon; It does not exist except in society and cannot be conceived outside it." (REALE, 2002, p. 2)

To better explain this intrinsic relationship between Law and Society, Reale presents the three-dimensional structure of Law in fact, value and norm, which in the author's words "Law is the heteronomous, coercive and bilateral attributive ordering of coexistence relations, according to a normative integration of facts and according to values". (REALE, 2002, p. 67)

Borrowing the three-dimensional structure of law: fact, value and norm, it is possible not

only to explain the three dimensions of Law, as already done by Miguel Reale, but also, through the same structure, it is possible to achieve an understanding of the social fact as factor in the creation of a legal norm.

It is explained: The occurrence of a certain fact in society with sensitive social repercussions can cause such an impact and great social commotion capable of generating an intense public outcry for justice (value) leading to the creation of the norm (law).

Bringing the above structure to the context of crime, we have the fact as the crime. Value as society's desire for "justice", which actually means a social outcry for more severe criminal laws. And the norm as the state response given to society with the enactment of new laws that punish crime more rigorously (triggering fact of the norm).

In effect, the State's deficient performance in its social function in the most diverse areas, such as education, housing, employment, health, public security, etc., has serious repercussions on society, greatly increasing crime due to the failure of the State. in primary crime prevention.

Primary crime prevention, as criminology explains, is exactly state action to effectively and efficiently guarantee access to social rights as a means of preventing exclusionary social factors from serving as a stimulus to delinquency.

As SICA rightly notes:

The 90s accelerated like never before the process of exclusion, increasing social inequalities and genocidal levels of income distribution. The number of poor people is growing and market fundamentalism has confused "level of consumption" and "standard of living".

This reality intensified the verticalization of societies and made the discourse of common or social well-being laughable, reducing the space for consensus and, therefore, increasing the risks and increasing the space

for conflict. (SICA, 2002, p.31)

Contrary to a preventive measure, the public authorities have given in to pressure from the masses, and have repeatedly used Criminal Law as a hasty response to the popular cry for “justice”.

This is the scenario of emergency Criminal Law: the creation of more severe criminal laws that emerge (il)legitimized in a populist reaction from the Legislative Branch.

In view of this, it is necessary to analyze whether this model of state response is in line with Democratic Criminal Law or Constitutional Criminal Law, which is based on respect for fundamental rights and guarantees.

EMERGENCY CRIMINAL LAW AND THE CASE OF “BOY: JOÃO HÉLIO”

The João Hélio case refers to the crime that shocked public opinion and shook Brazilian society, especially Rio, due to such brutality and the disregard for other people’s lives shown by criminals.

The crime occurred on February 7, 2007, in the suburbs of the city of Rio de Janeiro. The car in which the boy João Hélio, a child of just six years old, was traveling, was robbed by five criminals, one of whom, the one who said he was carrying a revolver, was 16 years old.

In addition to the boy, the car included his sister, his mother, the driver of the vehicle, and a family friend. Everyone managed to get out of the vehicle, but João Hélio, being a child, was unable to free himself from the seat belt that held him to the car, despite his mother trying to free him, the assailants took off with the vehicle at high speed, causing the boy was left hanging outside the car, being dragged for around seven kilometers.

The robbery, which ended up turning into a robbery (robbery resulting in death), shocked Rio’s citizens and generated great

social commotion due to the brutality of the action. Society could not accept the horror scenes described by witnesses who witnessed a child being dragged by a moving vehicle, leaving traces of blood and pieces of his body throughout the various neighborhoods he passed through.

In the context of this crime, which is already full of repulsive circumstances given its barbarity, there is one more element that increases social revolt: the fact that one of the assailants was, at the time of the events, a teenager. This implied that the teenager would not be punished with the rigor of the Penal Code, as in fact he was not. In this case, the teenager involved, who was 16 years old at the time of the criminal action, received a socio-educational measure, as for individuals under 18 years of age who commit acts similar to crimes, the treatment is given by the Childhood and Adolescent Statute (ECA).

This became the crucial point in the matter, making the crime even more revolting in the eyes of society. The population of Rio increased their level of discontent with public security in the city of Rio even further, demanding effective action from local authorities.

The then Governor of Rio de Janeiro, Sérgio Cabral Filho, who attended the seventh-day mass of the boy João Hélio, once again defended the reduction of the age of criminal responsibility and the autonomy of the states of the federation to legislate in criminal matters, exclaiming: “No more concentration in Brasília, no more thinking that Brasília will solve everything”.

The social outcry for the reduction of the age of criminal responsibility gained strength, and prime time television news began to give greater prominence to crimes committed with the participation of teenagers. Public opinion was divided: a segment of society took to the streets to demand a change in criminal legislation with more rigorous laws, while

another segment, a minority, linked to the defense of Human Rights, maintained that criminal rigor is not the solution to reducing crime. As a result, society was inflamed by criticism of the criminal imputability of minors under 18 years of age.

In this scenario of intense social fervor, in which the majority of society began to demand more serious treatment of crimes committed by minors under 18 years of age, the discussion was resumed regarding Constitutional Amendment Proposal Number: 171/93, which proposes changing the article 228 of the Federal Constitution, reducing criminal liability from 18 to 16 years.

The Amendment Proposal was approved in a second round in the Chamber of Deputies on 08/19/2015 with 320 votes in favor and 152 votes against. Given its approval in the second round, the Proposal was forwarded to the Senate where it is being discussed.

The Amendment Proposal, number: 171/93 is the populist response given by the Legislative State in order to respond to the emergency demands of the population. Criminal Law is once again called upon to resolve social crises on an urgent basis.

But is Criminal Law, which must be the *ultima ratio*, capable of satisfying the desire for peace and public security as maintained by those who defend the reduction of the criminal age?

Is it really just the provision of more severe criminal laws that is capable of curbing urban violence as advocated by those in power?

CRIME AND SOCIAL FEAR

A frightened society, cornered by public insecurity and distrust in its rulers, is fertile ground for the emergence of a Symbolic Criminal Law, whose purpose is to generate in people a false sense of security and an effective fight against crime.

The increasingly growing numbers of crimes

committed with violence, such as robbery, with increasingly brutal circumstances, “lightning kidnappings”, juvenile delinquency, homicides, massacres, have been propagated on national television by the country’s main television news programs, creating a spectacle of horror and widespread panic.

However, these same mass communication mechanisms are not concerned with publicizing, to the same extent, the increase in poverty, the increasing concentration of wealth by a minority and the growing social verticalization.

Maria José Fariñas Dulce and Marcelo José Ferlin D’Ambroso (2019, p. 118) in their collaboration in the work *Democracy and Neoliberalism: The legacy of the Constitution in times of crisis* highlight:

[...] a media completely subservient to the economic, social and political model based on the continuous shock of populations through news relating to terrorism, private homicides, invented epidemics and the fear of an invasion of immigrants. Thus, he concludes, the attention of the masses is diverted from their norms, from their propensity for the most ferocious and static inequality, the competition of the individual against the individual and social Darwinism, converging this attention on social and individual pathologies that the model itself creates, crime, corruption and war among the poor. (DULCE; D’AMBROSO, 2019, p. 118)

The urban social tragedy sells newspapers, increases audiences and moves the media industry that feeds on chaos.

The establishment of a situation of panic, of generalized phobia, makes society hostage to systemic fear. This way, the constant expectation of becoming the next victim of crime makes the population easily accept the suggestion or practice of more severe punishment or even the extermination of offenders.

[...] the unbridled social fear, which, fueled by the media, manipulated by political power and combined with symbolism, triggered the so-called Emergency Criminal Law, [...].

In this “new” Criminal Law, prison assumed a broad emergency dimension and once and for all stifled the discussion of the purposes of punishment and the mission of Criminal Law. It blurred the vision of lay people and also of penalists, astonished at the legislating hysteria and the growth of pan-penalism, the conduct of punishment to the role of social panacea. (SICA, 2002, p. 14).

CONCLUSION

The manipulation of collective fear and insecurity means that society is unable to distinguish the need for security from the manifestation of revenge.

[...] When there is a transgression of the law, the punishment applied is not seen as part of an educational process. And, yes, as a repressive act. If it were seen within an educational process, there would be concern about other components of this process. Seen only as punishment, it is a manifestation of society’s revenge against those who broke the rules. (GAUDÊNCIO, 2000, p. 57-60)

The recalcitrance of public authorities in effectively dealing with the social factors that trigger crime associated with the social fear that spreads day after day in popular news is, without a doubt, the binomial that “legitimizes” the modern penal system, as Leonardo Sica observes: “Oppressive limits are expanded and Criminal Law is reduced to merely punitive purposes, resulting in a situation in which the prison sentence assumes a broad “emergency dimension”. (SICA, 2002, p. 82)

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