

CONCEPT OF CRIMINALITY IN CONTEMPORARY CRIMINOLOGY¹

Criminality is the central concept of criminology, but as often happens in science, the concept is not easily defined.

Foreign criminologists avoid defining it, limiting themselves to the word “crime” i.e. a behavioural act transgressing a socio-legal prohibition, or establishing three basic approaches to our understanding of criminal behaviour: the legalistic (an act forbidden by law is a crime), the socially reactive (an act is a crime if condemned by society or the state and is punishable) and the critical (in agreement with two affidavits) (Brown, Esbensen, Geis, 1998: 17-23; de Keseredy, Schwartz, 1996: 31-63; Lanier, Henry, 1998: 13-35).

In Russian criminological writings there was for many years a perception that criminality was a historically ephemeral, socio-legal phenomenon of class-based society, understood as the aggregate of all the crimes committed on a determinate territory for a determinate period of time (Korobejnikov, Kuznetzova, Minkovsky, 1988:63). But everything in this definition is questionable: the “ephemeral” character of crime, the attachment to the class-based society and the definition of a social phenomenon by aggregating specific behavioural acts. In recent years a more accurate definition has appeared: criminality is a negative socio-legal phenomenon, existing in human society, having its own laws, quantitative and qualitative characteristics, with negative consequences for people and society, and requiring specific state and social measures for its control (Kudrjavitchev, Eminov, 1997: 22). But for one objection this would be an acceptable definition. If we experiment and substitute the words "drunkenness", "drug addiction" or "corruption" for the word "criminality" it follows that the definition is not specific to "criminality" but applies equally to these other terms as well.

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It is not by chance that neither Russian nor foreign criminologists have worked out a scientifically-based and unobjectionable definition for the subject of their research. Criminality is a complex social phenomenon without 'natural' boundaries (as distinct from drug-addiction, drunkenness and suicide) and definable with the help of two multi-faceted criteria: 1) its danger or real harmfulness to society and 2) its designation in the penal code (*nullum crimen sine lege* — there is no crime without its designation in the penal code).

It is obvious that in different countries and at different times the range of acts considered criminal differs substantially; an act recognised as criminal in one country is not considered to be so in another. Acts that were considered crimes yesterday e.g. homosexuality between consenting adults (see article 121 of the penal code of RSFSR, 1960), vagrancy, begging, sponging on society (article 209) have been decriminalised and vice-versa there are acts which have been criminalized (fraudulent enterprise – article 173 the penal code of Russian Federation, 1996 and fraudulent bankruptcy - article 197). In reality there is nothing which could be considered criminal *sui generis, per se*; crime and criminality are relative terms, conventional and contractual (a legislators agreement), at bottom they are social constructs, periodically reflecting certain social realities: some people murder others, some steal from others, cheat others etc. But actions bearing the same characteristics are not, in other contexts, considered criminal: killing an enemy in a war, capital punishment, court seizures of people's property etc.

The awareness that many common social phenomena are in fact constructed, more or less artificial "fabricated" by society, developed in the social sciences only during the second half of the twentieth century.

"Ordinary people in many different countries consider that absolutely different 'realities' are 'objective' and stand to reason" (Berger, Luckmann, 1967). Although such a criminological consciousness (applicable to our subject) was already present in ancient Rome (*ex senatusconsultis et plebiscitis crimina exercentur* – criminal acts arise from the decisions of both senators and the public),

in contemporary criminology the recognition that crime was a social construct came comparatively late. Notwithstanding this, today such a viewpoint is shared by many Western criminologists (Barkan, 1997; Caffrey, Mundy, 1995; de Ceseredy, Schwartz, 1996; Munice, McLaughlin, 1996). Thus the Germans Hess and Scheerer suggest that criminality is not so much an ontological phenomenon as a mental construct having an historical and protean character. Criminality is almost completely constructed by the controlling institutions which establish norms and attribute determinate meanings to certain acts; criminality is thus a social and linguistic construct (Hess, Scheerer, 1997).

From our point of view, all human life is no more than ontologically indiscrete activity for the purpose of satisfying demands. For example I am tired and I drink a glass of wine or cognac, or I smoke a "Marlborough", drink a cup of coffee, snort cocaine or smoke marijuana... And these are means of alleviating my tiredness, relaxing and cheering myself up. And the fact that the first four of these means are socially acceptable whereas the others are considered "deviant" behaviour is the result of a social construction, a "contract" of the "here and now" (for a glass of wine is forbidden in Muslim countries, marijuana is allowed in Holland and tobacco was forbidden in Columbus Spain etc.). In other words, human activity is a myriad-tongued flame and certain of these flames (with or without reason) are considered dangerous for other people and are therefore "extinguished" by society (moral condemnation) or the state (when legal restrictions are infringed).

In the light of this the basic questions of criminology are:

1. What are the demands of contemporary people?
2. What legal opportunities does contemporary society give to people to satisfy these demands?
3. What means and methods for the satisfaction of these demands does the modern state consider impermissible and why?

As V. Kogan remarked in 1983: "A crime of any type is a combination of a motive not in itself criminal and an operation not in essence criminal, when such a combination causes harm to certain objects and is prohibited by law" (Kogan, 1983: 89).

This quotation does not mean that social construction in general and criminality in particular are absolutely arbitrary (Oakes, 1999). Society "constructs" its elements on the basis of ontological realities. Thus, by reality we mean that certain types of human activity are harmful and damaging, and are understood and judged so by others, by society as a whole. But it is also true that other forms of criminal behaviour (behaviour recognized by society as criminal) do not harm others and are therefore criminalised without sufficient ontological grounds. In particular there are so-called "crimes without victims" in which the term's inventor E. Schur includes drug use, prostitution, homosexuality between consenting adults, and provision of abortion by doctors (Schur, 1965).

Legislators are guilty of too broad an understanding of harmfulness and especially of the harmfulness which deserves criminalisation. This is proved by the fact that, according to the letter of the law in the majority of modern countries, including Russia, 100% of the adult population are law-breakers (can one find, in fact, a person in Russia who has never insulted anyone – Article 130 Penal Code of the Russian Federation, or has never hit anyone, causing them bodily harm - Article 116, or never evaded taxes - Article 198 etc?). The situation is no better in other countries; thus 91 to 100% of respondents to a survey carried out in the USA confirmed that at some time or other they had perpetrated an act which the law classed as a felony (information obtained by Wallerstein, Wile, Martin and Fitzpatrick, Portfeld and others).

Not without reason postmodernist criminology understands criminality as an offspring of power which has the goal of limiting those individuals excluded from power but who try to overcome social inequality and behave in ways which the power structure proscribes.

It is clear that legal norms, especially those of criminal law and their realization (these are not always identical) depend directly on the political regime. As an example we can examine our state. After October 1917 the new Soviet powers, whose success depended so much on the democratically inclined students and intelligentsia, tried for a time to preserve an image of progressiveness, liberalism and democracy. In its governmental beginnings in 1919 and in the penal code of 1922 punishment was understood as a defensive measure and sanctions were not severe; in the 1926 penal code the term "punishment" was replaced by the phrase "measures for social protection". There was an attempt to replace prisons with labour camps (what happened in practice was another matter). The country's rulers at first took a liberal-abolitionist view of what was later perceived by the totalitarian Stalinist regime as a threat to the Soviet people; for example, in the 1920's prostitution was fully tolerated; what measures there were concerned only an endeavour to rehabilitate women lured into the sex trade (they were offered employment and the opportunity to upgrade their education and learn new skills). In December 1917 criminal sanctions against homosexuality were abolished (at this stage the 1922 and 1926 sanctions in the penal code were unforeseen). The first edition of the Great Soviet Encyclopaedia stated that: "while aware that the development homosexuality is wrong, society does not wish to condemn and cannot condemn... those who have such a sexual nature... our society... makes it possible for homosexuals to live without undue suffering" (Great Soviet Encyclopaedia, 1930: 594-598). Up to May 1928 drug peddling was not prohibited; in fact there was widespread indifference to drug-taking and addiction as a social phenomenon.

Later, during the totalitarian period, there was a gradual hardening of attitudes to all these "vestiges of capitalism" that were "alien to the Soviet people". By the 1930's prostitutes were no longer rehabilitated; instead, a new repressive regime was turned against them. Liberal attitudes to homosexuality were changed too; in 1934 male homosexuals were made to answer for their actions (and were punished

by 3 to 8 years in prison). In 1936 the people's commissar for justice² N. Krylenko compared homosexuals to fascists and other enemies of the people (notwithstanding the brutal repression of homosexuals in Hitler's Germany). The second edition of the Great Soviet Encyclopaedia reads: "in Soviet society with its healthy morals homosexuality, understood as a sexual perversion, is ignominious and criminal... in bourgeois countries homosexuality is an expression of the degradation of the ruling class and is practically unpunished" (Great Soviet Encyclopaedia, 1952: 35). In 1934 it became illegal to sow the opium poppy and Indian hemp. From the stated examples it is plainly obvious that the regime constructed various types of deviancy and crime, creating scapegoats on whom it was convenient to dump all the mistakes, failures and misfortunes of its own social policy (about *criminals as scapegoats* see: Yakovlev, 1985: 17-29).

An objective complication in the logical definition of criminality lies in the fact that the concept is formed on two different bases, each existing on a different plane: real (ontological, objective) harmfulness, and its codification in law, which is always the result of a legislator's subjective will. V.E. Zhrebkyn studied this circumstance as long ago as 1976; he remarked that the signifiers of the concept of "criminality" were both material, substantial (denoting danger or more accurately, harm to society) and formal, insubstantial (denoting illegality, designated in the penal code). Researchers can define these two indicators as following: "a material signifier is one which is essential, that belongs to the thing in itself, is a substantial, immanent feature; it is an objective signifier existing independently of the perceiving subject (in this case the legislator) and for him. The formal signifier is insubstantial, it doesn't belong to the object in reality, is not an immanent feature; the perceiving subject is present in the signifier" (Zhrebkyn, 1976: 37). However, Russian criminology has already overtaken these debates.

Leaving behind the concept of criminality as a particular case of deviancy, we can redefine it as a relatively widespread (mass), statistically stable social phenomenon, one of the forms of deviancy, achieving a degree of social menace

² Soviet name of the Minister of Justice.

and determined by law in the penal code (Gilinskiy, 2000: 79). An analogous definition of criminality proposed by John Hagan: "a type of deviation which consists of divergences from the social norm, swerves which are prohibited by the penal code" (Hagan, 1985: 49). It needs to be said that our definition is only provisional.

The difficulty in defining the basic concept of criminality applies equally to questions concerning its causes; even in physical and biological systems it is very difficult (although in general not impossible) to isolate the cause-effect link, to tear it from its context of interrelationships. It is more difficult for social systems.

The majority of criminologists gave up trying to find the causes of crime a long time ago and turned to the study of correlated dependence ("correlation versus causality" (Winfrey, Abadinsky, 1996: 9). In our opinion it is in principle impossible to find the causes of crime and only crime, inasmuch as the phenomenon is an artificial social construct undetermined by qualitative particulars. It is impossible to find a specific cause for a construct which capriciously changes its form in time and space at the whim of a legislator (or power); such a search leads to a truism: criminality is caused by the whole socio-economic system (M.N.Gernet, Administrative Herald, 1926: 30) or criminality is the result of the penal code.

As a result of correlated or factorial analyses "structural criminology" has established the interdependency of criminality and factors such as "gender, age, class and race" (Hagan, 1989; Messerschmidt, 1997). In our opinion an important integrative "criminogenic" (in general "delictogenic") factor is the fundamental contradiction between the relatively even distribution of human demands and the inequality in the existing opportunities to satisfy these demands, depending first of all on a person's position in the social structure; the more significant this rupture, the lower the responsiveness of society (its capacity to meet people's demands, as understood by A. Etzioni), the higher the deviancy level, including crime.

A new and important “delictogenic” factor is the change in society from hierarchical relationships to ones based on differentiation with the meta-code *inclusion/exclusion*, when “some people will be persons and others only individuals, some will be included in functional systems, and others excluded from them remaining creatures who try to survive till tomorrow” (Luhmann, 1998: 107). It is clear that the excluded constitute the social basis of criminality, drug-addiction, alcoholism and other negative deviations (Paugam, 1996; Finer, Nellis, 1998; Young, 1999).

Thus it would seem that the essentially theoretic questions raised in this paper are directly related to real legislative practice and to law-abidingness in general, development of a strategy and tactics for the war on crime, for without understanding the essence of criminality and its genesis we cannot hope to find adequate means and methods for its control (Gilinskiy, 1998) .

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