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CONSEQUENCES OF THE PANDEMIC FOR BRAZILIAN CRIMINAL LAW

CONSEQUÊNCIAS DA PANDEMIA PARA O DIREITO PENAL BRASILEIRO

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ABSTRACT

Objective: This paper seeks to discuss the criminal institutes which importance is intensified in a period of pandemic, such as currently experienced. The collective legal goods, the blank criminal norms and the crimes of danger, as well as the intention outline the criminal offenses that may arise in cases of non-compliance with measures to contain the spread of the Covid virus.

Methodology: The methodology adopted in the research is deductive, with the setting of assumptions. The conclusions presented are extracted following the research, the bibliographic review and the analysis of the relevant normative texts.

Results: In a pandemic period there are certain criminal categories which importance is reinvigorated, imposing a new doctrinal understanding about these institutes and

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also that Criminal Law has definitions of crimes that directly relate to this moment, as the last instance of behavior control (*ultima ratio*).

Contributions: The relevance of this paper is to revisit concepts that are often criticized by the doctrine, such as collective legal goods, blank criminal rules and crimes of danger, as well as the current reflection on the types of crimes that, in a pandemic phase, can be committed if the rules related to this singular moment are not complied with.

Keywords: Pandemic; Criminal Law; Dogmatic; Crimes.

RESUMO

Objetivo*: Com o presente artigo busca-se discutir os institutos penais cuja importância se intensifica num período de pandemia como o vivenciado, entre os quais os bens jurídicos coletivos, as normas penais em branco e os crimes de perigo, bem como pretende-se delinear as infrações penais que podem advir nos casos de descumprimento de medidas tendentes à contenção da propagação do vírus Covid.*

Metodologia*: A metodologia adotada no texto é a de caráter dedutivo, com a fixação de premissas, das quais se extraem as conclusões apresentadas, seguindo, a pesquisa, a revisão bibliográfica e a análise dos textos normativos pertinentes.*

Resultados*: Concluiu-se que num período de pandemia há determinadas categorias penais cuja importância é revigorada, impondo uma nova compreensão doutrinária acerca destes institutos, e, ainda, que o Direito Penal, como última instância de controle de comportamentos (ultima ratio), possui definições de crimes que se relacionam diretamente com este momento.*

Contribuições*: A relevância do artigo está na revisitação de conceitos muitas vezes criticados por parte da doutrina, a exemplo dos bens jurídicos coletivos, das normas penais em branco e dos crimes de perigo, bem como na atualidade da reflexão proposta sobre os tipos de crimes que, numa fase de pandemia, podem ser cometidos, se descumpridas as regras relacionadas a este momento tão singular.*

Palavras-chave*: Pandemia; Direito Penal; Dogmática; Crimes.*

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1 INTRODUCTION

Throughout the past year and based on the actual possibility of extension for the current year of 2021, people are living in a completely heterodox period, unprecedented for the living generations and with reflexes in public health, psychological, economic and cultural not even yet predictable. In concrete terms, it would be pure speculation any estimate as to when the barriers inherent to the situation currently established will be overcome.

There is in effect an ongoing pandemic, developed in apparent waves, which has not until now outlined the exact moment of its refraction. Virtually, all people experienced a period of difficult confinement. The opening of certain activities was not accompanied by the end of various limitations, which are otherwise necessary, considering that the contamination rates continue to advance.

Emotions and feelings arise in a completely different way from regular times; everyone is oppressed by a reality that has never been experienced in addition to fear, boredom, anguish, to the extent that the freedom of movement is compressed with ample justification.

In a complex situation like this, it is important to discuss some legal issues, especially within the scope of Criminal Law. There are some types of crime that stand out, which have their incidence more pertinent to this situation and, in addition, there are consequences in dogmatic terms of the theory of Criminal Law itself that are important. The objective of this article is to deal with the criminal perspective of the pandemic, the legal categories that seem most relevant and, ultimately, the crimes that are correlated with this moment and particular situation.

At first, a general approach will be carried out, and then the intention is to specify the terms of this discussion to finally enter into the more particular theme of criminal types that could be revealed in a pandemic situation.

In this period of pandemic, at least three categories of criminal law, which have been rejected in some approaches, acquire new meaning and, for this purpose, invite to a reflection. Each one of them will be briefly treated in the sequence.

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2 THE IMPORTANCE OF COLLECTIVE LEGAL ASSETS

The route of the legal good theory begins in the 19th century on the perspective that the legal good would be considered in terms of injuries to people's interests (FEUERBACH, 1840, p. 41-6); it would allude to the violation committed against a certain individual interest. In that past time, this contained an important dimension, being a preamble to the theoretical densification of the concept, but it did not respond above all to an issue relevant to such time, which concerned to crimes against religious feelings; in such type of crime the violation does not relate exclusively to one person (BIRNBAUM, 2011, p. 10-30). As a result, the evolution of the idea of the legal good began to encompass collective injuries and until today it is seen a kind of very consistent reinforcement on the theme of criminalization of behaviors that face non-individualizable interests. The examples are several, such as the environment, the financial system and the public assets, to mention only the most common ones.

Many authors, however, refuse the legitimacy to incriminate conducts that do not refer to a specific individual. The argument, in this case, is an undue expansion of Criminal Law, that should focus on its enlightenment characteristics, namely covering the violating facts to the interests of the people individually considered, transferring the other collective injuries to other branches of law. In line with what Hassemer (2001, p. 232) affirms, Criminal Law should be restricted to a strict nucleus (*eine Reduzierung des Strafgesetzbuchs auf ein Kernstrafrecht*), consistent with the protection of interests that can be brought back to a species of personal dimension.

However, when there is a period like the current one of a worsening pandemics, for all those who are critical of the criminalization of behaviors that violate collective interests, the argumentative burden to explain how to deal with this type of situation arises involving a wide collectivity of indeterminate individuals and goes beyond the limited understanding of the untying of men and women from their social dimension.

Better explaining, those authors who defend the idea that Criminal Law should continue to stick to its so-called classic standard, the Criminal Law which protection was concentrated on property, assets and, consequently, that referred exclusively to

the protection of individual interests. Such authors unequivocally lead towards an elitist vision, insofar as they seek to remove from Criminal Law exactly those behaviors, ultimately, practiced by the more affluent social classes, leaving Criminal Law solely to be effective in those cases of crimes committed by the less fortunate people (HEFENDEHL, 2010, p. 104/105).

When dealing about the protection of public health, that is, the criminal incidence of protecting the collective interest, especially in times of a pandemic, one is effectively recognizing the importance of this category of goods. The public health as explained by Hungria (1958, p. 96/97), consists in the common danger to the health of an indefinite number of people, being certain that the right to its preservation is uniform to all members, as members of the social environment, due to the fact of the association.

Those who refute the idea of collective legal goods end up leaving unprotected the public health and, consequently, the most expressive interests of people in a pandemic situation. In other words, when experiencing such a complex moment, the point of view is reinforced according to which the criminal guardianship must cover not only the individual interests, but also those of the community and consequently the misunderstanding of those who defend a purity of Criminal Law, end up considering it irrelevant when the needs for protection are effectively more evident.

A preliminary conclusion is that it appears as a consequence of the pandemic period to reinforce the thesis that Criminal Law must not fail to protect collective interests.

3 THE FORM OF CLASSIFICATION AS DANGEROUS CRIMES

The second dogmatic category to be reread, given the influences of a pandemic period, are the so-called crime of danger. In a short definition, it can be said that crimes of danger are those in which an incrimination does not require a conduct that produces damage to the legal good, as long as it causes a threat of harm. As explained by Figueiredo Dias (2012, p. 308), considering the way how the legal good

is put on the spot due to the agent's performance, the crimes of danger are concepted. Their criminal type is filled regardless any damage, being enough the existence of risk, the threat of injury.

This threat in certain cases must be demonstrated empirically in the hypotheses of the so-called crimes of concrete danger. In other situations, it is foreseen by the legislator, that is, from the simple performance of conduct it is possible to extract a risk of violation of the legal good, these being the crimes of abstract danger (JESUS, 2010, p. 229).

Such crimes of danger, as broadly known, are the constant target of doctrinal attacks in the sense of their illegitimacy and, for some authors, of their own unconstitutionality (FIGUEIREDO DIAS, 2012, p. 309/310) to the argument that Criminal Law would apply only when there was damage, namely, a result that was actually harmful to the legal good.

The issue, however, is that one lives in a time when the dimension of risk, with its characteristics mostly global, with sophisticated mechanisms for apprehending the probabilities of damage, it is significantly important, making injury in various cases preventable. Currently it is possible to foresee situations that, if they actually occur, will imply a brutal severity having tremendous consequences. When it happens, it is natural to anticipate criminal protection; even before the injury occurs, and with the objective of inhibiting or avoiding it, Criminal Law already acts to protect the legal good.This anticipated protection consists of trying to prevent behaviors that, in general, if they occur, will affect specific people, as can be seen in the simple example of the incrimination of the agent driving in drunken conditions, considering that the target is less to protect the road safety, as an abstraction, and much more to protect the life or physical integrity of people who may be affected by the irresponsible driver.

In the case of crimes that are related to the current pandemic phase, the same is true. As will be seen below, they are behaviors that represent danger to the other members of the social body that can be punishable before any damage was caused, precisely because the damage, in these cases, can represent such magnitude that the anticipation of the incidence of Criminal Law is justified, with the evident objective that the injury, with these characteristics, simply does not occur.

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For this purpose, a second consequence for Criminal Law during these pandemic times is the increase in the validation of incriminations made in the form of crimes of danger.

4 BLANK CRIMINAL RULES

In summary, blank criminal rules, for their perfect incidence, need to be complemented. Bitencourt (2012a, p. 199) assert that they are rules of incomplete content, vague, precisely because they depend on complement by another legal rule (law, decree, regulation, ordinance). In other words, the criminal type or the model of conduct described by the criminal law requires the addition of another rule, to give rise to the classification of the blank criminal rules as *lato sensu* or *stricto sensu*. The first one has the complement derived from the same formal source as the rule to be complemented; in a simplified way, the criminal law is completed by another law in a formal sense; the *stricto sensu* blank criminal rule, on the other hand, obtains its complement from rules whose author is formally different, as in the case of the criminal law being complemented by decrees or regulations issued by the Executive Power (ALFLEN, 2004, p. 67/68).

The nomenclature does not prove to be so important, because it must be understood that the contents of the blank criminal rules need to be complemented and, above all, require a non-legislative complement consisting of administrative acts. This is the case, for example, in the crime of drug trafficking, in which the indication of narcotic substances is not referenced in criminal law, but via ordinances of the competent administrative authority.

In the blank criminal rules there is no disregard to the principle of legality, provided that the criminal law establishes the “hard core” of the rule, linked to the verbs, to the definition of what needs complement in order to privately control the criminal-political choice of what is punishable, as long as it refers to the complement only to technical aspects due to a need arising from what is required for the effective protection

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of the legal good or regional and local adjustments, derived from geographical, economic or socio-cultural particularities (GUARAGNI, 2014, p. 53).

It is important to point out that certain situations require a kind of regulatory speed for a full normative effectiveness, which the parliament is often not able to grant, either in terms of filling in the content or in the sense of changes that eventually are necessary. The normative acts issued by the Executive Power, by its various organs, such as the Ministry of Health, have the possibility of regulating the means of combat and the effects of the pandemic much more adequately, inserting some of its regulations, such as a complement in the body of previous criminal rules, which already contain what is prohibited or unlawful.

In addition, it is included that an event of the severity of a pandemic requires reflection on the confrontation between public and private interests. The past Constitutional Law provided the thesis of the preponderance of the public interest over the private interest; this understanding has been declining in favor of the thesis favorable to a certain type of individualism. The situation experienced shows, however, that the Constitutional Law is not only made up of rights, as it also establishes duties. The public interest, especially in dramatic crisis situations, acquires greater relevance than the private interest and, therefore, implies the duty of people to submit to the various determinations that have much less a paternalistic sense of protecting the individual, as paternalism consists of interference with someone's freedom, justified by reasons relating exclusively to the benefits, needs or interests of the coerced person (DWORKIN, 1975, p. 230) inclining more to protect the community, due to the undeniable potential of spreading the virus in the concrete hypothesis of the pandemic.

In other words, this means that when one is limited in the possibility to walk in the streets as was allowed a few months ago, at any time; such determination does not seek, exclusively, to ensure that one does not become contaminated, but rather to prevent becoming a vector of contamination of other people, especially those most fragile and member of risk groups. The aim is to prevent the people to become a "source of danger" (*Gefahrenquelle*), a kind of time bomb, which will lead the virus and its dangers to an infinity of other individuals.

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All of these determinations, given the variability of circumstances in a pandemic, are made at the administrative level by the Executive Power (s). They end up completing certain criminal rules, notably the blank criminal rules. This is the reason why another consequence for Criminal Law of the present moment is the revitalization of the relations between Criminal Law and other branches of Law, and of the criminal law itself that needs to be complemented.

5 THE CRIMES OF THE PANDEMIC

Section VIII of the Brazilian Criminal Code provides crimes against public safety, which can be defined as the state of preservation or security in view of possible harmful events (HUNGRIA, 1958, p. 7). Public health, as was already mentioned, is recognized as a "right of all and, consequently, as a good of social interest". It is the legal good protected in one of the chapters of this Section, evidently as a projection of the people's right to live or integrity; this means that the collective legal good, in this case the public health, refers to specific people or individuals who may be specifically affected by the behaviors performed as a damage to the collectivity; Bitencourt affirms that the health constitutes "not only an individual legal good, but also a collective legal good, with a clear social dimension" (2012b, p. 299).

The crimes against public health are of those types that "cause a situation of danger to an indeterminate or not individuated" number of people (HUNGRIA, 1958, p. 7), as well as aim to protect, generally via blank criminal rules to interests that are collective, all combining the initial reflections carried out in this paper with the particular conditions provided in the Criminal Code.

At first, it is important to note that outside the Criminal Code there are important rules that have an impact in the structuring of the Criminal Law in times of pandemic. The first one is Law 13,979/2020, which provides in Article 1, § 1: "The measures provided in this law aim to protect the community". This law establishes three important measures: the first is isolation, consisting of the separation of sick or contaminated people; the second is quarantine, which is the restriction or separation of people

suspected of contamination; and finally there is the possibility of compulsory examinations, tests, sample collections and vaccination. Law 13,979/2020 started including the diversity of competences among the various entities of the Federation. In determining these measures, namely the protection of the community. In this case, it is not restricted to the imposition of duties only to the Union; States and Municipalities can similarly act within the spheres of their attributions. This law was subsequently amended by Law 14,019/2020, including the express obligation to keep mouth and nose covered by an individual protection mask, for circulation in public and private spaces accessible to the public, in public roads and public transportation, as well as in paid transportation vehicles, such as taxis and applications, buses, airplanes and boats, among other provisions.

In addition to the laws, Ordinance No. 356/2020, issued by the Ministry of Health, is part of the normative framework; based on the declaration of the state of emergency, more specific determinations on isolation and quarantine are established, being certain that the Inter-ministerial Ordinance No. 5/2020, which indicated the administrative, civil and criminal liability of those who refused to comply with legal requirements, was revoked by Inter-ministerial Ordinance No. 9/2020.

This section presented, briefly, a background will be completed with a closer analysis of the Criminal Code.

5.1 ARTICLE 268 OF THE CRIMINAL CODE

The most important crime for the current period is provided in Article 268 of the Criminal Code, which incriminates the infraction of a preventive health measure; the criminal type points to the failure to comply with the determination of the Government, aimed at preventing the introduction or the spreading of a contagious disease.

This conduct has as penalty the detention from one month to one year, being a less offensive criminal offence. The rules related to Law 9,099/1995 are applied, including the inhibition of arrest in blatant delicto, having the possibility of a criminal transaction and, certainly, if all this does not happen, the virtual conditional suspension

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of the process and, in case of conviction, substitution of imprisonment. The criminal consequence herein explained is characterized by some mildness, meaning that it is very difficult, almost impossible, to imagine that someone will be arrested by chance, condemned by Article 268 of the Criminal Code.

This fact does not reduce the importance of the rule, in this case, for a positive symbolic role of Criminal Law, in the sense of restraint of behaviors, as well as for the scope of prevention against such types of conduct. The symbolic character of Criminal Law, in fact, means that a rule of criminal prohibition is not reduced to its functional relevance, but also bears symbolic relevance (*symbolische Bedeutung*), which resides in the act of manifest of disapproval of the described conduct (HÖRNLE, 2006, p. 36). If there is a preventive sense in Criminal Law, it presents itself particularly when the conduct is predicted in the abstract as a crime; after the agent commits the infraction, as is evident, it seems a little more arguable to talk theoretically about prevention, at least about that concrete situation.

In any case, Article 268 of the Criminal Code is a blank criminal law that shows very peculiar characteristics, especially in the current case referring to the Corona virus. Its full effectiveness requires a rule that contains “the determination of the Government, tending to prevent the introduction or spread of an infectious disease, which may be an administrative act or a law” (JESUS, 1996, p. 315).

This complement may derive from a plurality of sources, such as Law 13,979/2020, as well as the provisions of States and Municipalities, which are also regulating people's behavior during the pandemic. The integration of the criminal provision in comment occurs not only through the law, but above all through administrative acts emanating from the Executive Powe, and most administrative acts that originate from the most varied entities from the Federation, States and Municipalities. Jesus affirms that “Government should be understood as any authority that acts within the limits of its competence, which can be federal, state or municipal” (1996, p. 316), which is the same understanding defended by Hungria (1959, p. 101).

Some variation is admitted regarding effectively which behaviors are determined or prohibited, as each federal entity may dispose of them depending on

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the greater or lesser intensity of the situation related to the pandemic, which appears in their respective territory.

In coastal areas, for example, the municipal prohibition against circulation on the beaches can result in non-compliance with the municipal determination, in the occurrence of the crime in question. The refusal to use masks, in certain environments, if imposed by state or municipal rules, is also part of the criminal type, and makes it possible for the criminal prosecution agencies to act, and the same happens, for example, about nighttime home permanence or some kind of "curfew", tending to reduce the circulation of people and the spread of the virus.

The crime is of simple conduct, meaning that it does not matter whether any harmful result actually occurs. In other words, even if there is no spread or introduction of a contagious disease, the simple non-compliance, the simple violation to the determination of the Government reveals, by itself, the occurrence of the crime. As Bitencourt explains, simple disobedience to the determination of the Government already implies the consummation of the crime and, in the case of "a crime of abstract danger, the effective introduction or spread of contagious disease is unnecessary for its typification" (2012, p. 312).

The determinations of the Government, which non-compliance gives rise to the crime of Article 268 of the Criminal Code, are not exclusively the determinations of the federal Government. The federal, state and municipal determinations, all components of this concept of Government, if violated, generate the criminal typification. For this reason, it is important to recall the old lesson whereby in this situation the competence of the authority from which the determination emanates can be examined, that is, the criminal judge who encounters someone accused of violating Article 268 of the Criminal Code can verify whether the administrative provision of the State, the Municipality or the Union was made overextending or not the competence that is constitutionally granted to it (HUNGRIA, 1958, p. 101); however, it not allowed to enter the convenience of the measure itself. In this case, it is not an attribution of the Judiciary to assess the adequacy of the measure adopted by any of the spheres of the Government, a sphere is already insusceptible to be syndicated, as this is the responsibility of the administrative authority.

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It is important to remember that in terms of federal regulations, isolation is defined as a measure concerning those who have the Corona virus, the disease, to the point that for the verification of non-compliance regarding isolation, there is a need for prior communication to the affected person about the compulsory nature of the measure. The agent must be formally aware of the requirement for his isolation. Similarly, mandatory quarantine depends on a specific act by the competent authorities revealing the necessary individualized formalization that these measures are being established towards the respective individuals. This is so true that anyone who reads Ordinance No. 356/2020 will understand that, at the end, there is an annex providing the "consent form" requiring the information on the need for such restrictions, isolation or quarantine.

Notwithstanding the other measures eventually established at the municipal and state level, and which non-compliance causes the crime of Article 268 of the Criminal Code. The municipal restriction on entry into parks, the prohibition on opening non-essential shops, the prevention of parties and agglomerations, all these provisions in cases of willful disregard are subject to criminal penalties whereby reference has been made; again, in this case, the blank criminal rule accepts the complement coming within the scope of its competence from each of the Federation entities.

The resistance to meeting these determinations putting the health and life of others at risk has in Criminal Law one of the ways of restraint.

As is evident, the complement of this blank criminal rule has what is called ultra-activity; even after the pandemic has ceased and the respective regulatory decrees and instruments are revoked, whoever has violated these administrative provisions complementary to Article 268 of the Criminal Code will be responsible for the conducts not benefiting from *abolitio criminis*; otherwise, quite simply, what one would have is the complete ineffectiveness of preventive measures, which future extinction would represent a kind of authorization for its own non-compliance.

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5.2 EPIDEMIC IN THE PANDEMIC

Another crime related to the current moment which typification is more difficult is the epidemic; in fact, the serious crime of epidemic, foreseen in Article 267 of the Criminal Code, providing: "to cause an epidemic by spreading pathogenic germs", imprisonment counting the high penalty of ten to fifteen year.

When referring to crime of an epidemic, it is relevant to draw three distinctions in the aspect of severity as explained by Bitencourt (2012b, p. 302/303). The first level is an outbreak, the sudden increase of a certain disease in a specific location, such as a neighborhood or city. For instance, in a certain period, there is an outbreak of measles, an outbreak of malaria which is limited to a specific location. The epidemic is more severe than the outbreak, the contamination of several people, in a short time, in various places, at a level higher than expectations as in a state or country. The third level is the pandemic itself, consisting of the infection of several people, in different places, often in different countries. In summary, the pandemic is a global epidemic.

The first question to answer in the analysis of Article 267 of the Criminal Code is whether incrimination by epidemic is possible in the event of a pandemic. There is some dissonance in this understanding, but everything suggests that the answer is positive. The reason is: if a mapping of the world in terms of the spread of COVID-19 is carried out, it will possibly verify that several places have a lower diffusion of the virus, and that some cities concentrate most of the contamination. Apparently, there are fluctuations in this context, in the sense that in some places the incidence of contamination increases, while in others there are reductions in infection, inverting the positions over time.

Assuming that someone infected, known to be infected, goes to a location where there are few records of the Corona virus and spreads the disease or any of its variations. Given the new strains of the virus, it will be possible that that individual will answer for the crime of epidemic provided for in Article 267 of Criminal Code, despite the fact that there is an established pandemic situation and a global problem therefore.

In the case of an epidemic the individual's objective, the active person, is not exactly to cause the death of a determined person. This is true that when the crime of

an epidemic occurs and it results in someone's death, its form is aggravated, according to paragraph 1, of Article 267 of the Criminal Code, with a double penalty. The objective in this case is to reach the community and, if it results in death, the individual is responsible for the qualified modality of the crime. If the individual's objective is to cause the death of a single person in some way by inoculating the virus leading to death, the typification is the crime of homicide as per Article 121, § 2 (qualified homicide), item III of the Criminal Code, which is the crime practiced by means of common danger (HUNGRIA, 1958, p. 98).

It is important to emphasize that the crime of epidemic is punished within the culpable modality in cases of imprudence or negligence, generating the spread of pathogenic germs.

It is interesting to deepen the debate drawing a parallel with the difficult theme of contamination by HIV virus for criminal dogmatics. As the scope herein is to simply draw a parallel, several arguments from this inexhaustible discussion will be overlooked.

Suppose, in this heuristic line, that the individual knows that he/she is contaminated by HIV and starts having unprotected sexual relations. Basically, the first question that must arise is whether the victim knew or not that the partner is infected. It is not unreasonable those who say that, if the victim knew and consented, it is a voluntary self-exposure at risk, dispelling the criminal responsibility of the offender, inexistent a legal risk prohibited. If the victim consented and becomes infected, he/she ends up bearing the burden of his/her own decision. On the other hand, it could happen that the victim does not know that the partner is contaminated by HIV virus. In this case, if the victim is infected, there are several answers brought from the doctrine, such as, for example, an attempted murder, to the health hazard, although prevailing, with some reason, the crime of body injury; when interpreting Article 129 of the Criminal Code, it is an offense to physical integrity and also to people's health.

There is an important distinction between the cases of HIV and Corona; in HIV, the advent of death takes time, shifts in time to the future, if it indeed occurs, to the extent that nowadays there is a set of treatments and medications that can extend the life up to the time of natural death. It does not happen in the case of the Corona virus,

the relationship between contamination and eventual death can be reach an almost immediate relationship due to the high lethal load of the virus and the lack of effective, or proven, medical treatment. Therefore, in the case of COVID, the agent who voluntarily contaminates someone will not have excluded the liability for homicide, depending on the concrete situation.

The conduct of spreading the virus directed to an individual or group of specific individuals does not eliminate the possibility of criminal liability for homicide or personal injury, whereas such behavior towards a group of undetermined people can reveal the crime of epidemic provided in Article 267 of the Criminal Code, even in a pandemic situation.

In fact, the severity of the epidemic is so significant that correlates to the use of chemical weapons in wars and the repulse that this generates under International Law. In Brazil, Article 51 of the former Decree 4,766/1942 provided that: "causing an epidemic in times of war, in the interests of the State in war against Brazil", was punished with the death penalty. The Military Criminal Code, currently in force, provides the same provision in Article 385, establishing the death penalty in a war situation - obviously known by everyone that in Brazil the death penalty is prohibited, except in case of declared war - if it causes an epidemic. Not only due to the deaths it risks producing in such a situation, but also because the outbreak of an epidemic generates immense panic in people and lowers the level of quality of life to levels never thought of, implying in an experience of personal degradation, considering that the punishment reaches such an expressive level.

5.3 OTHER PANDEMIC-RELATED CRIMES

In a lateral way and with a less evident incidence, there are other crimes that could be considered in a pandemic situation, like the current one. The objective is to list some criminal types that could be present in certain cases due to certain behaviors.

Article 131 of the Criminal Code, in providing the danger of contagion of severe illness, establishes the typical conduct of "practicing, in order to transmit to others severe illnesses of which one is contaminated, an act capable of producing contagion".

The penalty varies from one to four years of imprisonment and the conduct should be directed towards a specific individual or person.

Therefore, it is a crime of individual danger, and not a crime of common or collective danger. In other words, the individual knows that is contaminated or, at the least, should know that is contaminated and, nevertheless, practices an act susceptible of generating the infection of another person.

It is not so simple to define what is a severe disease for the improvement of this criminal type, but this objective is secondary because Covid-19 is a severe disease and for legal purposes this information is enough. In case of other diseases, the doctrinal discussions point out doubts about the respective severity of the diseases, which is not defined in any law.

In the hypothesis focused herein, however, it is possible to say that the person who practices an act susceptible to contamination in relation to others, an individualized and determined person, can be convicted by the crime of individual danger of Article 131 of the Criminal Code, considering that it will happen anyway if the contamination does not actually occur, for the obvious reason that it is a crime of danger, which is performed due to the simple cause of risk, the probability of damage.

The body injury provided for in Article 129 of the Criminal Code is a crime that does not exclusively concern to physical integrity, as already mentioned, but also includes protection for the health of people. For this reason, in case of effective malicious contamination, obviously in the absence of death, it is an offense that cannot be excluded among those that can be verified when the virus is transmitted. The body injury, when it implies a risk of death, it is classified as severe, with a high penalty to the level of one to five years of imprisonment and, if it refers to an incurable disease, it becomes very severe, giving rise to the variable penalty between two to eight years in prison.

Finally, Article 330 of the Criminal Code, providing the crime of disobedience, which is as a kind of subsidiary crime, just like a reserve soldier, for those cases that are not typified in Article 268, which is a breach of administrative rules.

In a situation like the current one, it is natural that the power of the State is amplified because it is necessary that norms and rules govern more emphatically the

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behavior of people, avoiding the spread of contamination; and, for this purpose, the non-compliance with rules enacted by government authorities may, eventually, call for the incidence of Article 330 of the Criminal Code that is also a criminal offense with less offensive potential, but nevertheless there are no consequences of a criminal nature. The characterization of disobedience requires a demand directed to a specific person, and its non-compliance, provided that it is not a clear illegal command, is sufficient for the typification of the crime. The determination of dissipation of meetings, the imposition of return to the domestic environment, if there is a curfew, or even the pressure to use a mask by the public authority, if they are to be ignored by the individual, may typify the crime of disobedience, if they do not obviously result in the characterization of a more severe crime, that is reason why the incidence of Article 330 of the Penal Code is subsidiary, as already mentioned.

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6 FINAL CONSIDERATIONS

Based on this study, the Criminal Law in times of pandemic is not exclusively derived from the Code; there is a set of regulations, especially administrative ones, that complete the legal outline that tends to deal with this complex and difficult situation. There can be no illusion that the pandemic problem should be solved through Criminal Law; a panorama like this shows that, in the set of knowledge rules, in which the Law, the Politics, the Economy and the Health are presented, when the situation in terms of public health is radical, all the other regional ontologies in some way submerge; it is natural because one is faced with an aspect that concerns the survival of the human being.

One cannot imagine that Criminal Law will resolve a pandemic with sufficiently uncertain consequences.

On the other hand, this also has an important consequence in revealing that Criminal Law presents itself as the most severe mechanism aimed at protecting the interests of people and ultimately the community. Criminal Laws should not be invoked to any injury that occurs to the legal system, as there are other ways to resolve them. However, there are more severe hypotheses that Criminal Law will be indispensable.

However, there is an increasing neglect in Brazil in terms of complying with rules enacted to reduce the spread of the virus. Clandestine parties and meetings, agglomerations, non-obeyance of use of masks and protective equipment, circulation in prohibited areas guided by the spirit of leisure and without any need. The apparent refusal or the voluntary oblivion as to the activation of the criminal mechanisms of restriction of behaviors are considered as illegal because offenders of Government rules will have contributed to this risky easing. The normative message transmitted by Criminal Law cannot be considered trivial, and its exercise in these increasingly common cases points out with necessary emphasis the types of conduct that are unacceptable in a pandemic,.

It is important to conclude that the role of Criminal Law precedes its own action. Even before someone violates a criminal rule, the rule is already fulfilling its role of

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restricting certain behaviors. Criminal Law is also part of this great complex web, which is the web of intersubjective relations.

In such an unusual moment, when restrictions and a difficult process of social distance prevail, paradoxically, one must understand how important it is to have a relation with each other. Precisely because it is about relationships that are established between people that Criminal Law is also part of this complexity.

In summary, the consequences of the pandemic for Criminal Law are the revitalization of the concept of collective legal goods, the verification of the importance of blank criminal rules given the dynamism of social relations and the verification that for certain cases the formulation of criminal types in the manner of crimes of danger is correct. In addition, it is concluded that there are typical kinds of appropriate incidence for the pandemic situation, considering that in certain cases there will be behaviors that must be precisely combated through the Criminal Law.

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