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Right to security in the context of the theory of social deviance

S u m m a r y

The article is dedicated to the problem of security in the context of the theory of social deviance. In the analysis attention is focused on the legal- sociological aspect of the problem, inasmuch as the purely legal and criminological aspects of fighting crime have traditionally been set apart. Legal-sociological analysis, having many points in common with the criminological approach, offers after all the possibility, even though as a matter of convention in scientific classification, to delimit more clearly the three basic research spheres: law, criminology and sociology of law.

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The problems of connection between security and social deviance as a social phenomenon have always been in the focus of attention of all civilized societies. In modern societies social deviance and crime have attained global dimensions and are taxing the resistance capacity of politicians, legislators, and specialized state organs alike. The emergence of new forms of criminal behavior at the end of the 20th and beginning of the 21st century has even provoked changes in the terminology of specialists in criminology [1] and has raised the need for uniting efforts in the search for adequate methods of counteracting this particularly dangerous social phenomenon. In theory and practice adequate clarity is still lacking as to whether it is for law alone that the new forms of social deviance (especially terrorism, cyber attacks, corruption and corruption-related crime) are a specific object of research, and, hence, of a practical strategy for restriction. Many and various problems are related to crime, which is indisputably a social phenomenon that until recently remained outside the field of vision of pure legal science (theory and legislature).

In the following analysis attention is focused on the legal- sociological aspect of the problem, inasmuch as the purely legal and criminological aspects of fighting crime and ensuring the security of citizens have traditionally been set apart. We have nowise attempted to set in contrast the positivistic-legal and the legal-sociological method of study; the aim has been to find common points of contact in the conceptual and practical applied aspects of the matter. Nor will we envisage a “complementary” (as laymen in the field of sociology of law might see it) empirical analysis of data from concrete research; instead, this is a conceptual presentation of a scientific thesis in the context of theoretical legal-sociological analysis. More specifically, crime and its concrete forms are viewed within the framework of the theory of the social structure of society, together with its particular set of categories, which are at times quite different from that of legal positivism. Moreover, legal-sociological analysis, having many points in common with the criminological approach, offers after all the possibility, even though as a matter of convention in scientific classification, to delimit more clearly the three basic research spheres: law (the legal approach), criminology (the criminological approach), and legal sociology (the legal-sociological approach). Such an approach is also needed for identifying and distinguishing the basic forms of counteraction against crime and other forms of social deviance. In this sense legal-sociological analysis is indisputably the widest conceptual framework for encompassing various social phenomena, including the phenomenon of crime. Criminology predominantly studies the conditions and causes of crime; as for law (criminal and criminal procedure), here the issue can be reduced to the finding of adequate legislative solutions, inasmuch as penal responsibility is indeed a very important, but certainly not the only possibility for fighting crime.

1. Legal-sociological conception of social deviance

The analysis of contemporary forms of social deviance requires a preliminary brief overview of the emergence of the notion of social deviance in legal-sociological theory and practice. The representatives of legal-sociological and criminological science usually indicate Emile Durkheim as the founder of the general conception of social pathology and social deviance. It is precisely in the framework of this conception that new elements were later included, such as “corruption”, “organized crime”, “Mafia”, “money-laundering”, etc. Durkheim introduced the concept of “anomie”, meaning by it a situation in which the varied functions within the social structure do not work synchronically. This concept, first presented in *De la division du travail social* [2], in its first variant referred to the social division of labor, which does not produce social solidarity but manifests the rise of conflict between various functions (or organs). In his later studies Durkheim described anomie as a condition of society where norms are lacking. In seeking the causes of social anomie, Durkheim looked to the very structure of society: he tried to identify and classify various social phenomena within it as “normal” or “pathological”. In fact, by applying his well-known “rules of sociological method” precisely to the sphere of law as a basic social fact, Durkheim succeeded in discovering adequate explanations for the social origin of deviant behavior. Proceeding from the belief that law (which he called a social fact) is indeed the phenomenon with the most intense social impact, Durkheim reached the conclusion that legal norms could serve as criteria for classifying behavior (which he referred to in his terminology as “the state of things”) as normal or deviant [3, pp. 58–61].

Merton’s model of deviant behavior is almost entirely based on Durkheim’s conception of anomie, but further develops and enriches it in view of contemporary characteristics of social structure. Merton agreed that there are situations where individuals or social groups regard the value and obligatory characteristics of norms with a decreased degree of respect. Together with this, he indicated social structure as the factor determining the motivation of human behavior. According to Merton there are two main elements of this structure that exercise pressure or determine the concrete orientations in the sphere of behavior. These are the culturally determined (in sociological terms) goals, and the institutionalized means for goal attainment.

E. Lemert made a critical analysis of Merton’s theory and indicated that the model proposed by Merton oversimplified the complex process of choice. Lemert pointed out that individuals in modern society operate with a great amount of values and norms, which tend to clash with one another. Moreover, the individual, being simultaneously a member of several groups with separate value systems, is under constant pressure due to these differences between values and

norms. This contradiction between interests, values and norms (including legal norms) can be a source of deviance. Individual behavior (whether conforming or deviant) is, according to Lemert, a chance result of the total pressure of the various groups and their norms. When in a pressure situation, a personal rarely resorts to a plainly deviant course of behavior. Instead individuals tend to follow a line of behavior that holds a potential risk of deviance [4]. A. Cohen, who is a proponent of the broad view that social deviance is any divergence from social norms, attempts to distinguish between social deviance (a divergence from social norms) and crime (a divergence from legal norms). He defines social deviance in the context of legal-sociological and criminological categories, which inevitably reduce the analysis to the problem of a distorted legal and moral consciousness [5]. In his studies of the sub-culture of criminals, Cohen stresses the connection 'social inadaptability – frustration – aggression – deviant behavior'. Unlike Merton in his model, Cohen tries to come down to the empirical level and present a wide schema of different forms of deviant behavior: he includes the legal factor as a component among the mechanisms that form attitudes and motives of deviant behavior.

The theory of social deviance is equally attentive to the importance of the legal factor in the general context of social structure in which the causes of deviant behavior are rooted. In this perspective the theory of social disorganization is drawn closer to the model whereby it is possible to distinguish more accurately between deviant behavior and violation of the law, between social pathology and crime, between concrete criminal deeds and some new forms of social pathology, which undoubtedly possess juridical characteristics, but the explanation of which cannot fit into the framework of purely juridical analysis.

2. The legal factor and social deviance

Social conformity is broader than legal conformity. Deviations from certain social norms are social deviance, but legal conformity is not always equal to social conformity. At the legal-sociological level it is important to ascertain the mutual connection between the "legal factor" and the concrete socially measurable parameters of the phenomenon. Schematically, this model can be represented thus:

A. Forms of deviance that indisputably hold a higher degree of threat to the public and for which there is no doubt that the traditional legal responsibility is of a penal kind;

B. Forms of deviance regarding which lawmakers periodically change their views, moving between tolerant and rigorist attitudes.

C. Forms of deviation of a disputable kind, to which the classical schema applies of reprehensibility in the perspective of other normative systems (ethics, religion, customs), but for which the application of penal responsibility is not the most effective method of counteraction.

Legal-sociological research is focused chiefly on identifying the specific characteristics of those forms of social deviance for which clear and unequivocal criteria for legal definition have not yet been established and hence an adequate strategy for counteraction against their most dangerous form, crime, has not yet been devised.

3. Social disorganization and pathology of institutions

The theory of criminal behaviour, as part of the theory of social disorganization, varies within a rather wide range. It is at a much later stage that the theory came to focus on the problem of the connection between law and the different manifestations of crimes against security. We speak of pathology of institutions in cases when the social disorganization and social deviance have penetrated into certain government structures, when the holders of power positions in the different branches (legislative, executive, and judiciary) are a source or a channel of deviant behavior. Moreover the scope may vary: ranging from bureaucracy, to which Weber was the first to draw attention, passing through white-collar crime [6, pp. 19–29], and encompassing forms of deviance like corruption, organized crime (Mafia-type organizations), which is a conglomerate of institutional and non-institutional forms of social behavior, “woven” into the social structure in such a way that pathology becomes the norm and the right to security is impaired.

It was not very long ago that the pathology of institutions became the object of both theoretical and empirical analysis. It was not studied earlier, because in general the functioning of institutions has always contained a bureaucratic element that can hardly be placed in the category of anomie. Besides, even if the construction ‘individual-oriented ethics – group-oriented ethics’ is assumed as an initial scheme, it would be hard to find an objective criterion for determining whether the functioning of a given institution is normal (corresponding to commonly accepted values such as security) or pathological. It is important to ascertain how legal institutions (in the broadest sense) can become a source of social deviance or else how they themselves can contain an element of dysfunction, which leads to growing social deviance in the legal sphere. But the question remains open regarding the social characteristics of exercising power. This element goes beyond the purely juridical analysis of institutional activity.

4. Legal and extra-legal measures for counteracting social deviance and ensure the right to security

Social deviance is a characteristic marker of contemporary industrial society. It is not by accident that in legal-sociological and criminological literature the term “fight”, “elimination”, “overcoming”, etc., have been forsaken with respect to crime and other forms of social deviance. Moreover the parameters of the phenomenon are constantly changing and legislation itself is faced with a complex dilemma: to criminalize or to de-criminalize. At the concrete juridical level things have an even more pragmatic dimension. Legislation in itself cannot restrict social deviation as if by waving a magic wand. What is worse, law itself can at times be a source of deviance: this may occur in periods of total change (for instance the transition from a centralized to a market economy), but also in periods of relative stability, when the clashes of values, hidden from the view of the large social structures, arise and come to the fore, so that even smoldering contradictions may lead to a breakdown of the whole social system. In such cases law is not able to prevent the larger conflict, which now becomes a secondary source of change; in its turn, change engenders new relationships and the need for a new legal regulation. Crime is not merely the accumulation of legally defined deeds in penal law. This is particularly true with regard to forms of crime like corruption (which is not simply the sum of passive and active bribery), international terrorism, mass suicides committed under the influence of religious sects, etc. This places lawmakers in a complicated situation: they have to find the distinguishing criterion for achieving a balance between legal and extra-legal sanctions. There are cases when a legislator changes his stand many times over regarding certain deeds. It is not by accident that in the latest research on social deviance, poverty is one of the most often discussed problems. In Durkheim’s view, poverty is a normal social fact [7, pp. 48]. According to most of the major sociological doctrines, it is an element of the social structure, and social inequality is a condition of the existence of society. Opinions are divided in the legal-sociological doctrines. Poverty (social inequality) is in itself perceived by some as a pathological phenomenon. According to others poverty (social inequality) generates a secondary pathology: crime, alcohol abuse, aggressive behavior, etc [8; 9, pp. 17–37]. The thesis that economic factors (poverty in this case) are criminogenic can hardly be empirically refuted, but in any case research on the issue is continuing. Many studies focus on the connection between poverty and lack of security; it is considered that the poorer a society, the greater the risk of lack of security.

There are two ways in which legislation can have an impact on the process of restricting crime and social deviance: by striking the right balance of criminalization and through a wise application of penalties. It is well-known that the

weight of the penalty is not where the re-socializing effect lies. What does have great importance for stimulating or restricting social deviance is the moral norms and values established over the ages, but also current public opinion, the development of institutions of civil society, the attained degree of legal consciousness (that of the legislator as well as that of the people to whom legal norms are addressed). This is the point of connection between legal decisions, public opinion and the concrete social-political situation. There is one other essential element: the need for going beyond the framework of national legislation to the perspective of European standards. The public interest is considered to be a generally applicable criterion: this is a sufficiently reliable category when criminalizing certain deeds defined within the sociology of law as forms of social pathology.

The criminological aspect of restricting social deviance (especially the new forms of crime indicated above) has been quite well researched. In the legal-sociological perspective there are several crucial problems which indeed make up a relatively clear picture of the specifics of the sociological method in this sphere. Of course, there is no unbridgeable gap between the criminological and the legal-sociological methods, but they do present some differences. In this connection there is, first of all, the issue of the anticipating role of legal-sociological analysis for identifying the factors or trends which, at a given time, provoke a growth of social pathology, of which global crime is part; In second place, it is within the framework of legal-sociological analysis that the issue is set regarding the already well-established models used for analyzing society, models which can directly be projected onto modern methods of analyzing crime and other forms of deviance, or can be used in perfecting penal and penal procedure legislation; Thirdly, there is the classical issue of the role of public opinion as a specific manifestation of legal consciousness in assessing social deviance and ensure the right to security.

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