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BETWEEN THE "BANALITY OF EVIL" AND THE MONSTROSITY OF THE CRIMINAL. THEORIES OF THE ALTERITY OF THE CRIMINAL, FROM THE POSITIVIST SCHOOL TO THE MODERN PERIOD

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Abstract: *There is an idea that seems able to cross the centuries and that is found, in one form or another, in almost every society and legal system: that of otherness, of alterity, of the differentiation of the criminal from other human beings considered "normal". If a criminal is completely different, if he operates according to other laws, then this would generate some serious consequences such as: "I, an ordinary man, could never be a criminal"; we could protect society much more easily since we discovered the criminal stigma, we would identify criminals much more easily using a "magic recipe", which would make scientific studies and social reforms almost useless. Although almost entirely false, such conceptions still have a wide spread and appeal, including for criminal sciences.*

Keywords: ***criminology; alterity of the criminal; categories***

1. Introduction

Sometimes in Antiquity and often in the Middle Ages, it was considered that at the origin of any crime there were evil manifestations, which did not come from the human being or from society, but from the forces of evil. Order (and implicitly law) were considered to have a divine nature, therefore any violation had to be severely punished, and the punishment took on a mystical aura. Both society and the law needed to find elements of easy differentiation between the criminal[2] and the "ordinary man". Thus, after the idea of "evil forces", which act on the individual and urge him to do evil, lost its significance for legal sciences (and for society), the theories that supported the abnormality of the criminal gained ground, which in reality played the same role: shifting responsibility for crime from society and the individual to external elements over which we have no control, or at most a limited one. Society is not responsible for the atrocity of certain acts or individuals, but external elements; nor is the individual responsible, since he was either subjected to irresistible occult forces, or was born with strong, defective, anomalies that subject him to an implacable criminal destiny. The attraction that such theories have over time (including today) can also be explained in terms of other huge advantages that they would bring, if they were real. They explain the success of the theories of Giambattista della Porta (1535-1615) who carried out an analysis of human physiognomy and studied the links between various physical characteristics and behavior, of Gall and Gaspard Lavater who theorized the existence of a connection between intelligence, behavior and the characteristics of the skull and, later, of the positivist school. Beyond their attractiveness, such seemingly benign theories also have a series of serious consequences (we will identify some of them in this paper).

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[2] In accordance with several criminological theories, we use the term "criminal" to refer not only to the person who commits a crime against life, but to the one who commits an act provided by the criminal law.

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2. The "alterity theories" regarding the criminal

Over time, research on crime and crime prevention has taken unsuspected, inhuman directions (such as, for example, eugenics) and sometimes absurd. Many theories, which we could call "alterity theories", emphasize the character of the criminal, presenting him as a being with special characteristics, totally different from other people. From antiquity to modern theories regarding the genetic transmission of certain character traits, the criminal was categorized as a different being. Some acts are so cruel that their commission becomes implausible. In Ancient Rome, during the period of royalty, jurists considered that such a monstrous act as parricide could not take place, therefore there were no legal provisions in this regard. Later, following the multiplication of such facts, the reality could no longer be ignored. The reaction is somewhat typical throughout history, an attempt was made to balance previous ignorance regarding the commission of such acts by a harsh punishment, with strong ritual elements: the sack punishment (*poena cullei*). The condemned was put in a sack, along with "evil" animals, and thrown into the water; a true ritual of purification rather than punishment[1]. The role of this harsh ritual punishment was also to isolate the criminal (who was deprived even of the right to be buried). So serious is the deed, so great is the offense to the gods, that only through this isolation can the community hope to avoid divine punishment. The harshness of the punishment, the character of a public spectacle, the continuation of the practice of ordeals often plays the same role in the Middle Ages: ostracizing the criminal, removing him from the community and avoiding divine punishment

Later, the criminal type identified by the representatives of the positivist school assumed the existence of special characteristics of criminals, atavistic characteristics. In agreement with many opinions of the time, they believed that in the criminal one can find a higher development of the region of the brain that is responsible for the instinctive part and reflexes. Differences between criminals and non-criminals would exist both at the intellectual level (including the level of feelings and perception) and at the physical level, the criminal presenting certain stigmata. According to Lombroso's theories (accepted, at least in part, by his followers), the main cause of crime is to be found in the human body itself. There is thus, according to this view, an implacable criminal destiny for those who are born with criminal traits. In his view, inherited traits (*atavic*) can remain latent in one generation, but if they exist, they will appear in other generations and will inevitably push towards crime. Not only the physiognomy of the criminal is different from that of the "normal" man, but also the structure (and sometimes even the functionality) of the internal organs and especially the brain. Although he accepted that there could be other types of criminals (those who "*let themselves be carried away by habit*" and those who succumb to a momentary passion), he gave the greatest importance to the born criminal. He believed that in animals, similar to humans, many traits are inherited and that "criminal" acts are determined by defective conformations of the skull. He affirms that even animals can be identified with crimes committed out of adversity and fits of rage, theft, that sometimes they kill other animals for no reason, that just like humans, they are affected by irresistible passions that lead them to commit crimes or even fall in love , that sometimes they associate in order to commit certain acts and that (similar to humans, Lombroso asserted), a special education (training) can develop criminal instincts even in animals that have such an instinct naturally[2]. He believes that an "irresistible force" acts on the criminal, which annihilates free will. "*Perversion of affection, exaggerated and unmotivated hatred,*

[1] Ştefan Cocoş, Alexandru F. Măgureanu, *Instituţii de drept penal roman (Institutions of Roman criminal law)*, Ed. Pro Universitaria, Bucureşti, 2014, pp. 159-160

[2] Cesare Lombroso, *L`homme criminel, Étude antropologique et médico-légale*, Ed. Félix Alcan, Paris, 1887, pp. 10-24

insufficiency or absence of any restraint, multiple hereditary tendencies are the source of irresistible impulses in the immoral criminal, as well as in the born criminal and the epileptic"[1].

One of Enrico Ferri's most controversial claims was the denial of free will, holding that this consciousness we have of being free to will one thing rather than another is a pure illusion[2] and that the human will is completely subject to natural influences, not only of a moral or psychological order but also of a purely physical order[3]. He states that the criminal responsibility of the perpetrator must be independent of his moral freedom or guilt[4]. An argument he used to support this idea was that the criminal law also punishes "involuntary" acts, the punishment must be - in Ferri's (and the positivist school's) conception- based on the idea of social defense against certain acts[5].

Raffaele Garofalo supports Lombroso's theories regarding the physical characteristics of the criminal. He argued that, although these characteristics are not constant, the comparison between criminals and non-criminals justifies the statement that their frequency is higher among the former[6] and he considered that in the case of criminals the occipital area of the brain (the area he considered to be responsible for the sensitivity impulsive) is more developed than the frontal (area considered to be responsible for reflection and the intellectual part). He agreed with the physical characteristics identified in criminals by authors such as Lombroso, Bordier, Marro or Ferri. However, what is very interesting about Garofalo is the claim that although we can talk about some characteristics of criminals*, they still could not give us an anthropological type of criminal, it is not possible to establish a single constant external characteristic that will help us to identify him, to distinguish the criminal from the "normal man"*[7].

In order to better understand the arguments of the positivist school, we will refer to an example, which we consider suggestive. A moment of particular importance for the emergence of criminology as a science is represented by the first International Congress of Criminal Anthropology held in Rome in 1885, on two distinct sections: "criminal biology" and "criminal sociology"[8]. The Congress took place under the powerfull (at that time) influence of Lombroso and with the participation of some important authors for the history of criminal sciences, such as Alphonse Bertillon, Enrico Ferri, Raffaele Garofalo, Pellegrino Rossi, Antonio Marro, Gabriel Tarde and others. Roukavichnikoff (also participating in the Congress), curator of an asylum for young delinquents, claimed that the moral improvement of the young inmates he cared for would also be accompanied by a physical or at least physiognomic improvement, "**observed"** by Roukavichnikoff following the analyzes of the photographies of the young people upon entering and leaving the asylum (where the young people were kept until the age of 16)[9]. This "*not only because they are clean, washed, combed and healthy [...] No: their features, for the most part, have lost what was menacing, emaciated, ferocious and acquired an expression that seems to us gentler, more rested, more normal, more honest. And remarkable thing! The improvement of physiognomy seems to us to correspond often, if not always, to the*

[1] Cesare Lombroso, *L`homme criminel….op. cit.,* p. 640
[2] Enrico Ferri, *La sociologie criminelle,* Ed. Felix Alcan, Paris, 1905, (*Sociologia criminale*, 1881), p. 319
[3] E. Ferri, *Sociologie…op. cit.* p. 324
[4] E. Ferri, *La sociologie …op. cit.* p. 383
[5] E. Ferri, *La sociologie …op. cit.* p. 453
[6] Raffale Garofalo, *Criminology*, Ed. Little, Brown and Company, Boston, 1914 p. 67
[7] But one fact is established, in Garofalo's opinion: there are some characteristics that we find more often in criminals. For example, he agrees with Lombroso, arguing that the assassin has a cold, glassy gaze and sometimes injected eyes, a large nose that is often aquiline or coriaceous, long ears, strong jaws, broad zygomatic bones, abundant hair, prominent canines and thin lips; he suffers most of the time from nervous contractions and spasms that are limited to one side of the face, causing the canine tooth to be exposed.
[8] Edmond Mayor, preface, p. IX in *Actes du Premier Congrès International d`anthropologie criminelle. Biologie et sociologie*, Roma, november 1885, Boca Frères, Editeurs-Librairies, 1886-1887
[9] Roukavichnikoff in *Actes du Premier Congrès International d`anthropologie criminelle…op. cit.*, p. 183

improvement of conduct"[1]. So strong was the belief in the new positivist theories, that it was possible to believe not only that there are elements in the human body that can turn him into a criminal, but also that through education it is possible to change the physical appearance. As absurd as it sounds, if the first part of the theory were true, then this effect would have been nothing more than a logical consequence (at least for some participants in the Congress).

Edwin Sutherland, founder of the differential association theory identifies the difference in treatment between those who commit violent crimes and "white collars", showing also that some crimes cause suffering to citizens directly, to individual victims. Other crimes harm citizens in an indirect way, for example treason, political corruption and business fraud[2]. The same author shows that criminal behavior is caused by some pathological characteristics or character traits; some researchers found the explanation of the crime in mental defectiveness, others in schizophrenia, others in psychopathic personality, and others in a composite group of emotional disturbances, while psychiatrists state that all criminals are psychopathic[3]. Some authors go even further, showing that psychopathy could be beneficial for the development of the "criminal competence" of the perpetrators, for criminal success, but showing that there is a limit, and a high percentage of psychopathy being just as harmful as a very low one[4]. Although the cited author points out that it is debatable how psychopathy makes you a more effective criminal, he states that psychopaths are masters of the art of self-control[5] and they are cruel, they can intimidate witnesses, they can control their emotions better than most when the stakes are very high or they are threatened and more adept at hiding their feelings. At the same time, "fundamental psychopathic traits can sometimes become exceptional qualities of an influential political leader"[6].

Modern science is still looking for the criminal gene, and in some studies (between the 1960s and 1970s, but also more recent) it is even stated that such a gene has been identified. A controversy has arisen when a gene called "warrior gene" was discovered. "The idea of *the warrior gene* crystallizes a western individualist way of looking at human behavior, social structure, and crime. It is based on the idea of defective individuals who carry within them the seeds of badness (moral or constitutional or dysfunctional or some combination of all three)"[7]. Even if such a gene were precisely identified, we believe that it alone cannot necessarily cause criminal behavior. Accepting a contrary argument would imply, to put it even more bluntly than Enrico Ferri, the complete annihilation of free will, with all the consequences that would follow on criminal responsibility. The very foundation of criminal liability would be under siege, since without freedom of will and action there can be no question of criminal liability, and the mechanism of taking action would be an unimportant notion.

Even if it is generally recognized that heredity is part of the broad framework of endogenous criminogenic factors specific to the personality of the criminal, the mere existence of ascendants or descendants is not a definite proof of the heredity of criminality.

Scientific development and new technologies, such as genetic mapping, offer the possibility of new research directions. After analyzing numerous studies of twins (over 14 million pairs of twins, including all studies on complex twin traits between 1958-2012, from

[1] Roukavichnikoff in *Actes du Premier Congrès International d`anthropologie criminelle…op. cit.*, p. 210
[2] Edwin Sutherland, Donald R. Cressey, *Criminology*, J.B. Lippincott Company, SUA, 1978, p. 24
[3] E. Sutherland, D. R. Cressey, *op. cit.*, p. 156
[4] Kevin Dutton, *Înțelepciunea psihopaților (The Wisdom of Psychopaths),* Ed. Globo, Bucharest, 2013, p. 119
[5] K. Dutton, *op. cit.,* p. 120
[6] K. Dutton, *op. cit.,* p. 132
[7] Grant Gillett & Armon J. Tamatea (2012) *The warrior gene: epigenetic considerations*, New Genetics and Society, 31:1, 41-53, p. 50

39 countries) a 2015 study shows that inherited biological traits would be 49%[1]. The study focused on all human traits that have been analyzed over the past 50 years. Among the most important traits studied are temperament, personality functions, weight maintenance functions, metabolic functions, depressive episodes, cognitive functions, and behavioral disorders[2]. The conclusion of the study is that all human traits can be genetically inherited[3].

3. Consequences of cataloging the criminal as a different category of human being and conclusions

In her book (which has been the subject of some controversy) *Eichman in Jerusalem. A report on the banality of evil*, Hannah Arendt makes very interesting claims about one of the architects of the genocide that took place in Germany, Adolf Eichmann[4]. Arendt claimed that Eichmann was neither sadistic nor amoral, but "terribly normal". The criminal Eichmann (as the Nuremberg and Jerusalem courts have decided) "was sick when he visited the extermination camps" but this did not stop him from continuing to plan the "final solution". The two notions, respectively that of a criminal and that of a "boring bureaucrat" are not mutually exclusive. The sad and uncomfortable truth was probably that "*not fanaticism but his own conscience pushed Eichmann to adopt his uncompromising attitude during the last year of the war [...]*" states Arendt[5]. Several psychiatrists have shown that Eichman is normal "*more normal than I am after examining him*" - stated one of them, while another stated that his entire psychological outlook, his attitude towards his wife and children, mother and father, brothers, sisters and friends was "*not only normal but even desirable. His case was not one of irrational hatred of Jews or anti-Semitism*"[6].

As far as the positivist school is concerned, it is obvious that the role it gave to heredity in the genesis of crime was greatly exaggerated. Even if we could ignore the idea that the human being can be a prisoner of a criminal destiny, the application in practice or in the penal codes of the principles of the Italian positivist school would create serious inequalities and errors. For example, the state of danger presented by the criminal (discussed by Garofalo and developed by Ferri) was divided into two types: major and minor. The first was to be established by using 17 criteria, the second by using 8 criteria (such as the psycho-biological constitution of the perpetrator, criminal or antisocial past, family and professional environment, motivation and mode of operation, connection with the victim, the attitude before and after the crime, etc.)[7]. Even if modern criminal science also takes into account many of these criteria, a clear "portrait" of each criminal and the choice of the appropriate punishment for each of them, based on biological criteria, would not only be ineffective, but would violate rights and freedoms fundamentals.

According to Nicolae Minovici and Ioan Stănescu: „*An investigation, which we undertook over a period of 30 years, among the prisoners and former prisoners of the Văcăreşti Penitentiary, entitles us to claim that heredity is not the cause of the causes in the determinism of crime or criminal acts. I have not found any antecedents of murderous parents to murderous*

[1] Tinca J C Polderman, Beben Benyamin, Christiaan A de Leeuw, Patrick F Sullivan, Arjen van Bochoven, Peter M Visscher, Danielle Posthuma, *Meta-analysis of the heritability of human traits based on fifty years of twin studies*, Nature Genetics, vol. 47, nr. 7, Ed. Nature Publishing Group, 2015, p. 1
[2] *Ibidem,*p. 2
[3] *Ibidem*, p. 7
[4] Some of the author's claims could be questioned, especially after the appearance in 2022 of some recordings (lost for more than 60 years) in which Eichmann no longer appears as a "boring bureaucrat" ready only to follow orders, but he seems capable of initiative and seems to brag about the deeds he has done. However, the development of such an analysis is beyond the scope of this paper.
[5] Hannah Arendt, *Eichman in Jerusalem. A report on the banality of evil*, Ed. Penguin Books, SUA, 2006, p. 146
[6] H. Arendt, *op. cit.* pp. 25-26
[7] Leon Radzinowics, Adventures in criminology, Ed. Routledge, 1999, p. 12

sons, apart, of course, from cases of occasional or accidental complicity in crimes of the social law"[1] .

In the 30s (and even earlier), N. Minovici clearly stated that even in the most dangerous criminal he did not discover any sign of degeneration and that the provocative element of antisocial reactions must be sought outside the individual. Such opinions remained almost unknown (even for Romanian researchers very often).

What could be the reason why such theories as Minovici's (otherwise pertinent and elegantly constructed - much more modern than those of the positivist school) where so little known? Why were they not widely successful, why where they not widely broadcast? We think the answer is simpler than we'd like to think. The overwhelming majority of the theories presented in the previous section present a much more attractive, a more comforting hypothesis. This is probably the reason why the idea of the alterity of the criminal makes its way through the centuries, as it reappears in different forms: the very comfortable idea that criminals are different from us.

Considering the criminal as a separate being, with different characteristics, although apparently benign, would have a series of serious consequences:

-if a criminal is different, we who do not have such characteristics, could never be criminals. Although such a conception is valid in most situations, it can have a dangerous character. We do not become criminals not because it is impossible for such a thing to happen, regardless of the situation, but because we constantly take care that this does not happen;

-if the criminals are different, then it is not society's fault and we have nothing to do, the measures taken are almost useless. It is about a shift of responsibility, which would practically prevent any desire for social reform and crime prevention. To be completely different is to be outside, not to be part of something. If the criminal were completely different, that would mean that he is outside society. When measures were taken, there would be a risk that they would take on hideous forms such as acts of eugenics or totalitarian ideologies. Raphael Lemkin, who used the word "genocide" for the first time, originally wanted to call such acts "barbaric". Such a name would have been incorrect and would have created a false image: that genocide cannot happen in modern societies, that it would be a "barbaric" phenomenon, external to civilization;

-if the criminals were different, we could protect ourselves from them much more easily, precisely by studying and highlighting these "different characteristics".

We are not saying that monsters do not exist. But we state that, unfortunately, it is not absolutely necessary to be a monster to commit monstrous acts.

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