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THE CRIMINAL LAW OF THE RISK SOCIETY IN BRAZIL OF THE CLASS SOCIETY

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ABSTRACT

The article deals with the perspectives of the use of Criminal Law of Risk in the national legal-criminal system. Initially, the formation of Brazilian class society is appreciated, within a political and economic context. Then, the advent of the risk society and its confluences with a specific dogmatic of criminal law is analyzed. Finally, some critical propositions are made about the use of Criminal Law of Risk in Brazil, focusing on the issue of the accentuated social inequality prevailing in it. To this end, the methodology used is dialectic, and the research technique, bibliographic.

Keywords: Risk Society. Criminal law. Expansion. Class Society. Inequality.

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INTRODUCTION

In Raízes do Brasil (1995) Buarque de Holanda points out that the imbrication between the public and the private, as well as between the family and the State, forged the bases for the consolidation of a "cultural broth" of corruption, which comes to the detriment of citizens' trust in the institutions and powers that be.

Such disbelief is maximized by the deep inequality – including in legislative treatment – that has marked Brazilian society since its beginnings and that, among whose consequences, the phenomenon of selective criminal repression stands out. In addition, we are witnessing a worldwide phenomenon of accelerated escalation in contemporary times: contact with the new risks arising from technological advances. In the society of risks, the spaces of comfort of modernity are annulled, and man is haunted by dangers that run with the wind or water and that are present in the air and in food. In the environment of globalization, threats spread, no longer respecting social, political or economic boundaries.

Thus, to the axiological conception of the unequal society is added that of the insecure society and, with this, the problematization of the potential expansiveness of criminal law is accentuated in order to encompass a whole new class of social risks (arising from this last paradigm) in a way that is harmonized with the consecrated dogmas of the Democratic State of Law.

In this scenario, if on the one hand there are schools and authors who defend the revitalization of criminal law in consideration of this new model of risk society, on the other hand there are those who advocate the maintenance of its classic characteristics, repudiating the consecration of a Criminal Law based on danger. For the latter, it would not be the role of the criminal law to combat the new social risks, which should be the responsibility of the other fields of law, such as civil and administrative, under penalty of witnessing constant violations of fundamental rights.

In Brazilian lands, the debate is even more problematic to the extent that the dominant classes insist on maintaining social, economic and criminal repression standards, conforming a state of equality that is only formal. This is the assumption, from which it is intended, in this essay, to work on the hypothesis that the concomitance of class society and risk society recommends additional caution in the adoption of the guiding characteristics of the so-called Criminal Law of Risk.

The approach to the theme is justified by its own relevance and topicality, stamped by the successive approvals of laws that expand the incidence of Criminal Law to sectors

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not previously regulated by this branch of Law, make criminal procedural rules more flexible in order to ensure greater effectiveness of control by criminal means, and thus advance fundamental rights and guarantees. To this end, the study begins with an approach to the political formation of Brazilian class society; in a second moment, the examination of the risk society and its effects in the scope of Criminal Law is carried out; at the end, the essay focuses on a critical reflection on the expansion of Criminal Law in Brazilian class society.

HISTORICAL AND POLITICAL PRELIMINARIES OF THE FORMATION OF BRAZILIAN CLASS SOCIETY

At the time of the Proclamation of the Republic, at the end of the nineteenth century, industrial capitalism was gradually gaining strength on Brazilian soil, accompanied by the entry of subsidiaries of large foreign companies. In this context, the system of social relations of domination was formed, with the alliance between large landowners and political leaders, called coronelismo, at the top pole, and at the bottom pole, the freed slaves and the lower classes of the urban centers, such as prostitutes and contingents of newly arrived immigrants (HERINGER JÚNIOR, 2016, p. 91).

After the First Republic, there was an economic concentration in the regional crops of coffee (São Paulo), milk (Minas Gerais) and cocoa (Northeast region), and the vote was forbidden to the illiterate. At the time (1891 to 1930), Brazil had a majority composition of a mass of illiterate people, determining that suffrage was restricted to a privileged group or segment of the Brazilian people[3]. This explains the resignation and conformism of social events by a significant portion of the population, a situation that was maintained under the empire of the Brazilian military regime (1964-1985), with the suspension of the fundamental rights and guarantees of citizens.

[3] According to José Murilo de Carvalho, with the Proclamation of the Republic, in 1889, "more than 85% of citizens were illiterate, unable to read a newspaper, a government decree, a court order, a municipal posture. Among the illiterate were many of the large landowners. More than 90% of the population lived in rural areas, under the control or influence of the large landowners. In the cities, many voters were government-controlled civil servants." He adds that "the Republican Constitution of 1891 only eliminated the income requirement of 200 mil-réis, which, as we have seen, was not very high. The main barrier to voting, the exclusion of the illiterate, was maintained. Women, beggars, soldiers, members of religious orders also continued not to vote. It is not surprising, then, that the number of voters has remained low. In the first popular election for the presidency of the Republic, in 1894, 2.2% of the population voted. In the last presidential election of the First Republic, in 1930, when universal suffrage, including women, had already been adopted by most European countries, 5.6% of the population voted in Brazil. Not even the period of major renovations inaugurated in 1930 was able to surpass the numbers of 1872. Only in the 1945 presidential election did 13.4% of Brazilians go to the polls, a number slightly higher than in 1872." (CARVALHO, 2002. p. 32; 39-40).

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Sérgio Adorno (1988, p. 20-27), by the way, emphasizes that from the political transition of 1970 to 1980, in the struggles for the democratization of society, "jurists stood out as a kind of organized and qualified political resistance", so that society became a "mandarinate of law graduates, concentrated around a State that, Strictly speaking, it was constituted as an immense archipelago of magistrates". According to the author, the "model of interpretation that opposed authoritarianism to liberalism" influenced Brazilian intellectuals who constituted a solid base of organized resistance against authoritarianism to submit to the interests of the dominant classes. In this sense, the contact of bachelors with liberal ideas, due to the introduction of natural law at the beginning of legal education in São Paulo, "conditioned them to see social relations as contractual relations between legally equal but individualized parties, endowed with autonomy of will and integrated by bonds of coordination." And the aforementioned author concludes: "In short, an intellectual prepared to, as a future professional of political activity, perpetuate the split between liberalism and democracy".

According to Dirley da Cunha (2013), the economic and social order had, in Brazil, its first constitutional discipline in the 1934 Constitution, under the influence of the German Weimar Constitution of 1919. Since then, the following Constitutions have no longer been limited to dealing with the political organization of the State, nor to the mere promulgation of civil and political rights, but have also come to discipline issues within the private domain, inaugurating the so-called Social State.

From then on, all other Brazilian Constitutions (1946, 1967 and Constitutional Amendment No. 01 of 1967) were guided by the positivization of an economic order essentially defending the collective interest and fostering social justice through interventionist public policies. The Federal Constitution of 1988, finally, followed the same path as the past, also instituting an interventionist economic order.

Notwithstanding this, Raquel Sparemberger (2016, p. 19-20) warns of the ineffectiveness of these provisions, accentuating the devaluation of social policy and the overvaluation of economic policies, in such a way that the former is seen as a "concession to politics". This is because, as poverty brings intense questioning by civil society, social policy would serve to attenuate this tension and reveal that something is being done on point, albeit only superficially.

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The difficulties faced in the Brazilian political-constitutional trajectory (violence and inequality), warns José Murilo de Carvalho, are related to the nature of the historical path, with a sequential logic inverse to that described by Marshall, to the extent that:

> [...] First came social rights, implemented in a period of suppression of political rights and reduction of civil rights by a dictator who became popular. Then came political rights, in an equally bizarre way. The greatest expansion of the right to vote took place in another dictatorial period, in which the organs of political representation were transformed into a decorative piece of the regime. Finally, even today many civil rights, the basis of Marshall's sequence, remain inaccessible to the majority of the population. The pyramid of rights was placed upside down. (CARVALHO, 2002. p. 219-29).

On the other hand, the historical Brazilian patrimonialism has given rise to numerous corruptive practices, such as electoral corruption and the halter vote[4], so that from 1822 to the present day, between the exercise of public freedoms and the satisfaction of needs, the choice of the economically less favored population (the vast majority), is usually for the latter.

By the way, Bruno Heringer Júnior (2016, p. 99-100) refers that the "seigniorial culture", by which the social structure is verticalized in command-obedience relations, promotes confusion between public and private spaces; the view of the law as a privilege for the rich and as oppression for the poor; the fascination with signs of distinction; the blocking of conflicts by ideologies, among other negative consequences. According to the author, even after redemocratization, "the persistence of the discriminatory model alerts to the obstacles that exist to any transformative political-legal activity".[5]

[4] Regarding the problem of coronelismo and its influence on the electoral process, Victor Leal Nunes adduces that "the primary element of this type of leadership is the 'colonel', who commands at his discretion a considerable batch of votes in a halter. The electoral strength lends him political prestige, a natural crowning achievement of his privileged economic and social situation as a landowner. Within his own sphere of influence, the 'colonel' as it were sums up in his person, without replacing them, important social institutions. It exercises, for example, a broad jurisdiction over its dependents, settling quarrels and disagreements and pronouncing, at times, true arbitrations, which the interested parties respect. They also bundle in their hands, with or without an official character, extensive police functions, which they often carry out with their pure social ascendancy, but which they can eventually make effective with the help of employees, aggregates or henchmen". (LEAL, 2012 p. 24).

[5] According to the author: "The privileged, called "doctors", are above the law, generally asserting their interests through the power of money and social prestige; they are invariably white, rich, university students; This first class includes businessmen, bankers, large landowners, politicians, liberal professionals and high officials. Then there is a mass of "simple citizens," members of the second class, to whom both the rigors and the benefits of the law are exhaustively applied; This group is composed of the so-called middle class (salaried workers and small civil servants). Finally, the third class appears, made up of the "elements" of police jargon; they are almost all black or brown, illiterate or semi-literate; this group represents the marginal population of large cities, informal workers, odd jobs, street vendors, beggars, squatters, abandoned minors, in relation to whom legal integration is carried out, almost exclusively, through Criminal Law." (HERINGER JÚNIOR, 2016, p. 99-100).

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It is in this scenario that the new ingredient of the risk society is inserted, which based on economic globalization, the integration of supranational markets and the unstoppable technological advance, has increased uncertainties and the feeling of insecurity, generating reflections even in Criminal Law. The following topic is dedicated to this issue.

THE ADVENT OF THE RISK SOCIETY: CONFLUENCES WITH CRIMINAL LAW

Understanding the relationship between risk society and Criminal Law presupposes understanding how man positions himself in relation to the social environment in the different state formats.

Stuart Hal (2006, p. 10) explores three distinct conceptions of man's identity: as a subject of the Enlightenment, a sociological subject and a postmodern subject. The first model deals with the subject endowed with reason, whose essential center of the *self* resides in the identity of the person, thus constituting a highly individualistic conception of the subject. In a sociological approach, it portrays the *man-in-the-world* mentioned by *Louis Dumont* (2000, p. 37 et seq.) in reference to the individual who, in the face of the knowledge provided by scientific rationalism, passes from a position of contemplation – *man-outside-the-world* – to a position of interaction and domination of nature and the universe. It is in this historical period that man is affirmed as an individual and center of the universe, whose preservation of the most basic rights justifies the formation of the State.

The notion of sociological subject, on the other hand, is consistent with the increase in complexity of the modern world and the awareness that the "inner core of the subject was not autonomous and self-sufficient, but based on the relationship with other people important to him", responsible for sharing the values of his culture. For the author, "according to this view, which has become the classic sociological conception of the question, identity is formed in the 'interaction' between the self and society". Here the dialogue is established with Pierre Bourdieu's (1996) theory of fields, according to which social environments, called fields, shape the personality of the subjects who act in them but, on the other hand, are also shaped by these agents. The power relations characteristic of each field act on bodies and from bodies. The *habitus*, the French sociologist explains, at the same time constitutes and is constituted by the relations of force, so that man does not

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exist decontextualized from his social context.[6] This is also what can be extracted from Heidegger's philosophy (2005, p. 209/210), according to which man, as a *being-in-the-world*, exists and shapes his existence based on relations with his social environment. From this perspective, returning to the doctrine of Stuart Hall (2006, p. 11), the subject "sews" to the structure, stabilizing "both the subjects and the cultural worlds they inhabit, making both mutually more unified and predictable."

Finally, the subject of postmodernity is the one who is, today, witnessing the fragmentation of his identity into several others, often contradictory and unresolved. Its conformity to the current culture is also collapsing, in the face of the drastic structural and institutional changes in continuous processing in the current historical phase. In these circumstances, the identity of the subject is fickle, since it is in continuous transformation in relation to "the ways in which we are represented or interpellated in the cultural systems that surround us." By the way, Stuart Hall concludes:

> A fully unified, complete, secure, and coherent identity is a fantasy. Instead, as systems of cultural signification and representation multiply, we are confronted by a bewildering and changing multiplicity of possible identities, with each of which we could identify – at least temporarily. (HALL, 2006, p. 13).

This fragmentation of the individual is well observed by Bauman (2007, p. 30) in his essay on postmodern liquid life. This study highlights the new individualism resulting from *negative globalization*, which results in the weakening of human bonds and the withering away of society, with the abandonment of individuals by the State and their instrumentalization as a "tool for the promotion of others".

Norbert Elias follows the same path in the essay entitled *The Society of Individuals* (1994, p. 20-21). According to this sociologist, as modern societies become more complex, more and more the individual immerses himself in the hubbub of big cities, in a reality in which most people do not know each other and have almost nothing to do with each other anymore. As a consequence, the individual ends up diluting himself in mass society.

In this scenario, Pascal Bruckner observes, the mass-man who emerges from this social format supplants minorities and begins to freely expand their desires, albeit in a paradoxical way: he longs to preserve the advantages of freedom (independence), but

[6] Pierre Bourdieu structures his sociological theory based on the assumption of the coexistence, in the constitution of social reality, of objective structures that guide and limit the practices of social agents, and of subjective structures of perception, thought and action, constitutive of what he calls *habitus* and *field*. It is a constructivist-structuralist theory founded on the tripod composed of the concepts of capital, field and *habitus*, at the junction between the objective and the subjective, which results in a double dimension of social reality.

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without the drawbacks of responsibility; he claims for the protection of the welfare state and victimizes himself (tendency to proclaim himself a martyr of others, society and the State). It so happens that the increase in victimization leads to an unlimited extension of the right, while the damage is no longer compensated, but the risk itself (BRUCKNER, 1996, *apud* MORIN; PRIGOGINE, 1996, p. 51-62).

Finally, this process of transformation of man is also highlighted by the sociology of Ulrich Beck, who explains the mutation from class society to risk society in the following terms:

> The concept of industrial or class society (in the sense used by Marx and Weber) revolved around the question of how to divide socially produced wealth in an unequal and at the same time legitimate way. In the new paradigm of the risk society, the question is similar, but at the same time completely different: it is a question of knowing how to avoid, minimize, channel the risks and dangers systematically produced by the process of advanced modernization and limit and distribute them in such a way as not to impede the modernization process, as well as to keep them within bearable limits (ecological, medically, psychologically, socially?) […] The process of modernization becomes reflective: it takes itself as a theme and problem. The issues of development and application of technologies (in the context of nature, society, personality) are replaced by questions of political and scientific 'management' (administration, discovery, inclusion, avoidance, concealment) of the risks of technologies to be applied currently or potentially in relation to horizons of relevance to be defined especially. The promise of safety grows with the risks and needs to be repeatedly ratified in the face of an alert and critical public opinion through cosmetic or real interventions in technical and economic development. (BECK, 1998, p. 25-26).

According to the author, the risk society has new sources of conflict and consensus: if everyone is equally exposed, they need to unite to face the dangers. Just as the idea of class society corresponded to the ideal of equality, that of risk society corresponds to the ideal of security (BECK, 1998, p. 55). But these new dangers have their processing accelerated by the impacts of globalization, considering the paradigm shift from the traditional economy to the legal market order. The integration of national economies into an international economy through trade, foreign investment, short-term capital flows, international flows of workers and technologies. This phenomenon maximizes the achievements of technological modernization and, naturally, all the risks arising from it, since the market is now larger and players are present all over the world, carrying out mass transactions, second by second.

It is in this scenario that the premises of a criminal policy oriented to security and risk prevention are established, based, according to Mendoza Buergo (2001, p. 25/30), on I) expansion of the penal system to new risks, including mega risks; II) the attribution of

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responsibilities is difficult due to the complexity of the relationships existing in the organization; III) dissemination of a generalized sense of insecurity. In the same vein, Diez Ripollés (2005, p. 05) highlights as characteristics of the Criminal Law of the risk society (I) the difficulty of attributing criminal responsibility to individuals and legal entities; and (II) the feeling of insecurity disseminated, especially by the role of the media in the unregulated exercise of freedom of the press, which is enhanced by the difficulty of understanding of the lay citizen about the limits placed on the exercise of punitive power within the scope of the Democratic States of Law.

The absorption of "mega-dimension" risks makes it possible to attract to the scope of criminal protection crimes that go beyond the traditional patrimonialist core of criminal law, encompassing the protection of legal assets related to the current complexity of the relations inherent to a maximized economic life. New risks are understood here, not infrequently linked to the activities of transnational companies operating, for example, in the chemical, energy and biogenetic areas. Due to the agile, hidden and sometimes ephemeral nature of these new dangers, the Criminal Law of Risk makes use of blank criminal types, which make references to other legislative instances, which are faster in fitting the normative complement. Furthermore, in the accurate doctrine of Silva Sanchez (2006, p. 20), the spaces of criminally relevant legal risk are expanded and the rules of imputation and the political principles of guarantee are made more flexible, all of which shows an option for more Criminal Law in qualitative and quantitative terms (D'Ávila, 2012).

Recognizing this preventive and expansive tendency of punishability, Claus Roxin, when pointing out the characteristics of this new criminal paradigm, asserts that there has been a shift from individual protection to the protection of the community (of the entire population, or of large groups of the population), citing as examples of these new criminal prescriptions anti-economic crimes and crimes against the environment, as well as product liability, major industrial risks, genetic technology and organised crime; in short, all behavior felt as a threat to society globally taken (*apud* VALDÁGUA, 2002, p. 18).

In the protection of these collective legal assets, therefore, the types of abstract danger predominate, as well as the anticipation of the moment of criminal intervention to achieve the preparatory acts, such as the criminalization of criminal organizations[7].

[7] After defining, in its article 1, paragraph 1, a criminal organization as being "the association of 4 (four) or more people structurally organized and characterized by the division of tasks, even informally, with the objective of obtaining, directly or indirectly, an advantage of any nature, through the practice of criminal offenses whose maximum penalties are greater than 4 (four) years, or that are of a transnational nature.",

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Changes are also made in the system of imputation of liability, expanding the situations of objective imputation and the criminal liability of the legal entity[8], resulting in the anticipation of criminal intervention as a way to deal with danger and avoid damage. This is how the criminal law of prevention is shaped, marked by restrictions on legal certainty in favor of greater effectiveness of criminal intervention, by thoughtless adherence to the ideology of zero tolerance, by the proliferation of emergency laws and by the increase in laws of a security nature (FARIA COSTA, 2010, p. 60).

Having elaborated this brief dogmatic synthesis, the remaining question concerns whether the current Brazilian political-social maturity allows the full establishment of a Criminal Law of Risk in an egalitarian manner for all individuals inserted in the society of risk (and of classes) or whether, on the contrary, its incidence would prove to be unequal due to the permanence of the Lusitanian and seigniorial rancidity of social stratification, responsible for the historical ambivalence of the national punitive system. Regarding this specificity, some constructive provocations are launched in the next item of this essay.

USE OF RISK CRIMINAL LAW IN THE-BRAZILIAN CRIMINAL LEGAL SYSTEM

The expansionist paradigms of criminal law offer a seductive criminal solution to the most diverse social problems. However, to the extent that they prove to be ineffective, they result in a symbolic criminal law that, in the end, comes to affect, primarily, the subjects weakened by globalized neoliberal power, such as the homeless, the landless and the late bourgeoisie itself: tax evaders, corrupt people and aggressors of the environment (Andrade, 2003, p. 25).

The warning of the aforementioned author awakens to the fear that the hardening of Criminal Law may end up serving as a means of preserving the current "state of things", accentuating selectivity, stigmatization and the expansion of the State's potential to commit arbitrariness against the citizen, as warned in the first topic of the work.

Law No. 12,850/2013 establishes as a crime: "Art. 2º Promoting, constituting, financing or integrating, personally or through an intermediary, a criminal organization: Penalty - imprisonment, from 3 (three) to 8 (eight) years, and a fine, without prejudice to the penalties corresponding to the other criminal offenses committed."

[8] This is the hypothesis of the Environmental Crimes Law, which in its article 3 establishes the criminal liability of legal entities and which, in its article 24, establishes the very serious possibility of forced liquidation: "the legal entity constituted or used, preponderantly, with the purpose of allowing, facilitating or concealing the practice of a crime defined in this Law will have its forced liquidation decreed, his assets will be considered an instrument of crime and as such lost in favor of the National Penitentiary Fund."

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By the way, Bruno Heringer Júnior emphasizes that the discrepancy between constitutional social discourse and practice was reflected in the Brazilian criminal system, which began to present marked ambivalence, generating serious social consequences. According to the author, "the neoliberal model underlying these changes generated an even more regressive form of criminal repression, aimed mainly at controlling marginalized human contingents, now considered as 'flawed consumers'." (2016, p. 97).

From this perspective, the aforementioned author continues, although the democratic ideal has contaminated the country since the 1988 Constitution, leading to the enactment of numerous laws aimed at criminalizing the conduct of the socioeconomic elites[9], the new legislations, supposedly bulwarks of the value of legal equality, were accompanied by various decriminalizing institutes that significantly minimized the repressive content of the laws that typified "white collar" crimes. Examples of this scenario are civil conciliation, criminal settlement, and conditional suspension of proceedings, instituted by Laws No. 9,099/95 and No. 10,259/2001; the prohibition of the conversion of the unpaid fine into deprivation of liberty, enshrined by Law No. 9,268/96; and, finally, the increase in the chances of replacing the custodial sentence with a sentence restricting rights or a fine, promoted by Law No. 9,714/98. Such expedients, combined with more recent ones, would have had the power to empty the hypotheses of applying custodial sentences for white-collar crimes, regardless of their seriousness in the casuistry, such is the amount of criminal benefits successively provided for by the legislation[10].

This scenario stems from the aforementioned confusion between the public and private spheres, from which the roots of the selectivity of the application of the law, especially the criminal law, are extracted, since the factors of primary and secondary criminalization have primarily focused on the underprivileged, the miserable and the

[9] The author cites: Law No. 8,078/90 (crimes against consumer relations); Law No. 8,137/90 (crimes against the tax and economic order and against consumer relations); Law No. 8,176/90 (crimes against the economic order); Law No. 8,666/93 (crimes in bids and contracts of the Public Power); Law No. 9,279/96 (crimes against industrial property); Law No. 9,605/98 (crimes against the environment); Law No. 9,613/98 (money laundering crimes); Law No. 11,101/2005 (bankruptcy crimes), among others. (HERINGER, 2016, p. 97).

[10] On the other hand, Bruno Heringer Júnior argues that, in parallel with the aforementioned relaxation of the criminal repression of the socioeconomic elite, several normative acts aimed at the intense control of marginalized groups came to light, such as Law No. 8,072/90, which instituted heinous crimes and the differentiated regime for their treatment, such as the symptomatic prohibition of progression of the regime of serving a custodial sentence. The author also mentions Law No. 10,792/2003, which, by amending the Penal Execution Law, provided for a differentiated disciplinary regime, as well as Law No. 11,343/2006, responsible for making the repression of illicit drug trafficking more rigorous. Finally, the changes in the types of crimes of theft, robbery and extortion in the Penal Code, whose penalties were significantly aggravated through Law No. 9,426/96 (HERINGER, 2016, p. 96/98).

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dispossessed, on the margins of the prevailing proprietary logic. It is in this sense that João Gualberto Garcez Ramos (1991, p. 13) proclaims that there is too high an expectation in relation to the possibilities of criminal law in the fight against crime, since the crisis established has much deeper roots than the supposed ineffectiveness of this branch of law. This is not a legal crisis, but a crisis of citizenship

In addition, another factor that problematizes the Criminal Law of Risk is that, even in more developed capitalist countries, liberal ideological reasons also determine, not infrequently, a selective pattern of repression of anti-economic crimes, as is the case of the crime of tax evasion. According to Carla Veríssimo De Carli, (2012, p. 73-74) liberal economic policy disapproves of most of the reasons that lead States to criminalize the conduct of tax evasion, such as high taxes, inflationary spending and lack of state support for the protection of private property. In the case of crimes related to the migration of speculative capital, the aforementioned author explains that the laws that criminalize such conducts end up inhibiting the free international circulation of financial investments, a policy that contradicts large investors and holders of world capital. This deficit of consensus results in the weakening of some States in prohibiting the movement of money, from which it is possible to conclude that such private forces have considerable power of pressure to influence public policies, and may even result in "threatening governments with withdrawal of investments, if the conditions of the country are not favorable to them" (De Carli, 2012, p. 74).

In international dogmatics, Winfried Hassemer is a notorious and ardent critic of the expansiveness of Criminal Law as an instrument for the prevention of new risks. Although the German author recognizes the problems inherent to the modern risk society, as well as the need for them to be properly considered, he asserts that this should not be done from a criminal perspective:

> If we try to solve these problems, we will not succeed and the most we will achieve is to destroy criminal law by eliminating its fundamental principles. By removing the guarantees of Criminal Law, we will eliminate its legal protective power and we will have instruments that will be of no use, because they will be badly located (...). (HASSEMER, 1994, p. 51).

In another passage, Hassemer (2003, p. 156) argues that Criminal Law should return to its core field, where individual goods and rights are found, such as: life, liberty and property, that is, rights that can be precisely defined. Any illicit act that escapes from this

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dome must be the object of what the author calls the "Right of Intervention", something between Criminal and Administrative Law, between Civil and Public Law.

On the other hand, Figueiredo Dias expresses disbelief in this alternative model proposed by the Frankfurt School, understanding that it would mean removing from criminal protection precisely those "conducts that are socially so serious that they simultaneously jeopardize planetary life, the dignity of people and solidarity with other people – those who exist and those who will come". The author asserts that such risks must be the object of an intermediate path, inherent to an expanded criminal law:

> Criminal law should respond to the problems of the post-industrial society through a dual or dualistic criminal policy and legal-penal dogmatics . Endowed with a core in relation to which the principles of classical criminal law would apply, unchanged (...) And as a periphery or lateral scope specifically aimed at protecting against large and new risks, where those principles would be cushioned or even transformed, giving way to other principles of "controlled flexibility", based on the anticipated protection of more or less indeterminate collective interests, without space, or time, or perpetrators, or victims, defined or definable, and therefore, in a word, of "lower guarantee intensity". (DIAS, 2001, p. 54-55).

This position is similar to that held by Silva Sanchez, (2002, p. 145) who, alluding to two-speed Criminal Law, professes that the conflict between a broad and flexible Criminal Law and a minimal and rigid Criminal Law must find a middle term. For the author, although it does not seem that today's society is willing to admit a "Minimum Criminal Law", this does not authorize the situation to lead it to a model of "Maximum Criminal Law". The State must treat the social demand of punishment in a rational way that combines functionality and guaranteeism.

By this logic, the classic model of imputation would be destined to the intangible core of crimes, those that affect the traditionally most valuable legal assets, such as life and liberty. On the other hand, in relation to Economic Criminal Law, for example, a controlled relaxation of the imputation rules would be appropriate, such as those referring to the criminal liability of legal entities and the expansion of the criteria for authorship. In addition, political criminal criteria could also be remodeled, such as the principles of legality and culpability.

In this regard, Silva Sanchez (2002, p. 145/147) argues that, in the hypothesis of "controlled flexibility" in certain areas of criminal law, it would not be possible to combine the deprivation of liberty sanction with the corresponding typical precepts of these sectors, so that the principle of reasonableness would play a central role in the consideration of expansiveness: "To the extent that this requirement has not been respected by the legal

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systems of several countries, so far, the expansion of Criminal Law lacks, in my opinion, the required political-legal reasonableness".

Claus Roxin, in turn, asserts that the legitimacy of criminal law to achieve these new legal goods arising from the new risks of society, even prior to the production of the damage, "is as controversial as the thesis that Criminal Law should withdraw from these new domains or significantly increase in its importance and should be limited to the classic 'nuclear Criminal Law'." (*apud* VALDÁGUA, 2002, p. 19).

The aforementioned divergences about the legitimacy of a Criminal Law of Risk, finally, show the absence of certainty and security regarding the possible benefits inherent to the expansion of Criminal Law and the consequent relaxation of the rules of imputation. They therefore highlight the need for precaution and maximum care in dealing with a topic so sensitive to fundamental rights and guarantees, especially in countries of late modernity, such as Brazil, where constitutional principles such as equality are still solemnly disrespected by the political and economic elites.

These retrograde forces, eager to maintain the supremacy of the current elitist and seigniorial establishment, use anti-democratic expedients in an effort to promote only formal equality between the different social classes, whose exacerbated hierarchization has historically inhibited the effectiveness of changes towards higher isonomic standards.

In the nineteenth century, Mikhail Bakunin had already had the opportunity to emphasize the position of prominence of equality over the other ideals of humanity, among them that of freedom itself:

> "I am a convinced supporter of economic and social equality, because I know that outside of this equality, freedom, justice, human dignity, morality and the well-being of individuals, as well as the prosperity of nations will never be but lies." (BAKUNIN, 1975, p. 185).

On the other hand, according to Zygmund Bauman (2003, p. 24), there is no security without a minimum sacrifice of freedom, to the extent that "this can only be expanded at the expense of security". The sociologist states that "security without freedom is equivalent to slavery" and that "freedom without security is equivalent to being lost and abandoned". For him, this circumstance "makes life in common an endless conflict, because the security sacrificed in the name of freedom tends to be the security of *others*; and the freedom sacrificed in the name of security tends to be the freedom of *others."*

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Nevertheless, although there is no *freedom* without *equality*, there is no *security* without sacrificing part of *freedom*, but there can and should be *security* without sacrificing *equality*, since all citizens, without distinction, have the same right in this respect. The opposite of this simply represents the selective repressive model criticized by this essay and, from a bias, a disproportionate immolation to the ideal of *freedom*, since, as said, the full enjoyment of this presupposes the presence of *equality*.

This is not to be disagreed with Ulrich Beck when he states that, while the idea of class society corresponded to the ideal of equality, the current risk society corresponds to the ideal of security. However, Brazilian society yearns, at the same time, for both ideals: equality and security. This undeniable finding, in itself, points to the conclusion that the Criminal Law of Risk, in Brazilian lands, inspires even sharper hermeneutical looks than those existing in countries with greater political, social and economic evolution (often those where criminal expansionist theories have origin).

This is because, while these more evolved nations have already transcended the paradigm of class society, or at least are moving in advance in this direction, Brazil still coexists, strongly, with both social archetypes (class and risk). For this reason, the consecration of new repressive-penal models needs to be weighed against the deficit of equality still reigning here, so that the adoption of measures for the elimination or significant reduction of inequalities is an objective that, if not prevalent, should at least be provided in parallel with any theoretical construction based on the ideal of security. especially when fundamental rights and guarantees are put in check.

Finally, the unbridled search for the ideal of security should not take place in defiance of the ideal of equality, whose concreteness is still alive in Brazilian (class) society. A different conclusion may result in the fact that the formulas and theoretical formulas of the Criminal Law of Risk, whose discourse refers to levels of broad protection of criminality arising from economic, transnational and technological modernity, in the end only serve, in practice, to further relativize the constitutional rights and guarantees of marginalized groups – and linked to traditional criminality –, operating an undue expansion of criminal control within the scope of classic criminality, in a distortion of the foundations of the relaxation of the rules and principles of imputation of criminal responsibility.

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FINAL CONSIDERATIONS

From the text presented, it can be inferred that the expansionist nature of Criminal Law arises and feeds on the desideratum of avoiding the new dangers arising from the risk society. To this end, the types of abstract danger, the anticipation of the moment of criminal intervention to achieve the preparatory acts, as well as the expansion of situations of objective imputation and criminal liability of the legal entity, mechanisms noted in laws such as criminal organizations, crimes against the environment and money laundering, predominate.

The adoption of these expedients, as seen, generates distrust and concerns in relation to the classic constitutional guarantees and traditional criminal principles. The criminal law of the globalized era inspires caution in the choice of the path to follow, because, although the urgency of its modernization seems intuitive, much still needs to be studied to better understand what should be expected from a criminal law impacted by the risk society. Although the inexorable reality of the risk paradigm is not denied, it is understood that an expansionary of criminal law is only recognized as healthy if it is in tune with the nuclear system of individual rights and guarantees.

Added to this is the realization that the promises of the post-modern world have not yet been fulfilled in Brazil, especially due to a "cultural broth" of corruption ingrained in the relationship between state power and society. It follows that the analysis of the theme must be done in the light of one of the fundamental objectives of the Republic: the reduction of social inequalities.

Based on the assumption that history is part of the fabric of social relations and is part of the "being-in-the-world" (Heidegger), the adoption of the penal model of risk must be preceded by confronting the situation of social inequality still rooted in Brazil. The legalistic bureaucracy determines a crisis of the law(s) and points to the difficulty of the legal system in producing "irritation" (Luhmann) through suitable responses to the excesses of the powers, public or private, in the direction of collective action.

In contrast to this difficulty, it urges that priority be given to a legal system built on the pillars of material equality, so that the elaboration and understanding of its norms can be processed through texts constructed and reconstructed discursively and experientially by society. In this conjuncture, the political-social maturation of citizens will allow them, through communicative action (Habermas), to achieve genuine democratic autonomy.

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Therefore, more than talking about the expansion of criminal law, it is urgent that Brazilian society continue to tread the path of politicization and exaltation of constitutional values, whose discourse, based on democratic legality, is a condition of possibility for a liberating emancipation from the shackles of inequality and coronelismo. Only with the consecration of an *open society of interpreters*, in the happy expression of Peter Häberle, will it be possible to conquer discursive, argumentative and democratic rationality, with a bias towards maximum effectiveness of the postulate of equality, even in a neoliberal economic scenario.

Throughout the espoused, the lesson of Father Antônio Vieira remains inviting to collective reflection when, in the Sermon of the Good Thief, Seneca recalls:

> "(...) This is what the other pirate said to Alexander the Great. Alexander sailed in a powerful armada across the Erythraean Sea to conquer India; and when a pirate was brought before him, who was robbing the fishermen, Alexander reproached him much for walking in such a bad office; but he, who was neither fearful nor sluggish, answered thus: Is it enough, sir, that I, because I steal in a boat, am a thief, and you, because you steal in an armada, are you emperors? So it is, stealing little is guilt, stealing a lot is greatness: stealing with little power makes pirates, stealing with a lot, the Alexanders (...) If the king of Macedonia, or anyone else, does what the thief and the pirate do; the thief, the pirate, and the king, all have the same place, and deserve the same name." (Vieira, 2012, p. 107).

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