

## **Theoretical and Normative Explanation of Legitimacy in Criminal Law**

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**Abstract:** The legitimacy of criminal law is essential and ambiguous foundation of the criminal system. The notion of legitimacy should be legally grounded. The law has to be rightful and its applications needs to be legitimate. The controversy legitimizing criminal law has become an issue not only among politicians and lawyers, but also among academicians. This study has investigated the legitimacy of the criminal law. The study also investigated the relationship between constitution and legitimacy of the criminal law. The findings indicated that constitution is an essential component of criminal law legitimacy. The authorities to legitimize their decisions need to abide by the written constitution of the country. This study also investigated the important of communication and interaction between components of society to comprehend the legitimacy of the criminal law. The legitimacy of the criminal law is also important to overcome conflicts and crises. This study identified that law enforcement does not resolve criminal issues as a whole, but it's an instrument to minimize the danger of its escalation. It will help the law enforcement to be respected and considered by the wider society.

**Keywords:** Legitimacy, Criminal Law, Normative Explanation, Justice System, Constitution.

### **INTRODUCTION**

The question of the legitimacy of criminal law has increasingly become important in contemporary discussions about this branch of the legal system [1]. Recently, it is almost unanimous opinion to point out that based on the answer that is formulated to this question, the theory of crime is constructed, which supposes a radical change in front of the so-called naturalistic currents, in which the construction of the crime was carried out from ontological criteria that also conditioned the content of each one of the structures. Then, an issue like this has come to occupy a priority place in the analyses on this science are made, when previously it was a matter on which the philosophers or sociologists of law were concerned. In the present study we will take care of pointing out the main theoretical positions that are currently in this regard, and then proceed to set a position on the matter.

In the globalized world, the legitimacy of the criminal law is matter because states are no longer independent if we accurately analyse their power in the international community. In the other words, states are bounded by certain international law that can not be breached easily. For instance, the countries might be pressured by the World Trade organization to change their current environment, and health condition and must fulfil policies dictated by the world banks. Also, the criminal law become more important in the recent years and the movement of criminals are easy. The

United Nations Security council, the African Union, the European Union may intervene and impose sanctions on the people, entities, and governments who are not abiding by the international criminal law and other international laws. This has become a controversy among academicians and needs to be analysed. Several decisions by the international community is not considered legitimate especially decisions relating to the criminal law. The actors whether local actors or international actors within the perspective of criminal justice system perceives system's legitimacy Ouziel [2]. In the other words, not every decision on the criminal is legitimate, but its controversial. The justification of the crimes is still under scrutinized and not clear just like exercising power by the leaders [3]. Also, there are some crimes that government are committing under criminal laws especially in the international arena such as the invasion of Iraq that was legitimized by the international law to destroy Hussein's capability to get the weapon of mass destruction. Another clear example of the controversy is the military intervention in Kosovo which was illegal but legitimate [4].

### **Definition of Legitimacy**

The concept of legitimacy has different meaning and it becomes an important concept in international law, politics and diplomacy. It also become a subject of discussion by the politicians and academics from different perspective. The concept of legitimacy seeks to include many different legitimacy

concepts which majority of them concern about democracy, good administration, and justice [5]. Tanchev [6] attempted to separate the term of legality and legitimacy. He described legitimacy as transcends of legal system in which law becomes inferior to the important values outside of the legal system and explained as the foundation of legal order. However, he demonstrated that legality reflects the observation of hierarchy system within the boundary of legal system [6]. The term of legitimacy derived from the Latin *Legitimare* which literally means lawful as it refers to the law. Legitimacy is generally classified into three types namely legal legitimacy, social legitimacy and moral legitimacy. Legal legitimacy is defined as property of an action rules, action and system in that signifies a legal obligation to support the action or system accordingly [3]. The other type of legitimacy is moral legitimacy that mainly concentrates of who has the right to rule [7]. In the other word, the term explains how the power of one actor is legitimized by another actor is morally justified. The third common understanding of legitimacy is social legitimacy. Social legitimacy is defined as an action, rules and actors by an actor belief that particular rule, action or system which are both morally and legally legitimate [8].

#### **Theoretical Possibilities of Legitimacy in Crime Law**

Within contemporary thinking there are several possibilities when confronting the question of the legitimacy of criminal law [9]. In the first place, there are those who affirm their illegitimacy for various reasons and advocate that it needs to be abolished, although in any case, they are minority. In fact, legitimacy is a substantial evidence in law abiding behaviour and it's important to enforce the lawful regulations in relation to criminal law [10].

Currently, the majority position points to the need to legitimize the penal system. However, there are differences between the various positions regarding their foundation and legitimation, which are reflected in the construction of the theory of crime proposed by each model. Thus, the term of legitimacy in international criminal law is not an absolute term, but it's more situational.

The predominant doctrine currently holds that there are two theoretical alternatives mostly accepted when raising the problem of the legitimacy of the criminal system. One such possibility is to legitimize the penal system and carry out the dogmatic construction of crime from the constitutional order and, on the other, to promote the dogmatic implementation of a functional perspective of a radical nature.

#### **The Constitution as a source of legitimacy of criminal law**

In fact, constitution in major parts of the world is the main source of power. The government especially

in the democratic systems refer to the constitution for any criminal related issues and do not violate the draft of constitution under any justification [6]. The aforementioned proposals, which dominate the contemporary panorama of the discussion, arise from the second half of the twentieth century, mainly in Italy, and maintain that the legitimacy of criminal law derives directly from the content of the constitution, which, as a superior rule, It establishes the aims and functions that the repressive order must fulfil, so that it produces the effects sought by the constitutional order, even at the expense of renouncing the construction of a system as such. Thomas Paine described constitution as antecedent to Government, and a Government is only the Creature of a Constitution [5]. The above depends on the solution in each case, as well as the politically-criminally desirable according to the established guidelines.

The notion of criminal law derives from the State, and consists of guaranteeing the common life of citizens without being endangered such as United states constitution that aims to protect citizens from intrusion [11]. In Italy, the majority doctrine has followed the path of legitimizing criminal law from the Constitution. Thus, Donini [12] finds in the Charter the foundation of both punishment and criminal law. The aforementioned author points out that the fundamental norm imposes a model of penal intervention on Parliament, to which Parliament is bound in the purposes and instruments of guardianship, as well as in its negative limits. There is a actually a link between the constitution and the criminal law, in that the former defines and legitimates by itself the mechanisms of state power, within which is the repressive right.

Among us a similar position, regarding the link between criminal law and the Constitution, is found in the work of Stuntz [13]. For the aforementioned jurist, the State arises from the need to maintain the order established by those who dominate in a certain society. From the existence of the State arises, without more, the right, which will be a vehicle to impose political orientations. Thus, the basis of criminal law for the aforementioned author is found in the Constitution, a rule in which power relations are regulated. In fact, the principles of constitution is sought to establish strategies to control socially harmful events, to guarantee the rights and duties established in the Constitution, to achieve the ends of the State, to ensure a just order and solve the problems posed by criminal law through the production of just consequences.

Within these positions, the foundation of the right to punish is found in the Constitution, which, as a fundamental rule, establishes the aims of the State and subordinates the rest of the legal system, which is also the basis of the right to punish, because the latter is

indissolubly linked to the State model. This theoretical current is based on the construction of a system of crime that renounces systemic coherence in order to achieve the ends of the State, as embodied in the Fundamental Charter, which is why it finds a normative referent, legal, if you will, at the time of justifying the criminal law.

Additionally, the fact of renouncing a systematic construction, which prefers solutions to specific cases instead of establishing a system that gives similar responses to a generality of events, it is undoubtedly a commendable effort, but one that makes the system unpredictable, when the predictability of judicial decisions, as an expression of legal certainty, constitutes one of the ends of dogmatic.

### **Normative Explanation of Legitimacy in Criminal Law**

The normative proposal finds the legitimization of criminal law in sociological criteria which indicates the need for law, first, and the legitimacy of the penal system, afterwards. Sociological criteria is also a subject of discussion when legitimizing criminal law [5].

The genesis and maintenance of social order are given by complexity and by the phenomenon of double contingency. With the concept of complexity, this study refers to the set of all possible events, and covers the unlimited field of possible worlds. So, then, this phenomenon is a world of possibilities that, as such, is not real, because the radical equality of the possible, as far as possible, is not broken until some priority allows the decanting of one of those worlds as Real.

That field of possibilities, which is called complexity, is presented as chaos [14] but once an order is introduced to this unattainability and complexity is reduced, the foundations are laid for priority, which allows one of the worlds to take hold as real, and thus society begins to exist.

Luhmann [15] presents the original situation through what he calls the double contingency in which a contact is established between two subjects, where the complexity has not yet been reduced, so that none of them is able to know what to expect from the other subject. In this state there is no order, which appears through the reduction of complexity, which begins when one of the subjects does something and when his action puts an end to indeterminacy. When acting, it makes an offer to the other subject, who can choose whether to accept it or reject. In such cases, whatever the answer, it will operate as a selection, with which the other party can be linked in the same key, which is the

moment in which there has been a communication between the parties.

The founding character of the social aspect of this act is found in its connection value for the other party, and allows the component of any social structure, expectations, to be generated. Hence, for Luhmann, social systems arise from a need but they are due to chance of those first distinctions, whose content is not prefigured in any previous nature.

The increase of people who are integrated into the system and the multiplication of communications generates a complexity that Amado calls paralyzing. Thus, prevents the growth of society until it is reduced. While each individual must take into account all possible budgets in society before each event and have a general and indeterminate communicative system, the blocking of the dynamics is inevitable.

The solution to the double contingency is possible through the expectations that will fall on both behaviours and other expectations. At the same time, these expectations must be removed from non-essential peculiarities of the situation and must have a clear and simple validity scheme, so that it is not necessary to modify them in each event. Likewise, they are temporarily valid for long periods and have an element of generality that is achieved by fitting them into symbolic abbreviations that facilitate the participants understanding and assimilation of the prevailing expectations in each system, for which expectations are grouped into people, roles, programs, and values.

If the system is born in a complex society by essence, in order to reduce that complexity its own existence is determined by the fact that among individuals there can be no consensus. Amado points out that no system can arrogate the knowledge of all that exists, but only of what falls under its particular code and its selectivity, and therefore there can be no global social consensus. The foregoing, in turn, leads to the fact that the conflict does not destroy the system, but rather presupposes its articulation. In the system, the conflict is normalized and the contagion to the social environment is avoided.

For that reason, Amado and Antonio [14] points out, the legitimations of a system must be its product and not come from outside. It is not the consensus with some values or with a moral that justifies a decision, but the good functioning of the system which brings a necessary social recognition. Thus, legitimate decision is that which is admitted without criticism whose authority is accepted without consideration of the correctness of its premises. Other authors believe that in order the decision to be legitimate there must be relevant reasons including

evidence which provides a legitimate ground for deliberation [16].

The extension of consensus in society occurs through institutionalization, as institutions serve to generalize a consensus budget; the individual consents in advance to the results of the institutional operation. Therefore, a tacit consensus and whoever denies that consensus is isolated and cannot justify his disappointment of expectations. As for the legal system, its purpose is the use of conflicting perspectives for the reproduction and the formation of behavioural expectations congruently generalized in the temporal, material and social.

If the structures of social systems consist of expectations, there is a present insecurity, because these can be defrauded, so it is necessary to have a mechanism that allows the maintenance of the system even in such cases.

The coercive element allows the assumptions of the rules can be made even on breaches or oppositions. The legitimizing consensus gives support to normative expectations through legal norms, as well as sanctions when these are defrauded.

The criminal laws within international law has been shaped and characterised by series of conflicts and crises. In such cases the law plays important role in minimizing the conflicts. However, the law is not a means to avoid conflicts, but to foresee and prepare them to prosecute, as their rules imply the anticipation of the conflict. The law is normally used by the governments and institutions to avoid different sorts of conflict [17, 18]. The law usually provides solution to particular problems, however there are also lawys that complicates the issues and becomes a problem itself [19-21]. The conflict is used by the law to generalize expectations and, at the same time, it finds in the right the dynamic element that allows its evolution and adaptation to changes in the social environment. Likewise, law serves to give conflicts a specific communicative channel that prevents their indiscriminate dissemination in the social environment. Furthermore, the expectation of coercion serves to prevent further violence in the environment, as a way of imposing pretensions.

When the subject decides to get involved in society by following both the communication guidelines and the rules for the transmission of meaning previously established by the social system within which the relationship occurs, he manages to establish communicative processes with other individuals, and in this way the concept of person. At that moment the individual joins the society, from which the claims recognition as being different, and decides to establish

communication processes; with this he benefits from social contact, but he must assume obligations with that medium, and in this way the concept of responsibility appears.

There are several objections that this position receives from the doctrine. In the first place, it is alleged that a position such as this one renounces legitimizing the system and, therefore, would serve to justify any regime. In this regard, we have seen how these positions do address the problem of the legitimacy of criminal law, by looking at non-legal references, specifically sociological, right solution to our judgment.

## DISCUSSIONS AND CONCLUSION

The criminal law is legitimized by recourse to normative references such as the Constitution, we are halfway there, because the problem of the legitimacy of the higher order remains latent, so that the issue is not completely resolved. Additionally, admitting a position like this leads inexorably to accept and eventually to presuppose from the outset the higher postulates, regardless of their content and justification.

In the second place, the argument according to which this position ignores the human being is recurrent. This is not entirely correct. The first thing is to point out that each person has an autopoietic psychic system different from social systems, whose elements are not communications. The social system is alien to the individual and constitutes its means.

The individual is necessary for society, but is not part of the self-referentiality of the system. The individual subject is not the centre of the system, is subject to himself, as well as to the particular self-referential system proper to his conscience; but there are no systems of subjects, insofar as society and its systems are composed of communications, not of individuals.

The understanding of man as a social being marks the point of departure to maintain that, in this conception, the individual does matter, but as a subject that society needs to be able to develop, and it is precisely the aforementioned distinction between individual, subject and person that recognizes such a situation. Indeed, once man has had an understanding of himself as an individual entity differentiated from others and has recognized others as similar to him, it is when he decides to participate within the communicative processes. For criminal law as it was discussed this cannot invade the sphere of autonomy of the individual, but, on the contrary, its intervention must be limited to those events that disturb the constituted society.

Finally, it is clear that criminal law cannot in any way contradict the Constitution, because the former is subordinate to it; however, such coincidence refers to formal legitimacy, but in no way, in our opinion, does it solve the problem of material legitimacy.

Given the above, it is clear that the objections against this position are unfounded and that, on the contrary, it achieves an adequate explanation to the question about the legitimacy of criminal law.

This study concludes that criminal law finds its justification and its legitimacy in a society that arises from the solution of the double contingency and that, as it progresses, the complexity that this entails makes the need for a mechanism that allows communications, a fundamental element of the social system, to unfold in an adequate, predictable manner, and hence the need for law becomes imperative.

In the absence of the protection of expectations, society would undoubtedly be destined to dissolve, in as much as chaos would reign and return to a state of violence in which the stronger would simply prevail over the others. Thus, the legitimacy of criminal law would be given by the maintenance of the expectations necessary for communication within society. Criminal law would be concerned with maintaining the normative structures on which the entire social order is based.

Therefore, if we understand that men benefit from the social, because they know what to expect from other people, thanks to the fact that the law supports their expectations through the norms, it is hardly logical that they should submit to the rules that regulate communication processes within society. Only in this way is the progress of society permitted.

Thus it is necessary the existence of the right, and of the penalty, which will be at the head of a single power, the State. The legitimacy of the state entity is not the subject of this study, because it would overflow the analysed topic, but it is clear that being the expression of the will of a majority, it is legitimized to establish the parameters of conduct within society. The current panorama of criminal law and the sad reality that is throwing in terms of injustice, unfavorable consequences and others, certainly deteriorates its image, but we cannot say that this makes it illegitimate and unnecessary.

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