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'The Abuse of Prices Increases from a Criminal Law Perspective'

There is a recurring perception that all conflicts that our society cannot resolve will be pacified, as if by magic, by criminal law. Even worse, for some, criminal law has long been the first alternative for solving social conflicts, abusing the concept that it should serve only as a last resort.

In Brazil, the Covid-19 health crisis triggered new conflicts of interest in society. To some, criminal law quickly emerged as a wizard's wand to resolve pandemic-related problems.

Early on, Brazil lacked a national health policy to deal with the Covid-19 crisis. Consequently, many Brazilian states embraced social isolation without adopting a complete lockdown. As a knock-on effect of this, roughly half the population of São Paulo disregarded recommendations to stay at home. It was not long before public authorities considered using police force and threats of imprisonment to enforce social isolation. Soon, hardline policies were discarded since overburdening an already overcrowded prison system that lacks minimum sanitation conditions would do much more to spread the virus than to contain it.

Profiteering off the confusion

Isolation policies (or lack thereof) were soon followed by supply issues, aggravated by the consumer stockpiling. Shortages, combined with rising demand, led to sudden price increases, especially for basic food and hygiene products.

It did not take the authorities long to announce inspections aiming to fine, or even close, businesses practicing abusive price hikes. In the state of São Paulo alone, over two thousand inspections were carried out in April. This often stopped essential products, such as hand sanitizer and masks, from being sold at prices of up to three times their pre-crisis index.

However, in the last week of April the authorities began speaking as if raising prices was a crime. Under the pretext of possible criminal embezzlement – inappropriate in the absence of fraud – São Paulo's authorities began to publicly threaten to arrest business owners.

Overreach and antique laws

Analysing the two Brazilian laws related to consumer protection – Law No. 8,078 and Law No. 8,137, (both from 1990) – it appears as if price gouging does not qualify as a criminal offense under the law. The Consumer Protection Code (Law No. 8,078/1990) qualifies abusive increases as an administrative offense, subjected to administrative sanctions, such as fines, the suspension of activities or interdiction of businesses. However, neither law offers scope for criminalisation.

Aware of this fact, but in another attempt to curb recurrent price hikes, the administrative authorities quickly began to invoke a law from 1951 to justify threats of arrest against proprietors.

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On one hand, article four of this law (1,521/1951) qualifies obtaining profits that exceed one fifth of a commodity's current value while taking advantage of consumer's pressing needs, as a criminal offense. But this crime, in addition to being antique and dissociated from the free market that characterises current commercial relationships, has such a low penalty that it would not even admit imprisonment under Brazil's criminal procedure code.

On the other hand, the third article, item VI, of the same law provides for a severe punishment. Two to ten years' imprisonment may be handed out, but only if the price of certain goods rise due to false information or other means of fraud. Although politicians and prosecutors used this article to justify authoritarian speeches and threats of arrest, for such a high penalty fraud must constitute an indispensable element of this crime.

Not all price increases are criminal

There was no fraud. There was a pandemic, which led, among other things, to an increase in the cost of raw materials, transportation and US dollar exchange rates. There is a shortage of goods and there is an increase in demand. That is more than enough to justify a lawful and justified price increase on the free market.

However, if the hike proves to be abusive, dissociated from this just cause, it is an administrative offense. Absent any fraud, they should never be classified as a crime.

Furthermore, to make this point abundantly clear, there were, at the time, at least three different bills pending in Congress with the aim of ensuring that such a crime is covered by Brazilian criminal law, especially during pandemics or other emergencies.

The price rise during the pandemic, often abusing consumers' needs, highlights the conflict between ensuring that certain indispensable goods remain affordable to the population and free market principles. Politicians should pay attention to this complex problem. But the issue also highlights a perpetual problem in criminal law studies, which is to assess the criminal relevance of administrative offenses.

Preserving the legitimacy of criminal law

Not every price increase is abusive; and, if abusive but not fraudulent, it is not, by any circumstance, a crime. This is because not all non-compliance with administrative and civil laws is criminal. This is true in the formal aspect, since no Brazilian law defines abusive price increase as a crime; but also in the material aspect of the legitimacy and effectiveness of criminal intervention.

Criminal law is guided by the idea of subsidiarity; it should be a last resort in situations when other legal instruments are insufficient to resolve social conflicts. Therefore, caution should be exercised when using criminal law. Politicians should avoid unnecessarily creating new criminal offenses where the administrative legal frame is capable of curbing undesired behavior.