

RESPONSIBILITY, PUNISHMENT AND SELF-DETERMINATION

*Leonardo Marcel de Oliveira*¹
*Guilherme Colen*²

Abstract

The "topoi" condition of the functionalist concept of the necessity of punishment makes it possible to solve, within the framework of the topical-hermeneutic method, contemporary issues of imputation of personal responsibility in the context of guilt. The preventive purposes of punishment present themselves as a criminal political power to avoid a concrete penal response to the perpetrator in situations in which the argument, constructed from the circumstances of the case, concludes that the concrete incidence of punishment would be a preventively ineffective measure.

Keywords

Functionalism. Criminal responsibility. Self-determination.

Summary

1. Introduction. 2. Imputation as the shaping institution of the entire dogmatic system of the theory of crime in Claus Roxin. 3. The need for punishment as a criminal political opening in the light of the author in Claus Roxin: the re-signification of guilt based on the development of the theory of responsibility. 4. Conclusion

¹ LLM and PhD Candidate at the Pontifical Catholic University of Minas Gerais. Researcher – CAPES/BR.

² Professor at the Postgraduate Law Program at the Pontifical Catholic University of Minas Gerais.

1. INTRODUCTION

The need for punishment as an imputable consequence of guilt is a theorization by Claus Roxin. Through it, the penal method seeks to engender the criminal political openness of *personal censorship*. In relation to this need for punishment, it is stated that it will concretely translate an imputation, in the framework following the completion of the culpable wrong; thus, as an interpretative vehicle in function of personal censorship, it will be the concretization of the governing principle of the system, which represents in the German author's ownership the *telos* for crime theory, namely criminal policy, to become functional.

In his functionalist proposal, Roxin structures different criminal policy principles pertinent to the specificities of the institutions of crime theory, which are injustice and guilt. In the latter, the preventive purposes of the penalty in the specific case become relevant. In any case, however, the concept of criminal policy is always linked to constitutional principles, as it is linked to the interpretation of criminal law. In fact, the opening up of criminal policy through the need for punishment should not be understood exclusively in terms of the pragmatic and utilitarian criteria of general and special prevention, since the aforementioned guiding principle of the system, criminal policy designed to prevent punishment, imposes on the law enforcer an interpretation which attributes meanings to the institutions of the penal method in *terms of constitutionally ensured principles and guarantees*.

In this context, the need for punishment, as a judgment of imputation of personal censure, is revealed as a particularly important institution when there is, in a criminal case, the application of a rule whose legislative construction of the criminal precept by which it is translated lacked the appropriate scientific technique. This phenomenon can be exemplified in criminal types which, when constructed by the legislator, were not informed of a nucleus (verb), an element that expresses concrete behavior in the conceptual model; instead, not a human action is incriminated, but a state

of mind, that is, a choice to conduct the life of the active subject, bringing the legal description closer to an expression of the criminal law of the perpetrator.

It should be noted that the phenomenon described above, when it manifests itself in such a way as to remove the core of the criminal type, will result in a problematic imputation controversy. Without conduct as a normative reference for the institutions of the theory of crime, there is an obstacle in relation to the constitutive elements that together form the basis for the institution of guilt. Since they were all designed to convey personal censure to the perpetrator of an injustice, there will be no power of guilt without the behavior carried out as a point of concrete coherence of personal reproach for having done so, being contrary to the law. Based on these developments, within the framework of the phenomenon of the absence of penal technique in legislative construction, the problem of the present investigation is identified as one of the vertices of its manifestation: non-nuclear criminal types. Based on the pre-understanding of the theoretical framework, the hypothesis is that the need for punishment because of guilt is presented as an institution that provides the possibility of solving it, since the preventive purposes of punishment and constitutional principles will be presented as a criminal political power to remove the concrete criminal response to the perpetrator. In the criminal field, these developments do not require the basis of a topical-hermeneutic methodology.

2. IMPUTATION AS THE SHAPING INSTITUTION OF THE ENTIRE DOGMATIC SYSTEM OF THE THEORY OF CRIME IN CLAUS ROXIN.

It should be noted that this statement, in which the concept of imputation is enunciated as the fundamental basis for the development of the penal method in Roxin's proposal, will necessarily have programmatic effects on the concept of crime. This is because criminal policy as imputation will be,

in this proposal, the conceptual key through which the axiological coherence of all the concepts of the theoretical system of crime in the criminal case will be unveiled. This means, therefore, that typicality, anti-juridicity and guilt will be institutions whose only possible material meaning will be profiled according to a theory of imputation. The legitimate conclusion of the existence of a crime, therefore, is a political criminal consequence.

Roxin bases this criterion on criminal policy, emphasizing the importance of a teleological analysis of criminal wrongdoing and the reframing of guilt from a functionalist perspective. It should be emphasized that other functionalist proposals resort to a different *telos* to perpetrate the attribution of meanings. It is therefore necessary to understand the role of this criterion in Claus Roxin's system, especially in relation to its specific foundation in criminal policy. This analysis allows us to clarify Roxin's conception of criminal policy and how it harmonizes the institutions of criminal dogmatics according to the concrete case, teleologically.

Roxin recognizes the subsidiary protection of legal assets that are indispensable for life in society as the broader criminal policy purpose of criminal law. This initial point immediately presents itself, the author tells us, as a fruitful space for the development of supralegal causes of exclusion of responsibility.³ There are various consequences of the political criminal system when viewed in terms of injustice and guilt. In fact, it is imperative to understand the differentiation between these two dimensions of imputation in the context of criminal law.⁴

Roxin's considerations state that the concept of injustice will correspond to the result of a criminal policy assessment deduced from the fundamental

³ROXIN 2000,61-62.

⁴ROXIN 1998,32. In the same vein, a note on the subject can be found in: ROXIN 1976,209-210.

task of criminal law: to protect individuals and society from risks that are inadmissible due to their social harmfulness.⁵ It can be concluded that through the criterion of risk, therefore, objective imputation will consist of the judgment that is projected onto the conduct carried out by the agent and, based on the attribution of criminal legal meaning, will reveal whether it has criminal relevance, that is, whether the necessary requirements, in legal-penal terms, to convert it into a criminal offense have actually occurred. Objective imputation consists of the first level of evaluation of the penal method, which involves the proper evaluation of the control of behavior, where those that offer prohibited risks to legal goods in the face of legal-penal norms will be considered illicit.⁶

Just as Roxin's functionalist methodology demands criminal wrongdoing to be understood and structured in a teleological way, in line with the political-criminal principle that pertains to it and the resulting imputation criteria that derives from it, guilt, in the logical sequence of the penal method, also needs an equal re-signification within the author's functionalist vision.

In the scope of the second level of imputation, which is subjective, Roxin establishes the theory of responsibility as its material basis. He emphasizes that, in the context of the personal censure of the perpetrator of the crime, the preventive criteria deriving from the penalty theory are the relevant fundamental political-criminal principle. Thus, guilt remains a central aspect of personal reproach, but no longer its foundation, as will be seen below. However, not only does guilt limit the personal reproach of the perpetrator of the crime, but it is also now complemented by the need to prevent the

⁵ROXIN 2000, 45; ROXIN 2006, 68 *et seq.*

⁶Objective imputation, which forms the backbone of legal-penal injustice, is therefore a criminal policy translated into legal concepts, which works on an empirical basis and weighs up the interests of freedom and security. ROXIN 2000,72; the author comes to the same conclusion in: ROXIN 2006,68; ROXIN 2021,40.

penalty, which leads to a subjective imputation that introduces a double limitation.⁷

3. THE NEED FOR PUNISHMENT AS A CRIMINAL POLITICAL OPENING IN THE LIGHT OF THE AUTHOR IN CLAUD ROXIN: THE RE-SIGNIFICATION OF GUILT BASED ON THE DEVELOPMENT OF THE THEORY OF RESPONSIBILITY.

Roxin starts from the structure of guilt, seen as a penal institution whose content is based above all on the doctrine of enforceability, to reinterpret it within a larger concept, which represents the concretization in the penal method of a theory of crime oriented towards the affirmation of the preventive purposes of the penalty, which will concretely allow the realization of a criminal policy for the specific case.⁸

It should be noted that this methodology aims to bring together, from the point of view of criminal policy, not only the dogmatic category of guilt, but all the elements that underpin the theoretical edifice of crime theory, with social reality: namely typicality, anti-juridicity and guilt.⁹ One of the objectives is to build a *praxis-oriented* science of criminal law. However, the role of the element that follows injustice and underpins criminal censorship of the human person in criminal law stands out for the plan proposed in this investigation. This element, which is guilt, will be concretized in its 'functionalization' through subjective imputation. This imputation of personal censure will be based on the prevention of the penalty applicable to the perpetrator of the criminal offense, based on the criterion known as

⁷ROXIN 2012,11.

⁸ROXIN 2012, 9; ROXIN 2016, 54; ROXIN 1976, 201; ROXIN 2006, 68.

⁹ROXIN 2002, 59.

penal necessity, which in turn is a dogmatic consequence of the theory of responsibility developed by Roxin.

Roxin's proposal develops from a critique in which the author points out the deficiencies that would make it impossible to maintain the *status quo* of the doctrine of guilt: precisely the reason for the new commitment that he seeks to establish as an overcoming.

Roxin points out that the non-functionalist doctrine of crime argues that personal censure of the agent who carried out the wrong would presuppose an evaluation of the concrete subject's internal decision-making space, namely free will. However, the basis for this evaluation of guilt, free will, is a phenomenon that has no verifiable existence, as contemporary science points out; in fact, to support the freedom of will of the specific agent as a factor in attributing personal censure is to consider it to exist or not on the basis of an unprovable scientific deduction, which is also an obstacle to its refutation in the context of a conviction based on it.¹⁰

Thus, the functionalist interpretation of guilt supported by ROXIN's work considers a different criterion to give it a foundation, which is articulated not on an ontological basis, but from a normative perspective. In this context, it is stated that freedom cannot be seen as a pre-legal reality, which refers to the world of being; it doesn't even need empirical proof, because it is actually a normative fact, since it is seen as a teleological parameter deriving from the Constitution, namely that everyone should be treated as free and responsible.¹¹

In this sense, regarding guilt, there is a first reformulation pointed out by the author. Freedom of will, a requirement whose absence removes the author's personal censure, should not be seen from the perspective of free

¹⁰ROXIN 1999, 407.

¹¹ROXIN 2006, 90; ROXIN 1999, 414.

will, as it is a phenomenon whose existence and concrete proof are not demonstrable, as science points out today. This freedom becomes an essentially normative issue, a postulate deriving from the Constitution. In this conceptual view, guilt, says Roxin, would be acting in a way that goes against the law, despite its normative accessibility in relation to the situation being concretely assessed.¹²

Still on the foundations of the 'traditional' view of guilt, Roxin attacks another vertex, which refers to the idea of retribution, historically linked to it. In Roxin's view, this is another insurmountable difficulty, which will therefore require abandoning the very idea of a concept of guilt that is proclaimed in it.¹³¹⁴ In fact, Roxin argues that there is no possibility of such a consideration, because the penalty must always, on the contrary, be connected to the social ends that legitimize it, and not impertinent grounds with the Social and Democratic Rule of Law, in which the penalty must be necessarily related to socially useful ends.¹⁵

This is precisely the author's starting point for his original proposal on the institution of the theoretical system of crime in question. He argues that the elaboration of institutions with extreme theoretical-dogmatic sophistication has forgotten the purposes of criminal law, which are substantially linked to criminal policy.¹⁶ The normative criminal policy criterion for personal censure, limited to guilt, can be found for the author in the purposes of punishment. By purposes of punishment, Roxin understands a foundation based on a dialectical theory as a justification for criminal punishment.¹⁷ The purposes of punishment would therefore be

¹²ROXIN 2006, 87.

¹³ROXIN 2002, 89 *et seq.*

¹⁴ROXIN 2013, 14.

¹⁵ROXIN 1999, 407.

¹⁶SIQUEIRA 2017, 278.

¹⁷ROXIN 2012, 9 *et seq.*

exclusively preventive; in other words, any reference, even mitigated, to the idea of retribution as its foundation is abandoned.¹⁸

In elaborating the theory of responsibility as the basis for personal censure, guilt therefore becomes an institution teleologically oriented towards the preventive ends of punishment, in consideration of a paradigm of the Democratic State of Law. Given that the normative structure of criminal law will involve recognizing that man, in his decisions, is free, it is equally true that he always resorts to values to motivate himself, and that his actions and conduct are therefore valuable. Criminal law cannot be oblivious to this fact, because taking it as a presupposition, it will act by establishing standards of expected conduct, which are always aimed at subsidiary protection of legal assets, and the rules are therefore structured with the aim of motivating individuals to develop their personal circle in compliance with these standards, which seek social peace and a space full of freedom common to all.¹⁹ It is also from this sense of expectation that the norms will be complied with, which has the aim of promoting a social objective, that the legitimate claim to impose a criminal penalty on those who fail to comply with them arises, since doing so instills a breach of expectations in the community in general, which becomes insecurity in relation to its effects: if this breach is not repaired through the action of criminal law, a sense of absence of coerciveness will flourish and the norm itself will lose the possibility of instilling motivation in others in their respective conduct.²⁰

Roxin gives it a new look in its foundations as a practical result of its functionalization, which has direct repercussions on its dogmatic structure. It is a development resulting from the union between the dogmatic issues of personal censorship and criminal policy, which translates into the

¹⁸ROXIN 1993, 32.

¹⁹ROXIN 1999, 415-416; ROXIN 2012. 9.

²⁰ROXIN 2016, 54.

elaboration of his theory of responsibility²¹. On the subject, the author states: ²²

It should be noted that guilt, now stripped of retribution and the ontological basis that previously supported it, is the functionalist guiding criterion of the personal censure: the political criminal principle linked to the preventive purposes of punishment. It will be the limit of imputation of responsibility through preventive punishment. It will conceptually result, as previously stated, as the perpetrator's realization of the wrong, even though, in the specific case, it has normative accessibility.

In this new guise, guilt will represent an institution with an exclusively protective function; here it will have a function in the system, based on a political criminal principle, which will shape the interpretation of personal censure in the context of the subjective imputation of the perpetrator of a specific case, which will consist of limiting the excesses that could possibly result from preventively indicated penalties, and from this point of view seen as legitimate sanctions, to be imposed on the perpetrator; but the preventive purpose of the penalty, as a utilitarian criterion aimed at social benefit in the face of the suffering imposed on the perpetrator, can easily reveal that a penalty that is materially inconsistent from a criminal policy point of view is socially indicated, i.e. contrary to the protective content of guilt and constitutionally guaranteed principles. These are situations in which the perpetrator must be excluded from any penal sanction, since the criminal policy defended by Roxin already includes as a presupposition of the concept itself a vision that embraces the guarantees historically integrated into criminal law (guilt, legality, etc.) and absolute respect for the content of the Constitution.

²¹ROXIN 2010, 43.

²²ROXIN 2012, 11.

He claims to propose the new name, responsibility, precisely because it includes a new dimension necessary for this imputation, which transcends the content delimited by guilt in personal reproach. In this sense,

Criminal law must be used to fulfill the legitimacy of its *subsidiary protection*. Criminal law is not a bastion of morality, it is not at the service of affirming the pretensions of groups or certain people; it is based on the view that it also has a social nature to fulfill, to impose itself legitimately.²³

Thus, such a development is attributable to a previous reasoning, which transcends the question of the fault of the author in the strict sense. The fact is that in the current idea that underpins the state's own actions, understood in a Social and Democratic Law model²⁴, there is only a legitimate performance of its regulatory task, which includes establishing incriminations, if it acts in this sense solely to pursue social ends, for the benefit of each and every one.²⁵ Nevertheless, the need for punishment cannot be seen solely as an imputable development aimed at excluding the subjective imputation of a culpable wrong for *preventive reasons* drawn from the theory of punishment. This is because the 'functionalization' of guilt presupposes, as we have seen, the re-signification of its very foundation, to make it correspond teleologically in the light of a political criminal treatment. There is, however, a fundamental presupposition, which precedes any criminal political guiding value criterion in Roxin's system²⁶, which must be carried out in the shaping of institutions, whether this is objective or subjective imputation. This assumption is the material basis of the legal and constitutional guarantees that derive from the normative

²³ ROXIN 2009,17.

²⁴ ROXIN 2008,330; ROXIN 2006,66 *et seq.*

²⁵ ROXIN 1991,26; ROXIN 2016,54.

²⁶ ROXIN 2000,73; ROXIN 1976,201.

substance of the current model of the Social and Democratic State of Law.²⁷ Since material relevance to the normative orientation underlying all constitutional and pluralist democracy is the first and most fundamental aspect for the legitimacy of any dogmatic proposition, the need for punishment seeks social legitimacy, but it also establishes a normative-constitutional filter, which is a contingency for the legitimate infliction of punishment on a culpable perpetrator. Therefore, guilt (as a necessary but not sufficient limitation) and the Necessity of Punishment (normative imputation of preventive criteria of punishment based on criminal policy and the content of the Constitution) are the founding elements of the new category of Responsibility.²⁸ The last aspect can be clarified through an example provided by Roxin, and thus make it possible to conclude the question: *“When I have tried to extract from fundamental rights, such as freedom of belief and conscience (art. 4) or freedom of opinion and association (arts. 5 and 8), possibilities for legal-penal exculpation, this has a programmatic significance: a criminal policy that wishes to base the criminal law system must embrace internationally recognized human and freedom rights. Where this is not the case, the precepts and interpretations are no more than elements in the exercise of power, but they are not norms or legal knowledge”*.²⁹

It should be noted that Roxin's theory of responsibility is fruitful because it allows the judge to make an evaluative correction to arbitrary applications of punishment through an evaluative correction in the sentence itself. In fact, it represents an original and guarantee-oriented movement since it

²⁷ In this sense, it is stated that: *“The best criminal policy consists, therefore, in reconciling in the best possible way general prevention, special prevention aimed at social integration and the limitation of punishment in a State of Law.”* ROXIN 2008,331.

²⁸ROXIN 1999,421.

²⁹ROXIN 2006,66; ROXIN 1999,421. The author deals vertically with cases of conscientious objection in: ROXIN 2006, 74; *ibidem*, 91 *et seq.*

seeks to constitutionalize criminal law by integrating it with *constitutionally guaranteed rights and guarantees*.

In this context, the right to self-determination has now been recognized as the legal expression of the individual's capacity for autonomous choice³⁰. Self-determination as a right was a guarantee engendered, in its historical roots, in a specific time frame, late in relation to the liberal guarantee of freedom, namely from the affirmation of the feminist social movements of the 20th century,³¹ which on a political and social level represented a commitment to the recognition and affirmation of women's civil and social rights. When dealing with this intersection, Agata Amato points out that the notion of the universality of human rights is intrinsically linked to the fundamental right we are discussing here, which goes hand in hand with this concept: the self-determination of peoples.³²

There is a plurality of structures in relation to the express provisions in the constitutions of states, with personal self-determination often being a principle that is evident as a normative expression, i.e. one that needs to be affirmed because of the meaning expressed in each constitution. For example, the Italian Constitution does not *expressly* provide for self-determination as a recognized right; however, as the author observes, it cannot be said that it follows from this that it has been denatured from that charter, since it is possible to infer it as a historical-normative canon of the Italian Constitution.³³

³⁰ In this sense, see: '*diritto all'autodeterminazione, nel linguaggio corrente, è il riconoscimento della capacità di scelta autonoma ed indipendente dell'individuo (...)*': MANGIAMELI 2009, 1; similar reference, on the subject: MANGIAMELI 2022,54.

³¹MANGIAMELI 2009,1.

³²AMATO 2022,80.

³³Although there is no literal provision for this right to self-determination in the Italian Constitution, it can be inferred from the Italian charter as a historical-normative canon. MANGIAMELI 2009,3.

In the Brazilian case, the 1988 Constitution of the Federative Republic of Brazil, although it does not reduce the term recognition of a fundamental right expressly spelled out under the name of the right to personal self-determination, often does so implicitly. Some examples can be transcribed. In the Preamble to the Constitution: It declares the supreme values of a democratic society, where it explicitly includes the value of *freedom* and equality; of necessary mention that it also enunciates in its Article 1, item III, where the dignity of the human person is affirmed as one of the foundations of the Democratic State of Law, which presupposes autonomy for its fullness; Article 5³⁴ the equality of all before the law guarantees the inviolability of the right to life, **liberty**, equality, security and property; item VI of the same article, provides for *the inviolability of freedom of conscience and belief*, directly reflecting the principle of personal self-determination.

Today, apart from the normative digression previously made, when we refer to the fundamental right to personal self-determination, its understanding is substantially linked to the very idea of the Social and Democratic State of Law. It is said to be substantially linked because it is not possible to think of this model of state without that right being fully protected, and this is a consequence of the very meaning that is expressed from this modular vision of democratic social organization. In this sense, see: *"However, the formula "social and democratic state of law" means not only an attempt to subject the work of the social state - which we don't want to give up - to the formal limits of the state of law, but also its material orientation towards real democracy. In this way, we aim to achieve a form of social state - i.e. one that takes an effective part in social life - at the service of all citizens. As a social and democratic state, it will have to create real social conditions that favor the life of the individual, but in order to guarantee control by the same citizen of these conditions, it will also have to be a democratic state of law. The democratic character of this state appears linked, therefore, to the synthesis of the social state and the state of law, and expresses both the need for "real" freedom - opposing the idea that the "social*

*state" should only direct its intervention to the benefit of certain groups - and "formal" freedom - paving the way for the possibility of a "state of law" not controlled by the whole people - for citizens."*³⁵

The Rule of Law presents itself as an expression of the related meaning of the state's actions as an institution within the current civilizational development of Western democratic societies, a political environment that subjects legitimate state action to the normative force of a rigid constitution whose content is in line with and seeks to perpetuate the historical affirmation of human rights. Within this context, these guarantees have a function determined by the realization of a plural and democratic environment, which has repercussions in conditioning the direction of the state's actions. In this context, the state can only act if it is exercising a socially legitimate function³⁶, i.e. it can act when it, in addition to respecting human rights, goes beyond the socially useful to the social, which involves the person of the citizen.³⁷

Criminal law is subject in its entirety to the principles immanent to a pluralist democracy and the social and democratic rule of law, which are described in the political charters of the states. Personal self-determination as a fundamental right renders innocuous any legislative intention to incriminate 'immoral' behavior (i.e. according to some ideological morality that one wishes to affirm!). The coercive imposition of states of life, life choices and ethical principles on people, without any support for offensiveness and socially useful (constitutionally legitimate and) purposes, is the most typical behavior of totalitarian states. Self-determination means precisely allowing everyone the free development of their personality). In fact, any criminal

³⁵ MIR PUIG 1994,34.

³⁶ ROXIN 2016,114.

³⁷ To paraphrase BRANDÃO, it should be noted that the Brazilian case is no different. As can be seen from the CRFB/88, the Social and Democratic State of Law model is in full force. BRANDÃO 2002,66-67.

type whose incriminated conduct, the object of regulation, is devoid of offensiveness, is an authoritarian offspring that ultimately seeks the moral protection of some in the face of the compulsory rectification of the self-determination and personality of those who think differently. As it is not possible for a criminal law to contradict the Constitution (logically and axiologically), any criminal law of this nature that is formally prevailing has no binding force.

The Constitutionalization of Criminal Law, therefore, is not an option, but the only one possible. At least in a constitutional democracy. In this sense, to paraphrase Burchard, *'The general foundations of the constitutionalization of criminal law do not require many words. The concept of constitutionalization has become very popular. I use it in an analytical way to express an obvious fact: criminal law, which is of a lower rank, is linked to laws of a higher rank, above all European law and constitutional law'*.³⁸

The integration of self-determination as a constitutionally assured guarantee integrates the need for punishment because it represents an imputable unfolding conformed by the governing criterion of the concept of criminal policy that also conforms it based on fundamental rights and guarantees, as Roxin himself has already argued when dealing with the exclusion of subjective imputation in cases of conscientious objection offenses. As you can see, when dealing with this issue, the German author emphatically states that every normative principle that governs criminal policy in his system already integrates human rights and the principles of a Social and Democratic Rule of Law in the most immediate way.

The need for punishment is appropriate, based on personal self-determination, to offer the judge a legitimate methodological path for subjective imputation. This imputation can result in the exclusion of

³⁸BURCHARD 2012,136.

criminal responsibility in crimes whose classification is close to a criminal law of the author, especially when a nuclear conduct is dispensed with to incriminate a state of life or mind.

Finally, it is essential to highlight the practical relevance of this research and its conclusions, especially in the Brazilian context. A notable example is the criminal misdemeanor of loitering, as stipulated in Article 59 of the Criminal Misdemeanors Act (Decree-Law No. 3.688, of October 3, 1941). With the conclusions reached in this study, the law enforcer has a legitimate alternative to rule out the application of a penalty in concrete cases, highlighting the applicability and relevance of this study beyond theoretical discussions, directly impacting legal praxis.

4. CONCLUSION

It should be noted that legality is not a characteristic of the science of criminal law, but rather its very mission and objective³⁹. In fact, in a way that is substantially different from other branches of the science of law, criminal technique imposes a binding obligation on the legislator to use language in a specific and precise manner, since the proper exercise of the creative activity of the Law, which will require the appropriate choice of linguistic signs whose structure and essence accurately express the semantic framework of the behavior it incriminates, is the first prerequisite for the subsequent development of the criminal method, as it derives from the principle of *nullum crimen nulla poena sine lege*.

However, the dynamic loses its effectiveness when the penal technique is relativized by the legislator, by ineffectively establishing the standard of incriminated behavior. This deficient activity will result in a loss of

³⁹HASSEMER 1998,16.

guarantees, which is why it is the first indication of the crisis of the criminal justice system when it is combined with a different dimension, but one that stems from it, which is set in *practice*.⁴⁰

This is a determining factor in the phenomenon that characterizes the crisis of the contemporary criminal law system. The deficiency lies in the imprecise determination of linguistic signs when typifying conduct in criminal law and linking it to the respective legal sanction. There is a need to overcome the threshold of formality and vague objectivity present in the legal definition of conduct, to make an evaluative correction to the decision, in line with the essence of the institutions that make up criminal law, as well as with constitutionally guaranteed principles and guarantees.

The central point of this facet of the crisis is that, in addition to the obvious lack of a material basis for legitimacy, which requires proactive action when applying the law, as Cláudio Brandão points out⁴¹, there is also often a technical alienation of the law operator. This alienation, when combined with the first political aspect, constitutes a real contradiction, revealing the complexity and challenges faced in contemporary criminal law.

In the context of this analysis, the phenomenon in question unfolds in multiple facets within the framework of a given legal system. One of these facets, one of relevance, is the one that culminates in the configuration of criminal types that mirror a 'perpetrator's criminal law'. In this scenario, the legislator's technical deficiency in criminal lawmaking is reflected in the formulation of incriminations whose description, conveyed by linguistic signs, fails to specify a central conduct clearly and unequivocally, articulated by a verb. Instead, we see the prevalence of incriminations anchored in aspects of personal life or individual choices, shifting the axis of analysis from the action to the figure of the perpetrator. It should be noted that the

⁴⁰BRANDÃO 2012,20-21.

⁴¹BRANDÃO 2012,20 *et seq.*

effects of this problem are not only felt in terms of typicality, since personal censure is also based on the conceptual definition of the type in order to make judgments about the perpetrator of the conduct described in it.

It should be noted that the need for punishment is placed as the foundation of punishment because it represents, in the system of *criminal* dogmatics of crime theory, the *meeting point between criminal policy and the person who appears there as the perpetrator of the crime*. In effect, the functionalization of guilt is based on the criterion of the need for punishment, which transcends it in order to establish itself in the penal method as a vehicle for opening up criminal policy to personal censure.

General prevention and special prevention are the content of the need for punishment as an attributable outcome. This substance, to be imputed to the culpable author, is an imposition of the very normative political criminal criterion chosen by Roxin to harmonize the institutions aimed at personal censure in the penal method: it is precisely the theory of the ends of punishment. In this sense, the imputation judgment will be an attribution of meaning according to the normative criminal policy criterion.

It is worth emphasizing, in this area of manifestation of the phenomenon of the legislator's technical alienation, the special implication that such developments could have in relation to guarantee and humanitarian damage, since by emptying the precept of a conduct conceptually defined as the crime itself, an obstacle is created for the incidence of the penal institutions themselves and the consequent possibility of excluding an illegitimate penalty, considering that all the categories of the penal method were created and developed as a result of this action.

Roxin's proposal is characterized by a concept of criminal policy that already integrates fundamental rights and the principles of a social and democratic state of law into its base, as an elementary and inseparable presupposition. It follows logically, therefore, that the correct conformation of the interpretation of criminal institutions that criminal policy makes when

directing the attribution of dogmatic institutions to their respective objects will also be carried by the aforementioned fundamental rights and the principles of a Social and Democratic State of Law. The German author himself tries to develop various groups of cases in which, based on the content of the Constitution, he supported the possibility of subjective imputation to exclude liability, due to the lack of need for punishment. He did so, for example, in relation to crimes of conscientious objection.

It should be noted that the previous analysis of the meaning of personal self-determination in the context of the Social and Democratic State of Law revealed that it is a constitutionally guaranteed right. In Brazil, the directives of this paradigm of State are fully in force in the Constitution itself, and it is also a logical consequence that personal self-determination is part of the substance of the protection of the Brazilian Constitution, as a fundamental guarantee.

In fact, it follows from the above that the need for punishment is revealed as a fully legitimate functionalist imputation criterion for supporting the exclusion of the criminal responsibility of a possible culpable author in a specific case in relation to any incrimination whose threat of punishment falls on a life choice or state of mind, since self-determination will be a political criminal factor to engender an argument that will shape the interpretation of the institutions of the penal method in such a way as to legitimize a *contra legem* decision in which the incidence of the penalty as an expression of empty form is ruled out on the grounds of valuing the substance of the human person.

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