CULPABILITY AND ITS ROLE OF LIMITING THE STATE'S PUNISHING POWER

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Abstract
This article deals with the dogmatic structuring of criminal law from the perspective of criminal offense theory. Therefore, this paper analyses, firstly, the mandatory prosecution principle from its political and dogmatic analysis, to further examine culpability in criminal law, as a principle and in its role of limiting the State's power to punish.

Keywords
Culpability. Criminal dogmatic. State power to punish.

Summary

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1. INTRODUCTION

The principle of legality is a watershed in criminal law[2]. Before the structuring of this principle, criminal law was known for its arbitrariness. It was the reign of terror. However, after its institution, criminal law inaugurated, with the liberal period, a new phase, guided by human dignity.

The principle of legality emerges historically with the bourgeois revolution and expresses, in the legal-criminal field, the most important stage of the movement that took place in the direction of legal positivity and the publicization of criminal reaction.

If, on the one hand, the principle of legality gave a response to the current state power, that is, to the abuses of absolutism, on the other hand, it revealed the affirmation of a new security order for the individual towards the state power[3].

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[2] "We can divide Criminal Law into two major periods: the reign of terror and the liberal period. The reign of terror is the one in which there is no concern with the humanization of criminal repression, there is the use of excessive and unlimited violence, offering no guarantee to the human being in face of the State's right to punish. The second period, the liberal period, inaugurates the scientific phase of Criminal Law, it begins with the formulation of the Principle of Legality and, therefore, begins tardily." (BRANDÃO, Cláudio. Introdução ao direito penal [Introduction to criminal law]. Rio de Janeiro: Forense, 2002, p. 11).

[3] BATISTA, Nilo. Introdução crítica ao direito penal brasileiro [Critical introduction to Brazilian criminal law]. Rio de Janeiro: Revan, 2001, p. 65. According to Olaechea, "Criminal law is presented as an instrument that creates freedom and its function is supported by the principle of legality. Western criminal law is inconceivable without the principle of legality, since it symbolises the legal culture of the West and its framework of influence". (OLAECHEA, José Urquizo. Principio de legalidad: nuevos desafios. Modernas tendencias en la ciencia del derecho penal y en la criminología [Principle of legality: new challenges. Modern trends in the science of criminal law and criminology]. In: Congreso internacional Facultad de derecho de la UNED [International Congress of the Faculty of Law of the UNED], Madrid: Universidad Nacional a Distancia, 2000, p. 61).

The political significance and scope of the principle of legality go beyond the historical conditioning that produced it and represent the master key of any penal system that claims to be reasonable and fair.

Politically conceived by Cesare Beccaria, in 1764, in his work *On Crimes and Penalties*, the principle of legality plays an essential role in delimiting the actions of magistrates and avoiding arbitrariness. According to Beccaria "(...) only laws can determine the penalties set for crimes, and this authority can only reside in the legislator (...)"[4].

Beccaria tried to dispel the arbitrariness of that time by stating that it was exclusively up to the legislator to formulate laws and that penalties could not exceed the limits set by them. Thus, the principle of legality, in addition to guaranteeing the possibility of citizens having prior knowledge of crimes and their respective penalties, also protects the individual before the state power, as they will not be subjected to criminal coercion other than that established by criminal law[5].

We emphasize, however, that it was not up to Beccaria to dogmatically formulate the principle of legality, but to Feuerbach, according to whom "all legal punishment within the State is the legal consequence, founded on the need to preserve the external rights, of a legal injury and of a law that condemns a sensible evil"[6]. From this assertion derive three principles that will guide all criminal dogmatics: *nulla poena sine lege* (in order to apply a punishment, there must be a criminal law beforehand); *nulla poena sine crimen* (punishment can only be applied to a criminal action); and *nullum*

[4] BECCARIA, Cesare. Dos delitos e das penas [On crimes and penalties]. São Paulo: RT, 1999, p. 30.

[5] BATISTA, Nilo. Introdução crítica ao direito penal brasileiro [Critical introduction to Brazilian criminal law]. Rio de Janeiro: Revan, 2001, p. 67.

[6] FEUERBACH, Anselm von. Tratado de derecho penal [Treatise on Criminal Law]. Buenos Aires: Hammurabi, 1989, p. 63.

crimen sine poena legali (the legally prescribed criminal action is conditioned by the legal punishment)[7].

The principle of legality was, therefore, an indispensable condition for the emergence of criminal dogmatics. It is the fundamental substrate on which all criminal dogmatics is based, because without criminal law there can be no crime, nor its legal counterpart, the punishment[8]. According to Welzel,

> Science exerted an influence on the shaping of criminal law in the 19th century. With Anselm v. Feuerbach, a supporter of Kant's criticism, criminal-legal science in the modern sense begins, characterized by a precise conceptualization and

[7] FEUERBACH, Anselm von. Tratado de derecho penal [Treatise on Criminal Law]. Buenos Aires: Hammurabi, 1989, p. 63. "Contrary to what is often disseminated, Feuerbach's works do not contain the broad formula *nullum crimen nulla poena sine lege*; there is, however, a linkage of the formulas *nulla poena sine lege*, *nullum crimen sine poena legali* and *nulla poena (legalis) sine crimine*". (BATISTA, Nilo. Introdução crítica ao direito penal brasileiro [Critical introduction to Brazilian criminal law]. Rio de Janeiro: Revan, 2001, p. 66).

[8] According to Cláudio Brandão, 'the principle of legality has already been described as a principle of principles, as the founding value of criminal law, which represents the first condition for the development of all the criminal dogmatics of this law. This statement in no way reflects any error. In fact, the principle of legality has a fundamental formal meaning for criminal dogmatics, but its material meaning is just as important. Indeed, it is from this dichotomy that all the other principles and institutions of criminal law derive, which is why it is rightly referred to as the 'principle of principles', as without it criminal dogmatics could not have the contours it has today." (BRANDÃO, Cláudio. Tipicidade penal: dos elementos da dogmatics ao giro conceptitual do método entimemático [Penal definition of crimes: from the elements of dogmatics to the conceptual turn of the enthymematic method]. Coimbra: Almedina, 2012, p. 147-148).

> clear systematics in relation to the object (Lehrbuch, 1801).[9]

Accordingly, Santiago Mir Puig points out that:

> Although modern German dogmatics probably did not begin definitively until Binding, as the fruit of the same positivism that would give rise in Italy to criminal-legal technicality, there is broad agreement in Germanic doctrine in considering Feuerbach the "founder (better: Neubegründer) of the science of German criminal law," as von Liszt wrote. From the appearance of his "Revision" and his Lehrbuch up to Binding's work, the doctrine already reached an important development "intensively and extensively". This was logical, since the ideological movement that gave birth throughout Europe to modern criminal science can be traced back, admittedly, to the Enlightenment, immediately through the work of Beccaria.[10]

In order to attribute legal certainty to the rising criminal dogmatics, the principle of *error vel ignorantia non excusat* was idealized as

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[9] WELZEL, Hans. Derecho penal alemán: parte general [German criminal law: general part]. Santiago: Editorial Juridica de Chile, 1997, p. 13. Likewise, "Feuerbach is often considered to be the founder of the modern science of criminal law, with the systematization of his Lehrbuch (1801) standing out above all as a model for later penal treatises". (MENDES, Paulo de Sousa. O torto intrinsecamente culposo como condição necessária da imputação da pena [The intrinsically culpable tort as a necessary condition for the imputation of the penalty]. Coimbra: Coimbra, 2007, p. 265).

[10] MIR PUIG, Santiago. Introducción a las bases del derecho penal [Introduction to the basics of criminal law]. Montevideo-Buenos Aires: BdeF, 2003, p.177.

absolute, because in the presence of few and clear criminal laws there would be no way for the agent to claim ignorance.

Beccaria, as early as 1764, when delimiting the political nature of the principle of legality, emphasized the need to elaborate clear and simple laws, when he said, in a true dialectical exercise: "Do you want to prevent crimes? Make it so that the laws are clear, simple, and that the whole force of the nation condenses in defending them, and that no part of the nation be employed in destroying them"[11].

However, modernity's political-penal project on crime prevention was never implemented. This is because it foresaw the need to enact few clear criminal laws, very differently from what we currently see today in the form of extremely complex and numerous criminal laws. On the matter, Beccaria pointed out that "Prohibiting a large number of different actions is not preventing crimes that may arise from them, but creating new ones; it is to define virtue and vice, conceptualized as eternal and immutable, at will"[12].

To rationalize the use of state violence, that is, to ward off barbarism and affirm civilization[13], the Germans developed criminal dogmatics in the 19th century, which is currently understood as argumentation based on criminal law and its constituent elements. In other words, criminal dogmatics is the method of studying criminal law[14], the theory that seeks to attribute scientificity to the study of criminal law. According to Willis Santiago Guerra Filho,

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11 BECCARIA, Cesare. Dos delitos e das penas [On crimes and penalties]. São Paulo: RT, 1999, p.129.

12 BECCARIA, Cesare. Dos delitos e das penas [On crimes and penalties]. São Paulo: RT, 1999, p.128.

13 CARVALHO, Salo de. Antimanual de criminologia [Antimanual of criminology]. São Paulo: Saraiva, 2013, p. 25-26.

14 BRANDÃO, Cláudio. Introdução ao direito penal [Introduction to criminal law]. Rio de Janeiro: Forense, 2008, p. 06.

> If talking about "theory" immediately refers to the pretension of making scientific studies - otherwise it would be more correct to talk about "doctrine" - calling a theory "legal" is a sign that it has to do with the science practiced by jurists, the so-called "legal dogmatics", that is, that the theory is directed towards the study of law as done by jurisprudence, in the sense of "science of law".[15]

Thus, in order to make the study of criminal law scientific and differentiate it from the study of other branches of knowledge, three theories of criminal dogmatics were developed: the theory of criminal law, of crime and of punishment. They are all inextricably linked, as we cannot conceive of the existence of a crime that is not provided for in a criminal law and for which there is no corresponding penalty[16].

The theory of crime makes criminal law scientific by representing a method that aims to establish a conceptual framework so that an action becomes a crime[17], nowadays understood as a conduct that is legally defined as a crime, illegal and culpable[18]. In a lecture given on

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[15] GUERRA FILHO. Willis Santiago. Processo constitucional e direitos fundamentais [Constitutional process and fundamental rights]. São Paulo: SRS, 2009, p. 32.

[16] BRANDÃO, Cláudio. Tipicidade penal: dos elementos da dogmática ao giro conceitual do método entimemático [Penal definition of crimes: from the elements of dogmatics to the conceptual turn of the enthymematic method]. Coimbra: Almedina, 2012, p. 26.

[17] BRANDÃO, Cláudio. Tipicidade penal: dos elementos da dogmática ao giro conceitual do método entimemático [Penal definition of crimes: from the elements of dogmatics to the conceptual turn of the enthymematic method]. Coimbra: Almedina, 2012, p. 26.

[18] According to Juarez Cirino dos Santos, 'the tripartite system of punishable fact, still dominant in contemporary dogmatics, defines crime an *action* that is defined as a crime by law, and that is also unlawful and culpable, a concept formed by a noun qualified by the attributes of adequacy to the legal model, contradiction to the prohibitive and permissive precepts and the reproach of culpability'. (SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 76)

September 23, 1971, at the Córdoba Criminal Law Institute, Welzel addressed the issue:

> In the spring of 1966 I gave several lectures in Japan and Korea on the development of German criminal dogmatics over the last hundred years. At those I explained that a hundred years earlier the distinctions we are working with today were ignored: until then, the fundamental concept of criminal law was "imputation". Later, this concept was abandoned: in 1867, Jhering developed the concept of "objective unlawfulness" and from it, around 1880, "subjective" fault was separated (especially in Franz von Liszt's treatise), while the concept of the definition of crimes was elaborated only in 1906 by Beling. In those lectures I said that "the division of the crime into three different degrees of judgment and evaluation, structured one above and after the other... provides a high degree of rationality and security in the application of the law" and "by differentiating the degrees of evaluation, it also makes a fair final result possible". Thus arose the new "classic" system of crime with its division (definition of the crime, unlawfulness and culpability).[19]

When a crime is defined as such, what comes into play is a judgment of the fact's conformity to the law. Unlawfulness, on the other hand, is a judgment of disvalue that qualifies the fact as contrary to the law.

[19] WELZEL, Hans. Estudios de filosofia, Del derecho y derecho penal [Studies in philosophy, law and criminal law]. Montevideo-Buenos Aires: BdeF, 2006, p. 50.

According to Welzel, unlawfulness is a relation between the action and the legal system that expresses the former's lack of conformity with the latter[20].

The definition of a crime, as well as unlawfulness, are value judgments that deal with the fact and shape what we call criminal wrongdoing. It is only with fault that the unlawful action becomes a crime.

In turn, fault is a judgment of personal disapproval made by the perpetrator who committed the criminal offense, since being able to behave in accordance with the law, they chose freely to act in a way that went against it[21].

Fault is a constraint on state intervention, as it places the individual at the center of criminal law. Although it is correct to say that criminal law is required to establish social security, it is also true that criminal law is responsible for ensuring individual protections[22].

1. THE ROLE OF FAULT IN MODERN CRIMINAL LAW

Fault, in its triple modern conception (principle of criminal law, element of the crime and basis of the penalty[23]) provides the individual

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[20] WELZEL, Hans. Direito penal: parte geral [Criminal law: general part]. Chile: Editorial Juridica de Chile, 1997, p.166.

[21] SAINZ CANTERO, José A. Lecciones de derecho penal: parte general, introducción [Lessons in criminal law: general part, introduction]. Tomo I. Barcelona: Bosch, 1981, p. 41-42.

[22] CADOPPI, Alberto; VENEZIANI, Paolo. Elementi di diritto penale: parte generale [Elements of criminal law: general part]. Padova: CEDAM, 2010, p. 10.

[23] It should be noted that "the relationship between culpability and punishment is a controversial subject that forms part of the theory of crime, where the structure and dogmatic functions of culpability, both in the economy of crime and in the justification of punishment, are thoroughly examined". (BATISTA, Nilo. Introdução crítica ao direito penal brasileiro [Critical introduction to Brazilian criminal law]. Rio de Janeiro: Revan, 2001, p.103). According to Fábio Machado, "as an alternative to overcoming this problem, part of the doctrine seeks to base subjective imputation on principles other than culpability, e.g. on the preventive needs of punishment. Or, to deny that culpability can serve as a constraint on the measure of punishment, so that the principle of proportionality can

with some restrictions on the application of the punishment, i.e. the intervention of state violence. As a result, we can see that fault is the reproach based on the perpetrator[24]. According to Welzel, "The theory of

operate instead." (MACHADO, Fábio Guedes de Paula. A culpabilidade no direito penal contemporâneo [Culpability in contemporary criminal law]. São Paulo: Quartier Latin, 2010, p. 24). However, Jorge de Figueiredo Dias is categorical in stating that "(...) all criminal law is a criminal law of fault and this is the presupposition and foundation of all punishment and its measure." (DIAS, Jorge de Figueiredo. O problema da consciência da ilicitude em direito penal [The problem of awareness of illegality in criminal law]. Coimbra: Coimbra, 2000, p.177). Juarez Cirino dos Santos, on the other hand, addresses the problem best when he deals with the ontological foundation of fault, namely free will, from the finalist epistemological assumption of action, in other words, from the pure normative conception of fault. According to Juarez Cirino dos Santos, "the material foundation of culpability (also called the ontological foundation of culpability) is defined by the subject's capacity for free decision - and here's the problem: the thesis of freedom of will in the concept of culpability is non-demonstrable. If criminal punishment presupposes culpability and if the reproach of culpability is based on an indemonstrable fact, then culpability cannot serve as the basis for punishment. For this reason, the judgement of culpability cannot be an ontological concept, which would describe a quality of the subject, but a normative concept, which attributes a quality to the subject. Today, the thesis of culpability as the basis of punishment has been replaced by the thesis of culpability as a restriction of the power to punish, with the exchange of a metaphysical function of legitimising punishment for a political function of guaranteeing individual freedom. This substitution does not represent a simple change in terminology, but a change of sign in the concept of culpability, with relevant political-criminal consequences: culpability as the foundation of punishment legitimises the power of the state against the individual; culpability as a restriction of punishment guarantees the freedom of the citizen against the power of the state, because if there is no culpability there can be no punishment, nor state intervention for exclusively preventive purposes. The definition of culpability as a restriction on the power to punish contributes to redefining criminal dogmatics as a system of protections for the individual in the face of the state's punitive power, capable of excluding or reducing state intervention in the citizen's sphere of freedom." (SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 278-279).

[24] MAURACH, Reihart; ZIPF, Heinz. Derecho penal: parte general [German criminal law: general part]. Buenos Aires: Ástrea de Alfredo y Ricardo Depalma, 1994, vol. 1, p.582.

fault has to expose the assumptions by which the perpetrator is reproached for the unlawful conduct"[25].

As a principle, fault is established by the premise *nulla poena sine culpa*, which means "there is no penalty without fault". This Latin aphorism is the foundation of Enlightenment liberal thinking, which was based on the principle of legality and had as its logical consequence the removal of objective criminal liability, choosing subjective criminal liability as its structure.

Through the development of the principle of fault, which ruled out any form of objective liability in criminal law, fault gained autonomy in the theory of crime, ceasing to be analyzed only as a defense to objective liability and becoming an autonomous element in the structure of the crime[26].

Fault can also be understood as a basis for punishment[27]; it rules out any objective liability, in other words, liability for the outcome alone, and must be attached to the disapproval of the perpetrator's conduct in order for punishment to be applicable.

The analysis of fault, considered as a principle, an element of the crime and the basis of the sentence, is aimed at the protection of the individual, which is the true foundation of modern criminal law.

However, criminal law history has shown that the individual was not always treated as the center of concern. As a consequence, the

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25 WELZEL, Hans. Direito penal: parte geral [Criminal law: general part]. Chile: Editorial Juridica de Chile, 1997, p.166.

26 MACHADO, Fábio Guedes de Paula. A culpabilidade no direito penal contemporâneo [Culpability in contemporary criminal law]. São Paulo: Quartier Latin, 2010, p. 23.

27 To this effect, Karl Binding reports that: 'According to the current legal conviction, culpability as a faulty action is not only an unavoidable prerequisite, but also the legal basis for punishment. The principle 'no culpability, no punishment' reigns *de lege lata*, without any limitation whatsoever". (BINDING, Karl. La culpabilidad en derecho penal [Culpability under criminal law]. Montevideo-Buenos Aires: BdeF, 2009, p.05).

treatment of fault has varied over the course of time until its dogmatic structuring in the 19th century by the Germans.

In the 20th century, several theories were developed regarding the concept of fault. In Brazil, the institute also gained prominence in criminal law.

The first part of article 21 of the current Brazilian Penal Code, however, states that "ignorance of the law is not excusable." Now, if the judgment of fault is one of personal reproach, how can we justify a premise that applies generally and abstractly to all individuals, without verifying, in the specific case, whether the actor knew the criminal law?

This presumption could never exist in a criminal law that claims to be democratic. The Brazilian Penal Code only stipulates that being ignorant of the law is a cause for reducing the penalty (article 65, item II).

The premise *ignorantia legis neminem excusat*, despite having been established, especially in the codifications of Latin countries, as an untouchable principle of modern law, can no longer be upheld in the wake of legislative pluralism and the highly technical nature of criminal law. The complex problems raised by the interpretation and application of laws, even for jurists, make it utterly impossible today to say that everyone should know the law[28].

As we have discussed, the first part of article 21 of the Brazilian Penal Code addresses a principle of legislative policy, which envisages the absolute knowledge of the law by all citizens. Certainly, a rule of this nature cannot prosper in the context of a criminal law of fault, which is based on the analysis of the individual, because, according to the wording, it is presumed that everyone knows the criminal law when, in fact, not even the jurists[29] do. As stated by Eugenio Raúl Zaffaroni,

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[28] DIAS, Jorge de Figueiredo. O problema da consciência da ilicitude em direito penal [The problem of awareness of illegality in criminal law]. Coimbra: Coimbra, 2000, p. 53-57.

[29] We have chosen to use the term "jurist" in order to move away from the commonly used expression "operators of the law". An interesting criticism of the term "operators of the

> The principle of culpability and its violation by the *error juris nocet* rule manifest the dialectic between the rule of law and the police state in the theory of error. In favor of the *error juris nocet* rule, it was argued that criminal prohibitions were obvious to all. This is not sustainable in the face of current criminal legislation, which is no longer a limited catalog of conducts more or less known to all, but a motley collection of provisions without transparency. From the old enlightenment illusion of a criminal law so clear that anyone could know it, we have moved on to a situation in which the law is known to almost no one and even those who interpret it technically have great difficulty in doing so.[30]

In addition to the large number of laws in force in Brazil, we should also highlight the complexity of many of them, which makes them even more difficult to understand.

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law" comes from Felipe Martins Pinto, who points out the following in footnote number ten: "The word was used in allusion to the phrase operator, insofar as it has the same radical and conveys for the actor the idea of a 'techno-bureaucrat' of the Law, blunted and domesticated." (PINTO, Felipe Martins. O princípio da presunção de inocência e a execução provisória da pena privativa de liberdade [The principle of the presumption of innocence and the provisional execution of custodial sentences]. In: PINTO, Felipe Martins; MARCHI JÚNIOR, Antônio de Padova. Execução penal: constatações, críticas, alternativas e utopias [Criminal enforcement: findings, criticisms, alternatives and utopias]. Curitiba: Juruá, 2008, p. 81)

[30] ZAFFARONI, Raúl Eugenio; SLOKAR, Alejandro; e ALAGIA, Alejandro. Manual de derecho penal: parte general [Criminal Law Manual: General Part]. Buenos Aires: Editar, 2006, 567-568.

Furthermore, the requirement of a prior law is intended to make citizens aware of and understand the illicit nature of the criminal action defined as crime. The principle of fault, a necessary consequence of legality, prevents the state's punitive power from acting when the citizen does not know or understand the criminal law[31].

2. FAULT AS A RESTRICTION ON THE STATE'S POWER TO PUNISH

The material foundation of fault is structured on the basis of the subject's ability to make a free decision. Given the impossibility of demonstrating free will, there is no way of attributing to fault the characteristic of the foundation of punishment, but rather that of imposing restrictions on the state's power to punish.

The main theories that define the material concept of fault are: 1) the theory of the ability to act differently (by Hans Welzel); 2) the theory of the reproachful or defective legal attitude (by Jescheck and Wessels); 3) the theory of responsibility for one's own character (whose deterministic foundations go back to Schopenhauer); 4) the theory of the domain of legal motivation (by Günter Jakobs); 5) the theory of normative directability (by Noll)[32].

The theory of the ability to act differently is the dominant one in German literature and jurisprudence, according to Juarez Cirino dos Santos, and it bases the reproach of fault on the ability attributed to the actor to have been able to direct their conduct in another way, in other words, the actor freely chose to carry out the criminal offence, an act defined as a crime and, therefore, unlawful, when they could have acted in

31 ZAFFARONI, Raúl Eugenio; SLOKAR, Alejandro; e ALAGIA, Alejandro. Manual de derecho penal: parte general [Criminal Law Manual: General Part]. Buenos Aires: Editar, 2006, p.567.

32 SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 279-282.

accordance with the law[33]. The theory of the ability to act differently is based on the unprovable hypothesis of freedom of will. According to Juarez Cirino dos Santos, the ability to act differently is attributed to an imaginary person placed in the place of the real subject.[34] As said by Hans Welzel:

> The reproach of culpability presupposes that the perpetrator could have motivated himself according to the norm, and not in an abstract meaning that some man instead of the perpetrator could have done it, rather that this concrete man in this situation could have designed a will in accordance with the norm. This reproach has two premises:
> 1. That the perpetrator is capable, given their psychic forces, of motivating themselves in accordance with the norm (the existential presuppositions of reproachability: "criminal capacity").
> 2. That they are in a position to motivate themselves in accordance with the norm by virtue of the possible understanding of the unlawfulness: the possibility of understanding the wrongfulness). Cf. Armin Kaufmann, Schuldfähigkeit und Verbotsirrtum (Schmidt-Festschr, p. 319).
> Precisely with regard to both of these problems, the discussion of whether and how the possibility of the establishment of a liable will in accordance

[33] SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 279.
[34] SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 280.

> with the norm is theoretically conceivable in general (the problem of free will) must be raised.[35]

The theory of the reproachful legal attitude, also known as the theory of the defective attitude, as well as the theory of the ability to act differently, bases the reprobation of fault on the hypothesis of freedom of will. It bases the character of fault reprobation on the free self-determination of a disapproved or defective behavior on the part of the actor when carrying out the wrongful act[36].

For Johannes Wessels, a supporter of the reproachful or defective legal attitude theory,

> *The object of the culpability censure is the defective position of the perpetrator with regard to the conduct requirements of the legal order,* manifested in the unlawful act.
> The internal authorization of the censure of culpability lies in the fact that the person is vested with free self-determination and is capable of *avoiding the legally prohibited* act by exerting their *legal conscience,* as soon as they have attained mental and moral maturity and as long as they are not incapable due to abnormal mental states, in the sense of paragraph 20, of

[35] WELZEL, Hans. Direito penal: parte geral [Criminal law: general part]. Chile: Editorial Juridica de Chile, 1997, p. 170.
[36] SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis: Conceito, 2012, p. 280.

> understanding the wrongfulness of the act or acting in accordance with this understanding.[37]

Hans-Heinrich Jescheck, who is also a proponent of the theory of the reproachful or defective legal attitude, states that:

> Culpability is a deficiency of the internal attitude towards the law worthy of reprobation expressed through an action defined as a crime, and hence unlawful. This deficiency can be present to a greater or lesser extent, so that the criterion for determining a higher or lower degree of the motives is provided by the formation of the will. Hence, culpability, like wrongfulness, is a concept that can be graded. The point of reference to which the various elements of the concept of culpability are directed, and from which the latter must be understood, lies in the disapproved deficiency of the internal behavior.[38]

The theory of liability for one's own character bases fault on the characteristics of the actor's personality, linking liability to the assumption of what the actors are[39].

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[37] WESSELS, Johannes. Direito penal: parte geral [Criminal law: general part]. Porto Alegre: Fabris, 1976, p. 84.

[38] JESCHECK, Hans-Heinrich, WEIGEND, Thomas. Tratado de derecho penal: parte general [Treatise on criminal law: general part]. Granada: Comares, 2002, p. 457.

[39] From the perspective of Juarez Cirino dos Santos, 'the laudable purpose of excluding the metaphysical basis of the judgement of reprobation does not avoid problems regarding the principle of culpability: firstly, culpability by character is culpability without fault; secondly, culpability by character seems to presuppose a Criminal Law with preventive purposes; thirdly, punishment with preventive purposes cancels out the political meaning of

The determinism of liability for one's own character violates the modern character of fault. Despite being an attempt to detach it from the metaphysical character of free will (the foundation of the theories of the ability to act differently and the reproachful legal attitude), the theory of liability for one's own character is related to the criminal law of the perpetrator, and not to a criminal law of the fact, as is the criminal law of fault.

Certainly, the criminal law of the actor has no place in a criminal law with democratic structures, in which the protection of individual rights is placed at the center of criminal law. Modern criminal law cannot support punishing an actor for who they are, but rather for what they have done. However, despite Brazil being a Democratic State of Law (Article 1 of the Brazilian Constitution of 1988), the Penal Code (Article 59) considers personality as a way of individualizing punishment, explicitly demonstrating the remnants of an actor's criminal law in our penal system.

Removing legal provisions such as article 59 of the Brazilian Penal Code means, above all, structuring criminal law along the lines of the constitutional text and basing it on a system of protections, typical of democratic countries such as Brazil.

The theory of fault as a defect of legal motivation bases this value judgement on the stabilization of society's normative expectations. For Jakobs:

> Since it is impossible to demonstrate that it is preferable from the individual's point of view to respect knowable social norms, it is up to each individual to provide themselves with the necessary motivation to respect the norm, that is, fidelity to

individual protection (restriction of the power to punish) attributed to the principle of culpability". (SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis: Conceito, 2012, p. 280-281).

> the legal system. What is called culpability is a fidelity deficit to the legal order.[40]

Finally, the theory of normative dirigibility bases the judgement of reprobation on normal determinability by means of motives, on the psychic state available to the appeal of the norm existing in psychically healthy adults or on the capacity to behave in accordance with the norm[41].

4. FINAL CONSIDERATIONS

The theory of crime was developed to provide a high degree of reasonability for the attribution of criminal liability and thus avoid arbitrariness. Therefore, the starting point for structuring criminal dogmatics was the principle of legality. It so happens that fault is the foundation of any criminal justice system that claims to be reasonable and fair, because as well as ruling out any kind of objective criminal liability, it is also the only element of the theory of crime that focuses on the actor of the act that is defined as a crime and unlawful.

Thus, while definition as a crime and unlawfulness are judgements of value that deal with the fact, fault is a judgement of value that deals with the actor of the fact. Fault, in turn, is a value judgement about the actor.

To understand fault is to recognize the boundaries of the state's power to punish, circumscribed, of course, by individual protections.

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[40] JAKOBS, Günther. El principio de la culpabilidad [The principle of culpability]. In: Anuario de derecho penal y ciencias penales [Yearbook of Criminal Law and Criminal Science], Madrid, Centro de publicaciones, Tomo XLV, Fasciculo I, p. 1051-1083, Enero/Abril, MCMXCII, p. 1083.

[41] SANTOS, Juarez Cirino dos. Direito penal: parte geral [Criminal law: general part]. Florianópolis, Conceito, 2012, p. 280.

Fault must currently be understood from an architectural and not mechanical conception, because all the elements that structure it, namely criminal capacity, the requirement of different behavior and awareness of illegality, are structured in such a way that one element cannot be conceived without the other. In other words, these elements are not mechanically conformed (juxtaposed), but architecturally. Furthermore, in our view, awareness of wrongdoing plays an important role within fault, as it is the crucial element for defining the structure of the others, which works as an amalgam in this conceptual architecture that is fault.

Fault is therefore a necessary consequence of legality, as it prevents the state's power to punish when the citizen lacks knowledge and understanding of the criminal law.

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