IMPUTATION AND JUDICIAL DECISION IN CRIMINAL MATTERS: THE CRISIS OF CRIMINAL GUARANTISM IN THE LIGHT OF THE "IN MALAM PARTEM" ANALOGY IN HOMOTRANSPHOBIA

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Abstract

The present research aims to understand the decision of ADO 26, which equated to Law 7716, which deals with the crime of racism, the crime of homotransphobia. Such ruling, issued by the STF in 2016, should be analyzed considering the theory of objective imputation and based on Aristotle's enthymeme, considering the rhetorical use of the arguments employed in the decision's reasoning. That is, the perfect form of argumentation, the syllogism, is here dispensed with in the face of judicial activism. From this perspective, this study aims to understand the judicial functioning of decisions that tend to serve a purpose that deviates from the main function of Criminal Law.

Keywords

Homotransphobia. Enthymeme. Judicial activism. Objective imputation. Principle of Legality.

Summary

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1 INTRODUCTION

Criminal law thinks and reasons through types. If, on the one hand, the determination of the subject matter of the prohibition, based on the linguistic signs that form the typical description, depends on a construction by the legislator, on the other hand, the application of the type to settle criminal disputes does not depend on it. In this sense, Legality and Literalness are not to be confused, as the letter of the law alone is not enough to decide the case submitted to the Judiciary. It is in the context of the criminal decision that imputation is particularly important. In fact, imputation distances legality from literality in criminal matters, since it represents the attribution of an axiological meaning to a given fact.

The dominant theory in penal science today, namely Functionalism, is "propitious ground" for unveiling the differentiation between legality and literality. This is because the method he proposes depends on an imputation, represented by a convergence between the penal institutions created by the legislator and the aims of the penalty, according to a criminal policy for the specific case. This imputation will represent the hyperbole of neo-Kantianism, (re)understanding the specific legal context of the case and, in many cases, removing the previous formal solution, abstractly indicated as the legislative choice, as can be exemplified in "objective imputation", where the risk criterion is an obstacle to causality, chosen by the legislator to attribute the realization of a result to the active subject of the crime, based on the aforementioned criminal policy of the specific case.

However, it is necessary to point out that this method was created based on a democratic criterion, the purpose of general positive prevention, which is part of the democratic rule of law. In a democratic political context, imputation must be a *pro libertatis* mechanism, i.e. it must not serve to violate the constitutional guarantee stemming from the Principle of Legality, which sees the law as a mechanism for protecting man from those with the power to punish (jus puniendi). It is therefore not the role of the Judiciary to use imputation to punish outside the linguistic limits of the type, which, when done, goes against the democratic rule of law.

It is therefore necessary, when making a criminal decision, to access the spirit of the law, and not place it on the margins of the sentence. The construction of the meaning of the legal norm, through imputation, in the Democratic State of Law, has a negative limit: the violence of the penalty cannot be applied outside the linguistic limits of the type. Thus, analogy "in malam partem" violates the penal method and, in the case of Brazil, a fundamental constitutional clause, which establishes: "there is no crime without a previous law defining it, nor is there a penalty without prior legal commination" (art. 5, XXXIX of the Federal Constitution of Brazil).

2. FOUNDATIONS OF IMPUTATION IN THE INTERPRETATION OF CRIMINAL NORMS: THE CRISIS OF OVERCOMING SYLLOGISM WITH RHETORIC.

A current characteristic of the crisis in the criminal justice system, which represents an aporia, is the distortion of the *last-resort* nature of criminal law. Indeed, the interpretation of criminal rules often leads

to this observation: what should be the last *ratio* is, in the solution of many concrete cases, the first measure for social control. This is what happened in the case that is the subject of this investigation: the application of analogy *in malam partem* to allow homophobia to be criminalized.

The center of gravity in interpreting the penal system is the type. Since the type describes conduct worthy of punishment, it could be argued that the method of applying legal types is syllogistic, in which the case is the minor premise, which should be framed, when consistent with the legal description, in the model of conduct prohibited by criminal law, embodied in that type, considered the major premise. The theory of knowledge proposed by Aristotle, however, denies the validity of this argument.

Aristotle defines the "syllogism", which is the ultimate logical argument, a perfect expression of reasoning, based on the framing of premises: the major premise contains the minor premise, so that no different conclusion can be drawn from this adequacy. For example, when you take the major premise: "every man is mortal", in the face of the minor premise: "Socrates is a man", the only true conclusion will be that Socrates is mortal. This is because between the first premise and the second premise there is an elliptical element (middle term): the substance of man. The Stagirite also tells us that when there is an argument, there is no syllogism since there is no middle term.

Thus, it should be emphasized that the perfect framing of premises arising from the syllogism is due to the *middle term,* which, as said, is an ellipsis. In the case of premises dependent on argumentation, however, because there is no middle term, there will be what Aristotle called an "entymeme".

The enthymeme, as a form of argumentation, differs from the syllogism. The inversion of premises is an enthymematic form of rhetoric. In criminal interpretation, the judge first knows the case (minor premise) and intuits the conclusion. In order to rhetorically support the intuited conclusion, he looks for a major premise (which can also be the type) to support his conclusion. In other words, the criminal type is, of course, an enthymeme, given that in order for there to be subsumption there must be a choice of meaning by those who apply it, in other words, rhetoric, in order for there to be an effective attribution of a fact to a result. This is, therefore, the most important logical reduction in criminal law, considering that it is the criminal type that is the means by which criminal responsibility is realized. In this sense, Cláudio Brandão teaches:

> "The enthymeme is defined as a rhetorical syllogism because in it one of the premises is implicit. That said, as one of the premises is not stated, the conclusion cannot be a logical consequence of the adequacy of the premises and to substantiate it, the use of rhetoric is required. Ferrater Mora proposes a classification for the enthymeme, *verbis*: "the enthymeme is an incomplete syllogism, because one of the premises is not expressed. If the major premise is missing, the enthymeme is called first order; if the minor premise is missing, it is called second order." It's

> important to note that, regardless of the classification (first-order or second-order enthymeme), there is actually no absence of premises. In fact, the premise exists, but it is elliptical, so it is constructed rhetorically, which is why the enthymeme is called a rhetorical syllogism. Hitchcock says that, by definition, if we have an overall view of the enthymeme, an elliptical premise cannot be a declarative argument of the said overall, because, since it is not indicated, it is absent from it. It is precisely from this observation that the need for rhetoric emerges: it makes it possible for what is not part of the set (the elliptical premise), because it is not declaratively indicated in the set, to be part of it through argumentation".[2]

The argument stemming from the major premise chosen in the enthymeme, in criminal cases, has the function of justifying the decision and persuading that the sentence is correct. The notion of persuasion has also led to the conclusion that the concept of truth has been problematized, since rhetoric does not apply the ontological criterion, but rather the notion of *doxa*, which gives the judge a leading role, since the elements of the case (minor premise) will be

[2] BRANDÃO 2012, 200

compared with major premises that contain concepts subject to axiological hermeneutics translated into the attribution of meanings (imputations).
This argument is reinforced by what Adeodato says:

> "This is why man is the measure of all things, which can be considered both good and bad, just and unjust, true and false. There is no clear separation between the logical logos of "reason" and the realms of opinion, perception or myth. This is the logos of rhetoric, one of the ways of persuasion"[3] .

This translates legal rhetoric into good ethics. Discourse, in this context, already presupposes three elements: who speaks, how they speak and what they speak about, taking into account the authority of those who speak and the degree of seduction of those who speak, both of which characterize persuasion.
The very notion of discourse and rhetoric as a method has already been unveiled by Gadamer, who, when studying human communication and hermeneutics, established that the transmission of the message by those who speak depends directly on those who receive it, in view of the pre-understandings (conclusion of the enthymeme that follows knowledge of the minor premise) that each person already has as a result of their own reality and life context, in

[3] ADEODATO 2017, 28

other words, words have meaning and significance. According to the author:

> "When the judge knows that he is legitimized to complement the law within the jurisdictional function and against the original meaning of a legal text, what he does is what happens in any form of understanding." [4]

3. THE MAJOR PREMISE OF ENTIMEMA AND IMPUTATION: THE OPENNESS OF THE INTERPRETATION OF CRIMINAL NORMS THROUGH THE ATTRIBUTION OF MEANING AND FUNCTIONALISM.

In criminal law, the concept of imputation is the attribution of an axiological meaning to the institutions of that system. It was Samuel Pufendorf who built the germ of criminal science from this concept. However, while it is common to say that the hyperbole of imputation was built through functionalism, one cannot overlook the fact that it permeated previous scientific theories.

It should also be noted here that imputation also represents an enthymematic choice mechanism, since the judge can use it to support his conclusion based on a rhetorical construction (major premise) that assigns meanings, where appropriate, consistent with the desired conclusion, using the existing normative framework.

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[4] GADAMER 1977, 414

Regarding the scientific trajectory of imputation, it is important to situate the currents using the Brazilian legal framework as a point of reference. The current analysis of criminal imputation is based on the theory of the equivalence of conditions, considering the causal nexus to be equivalent to the nexus of responsibility. This imputation plan is described in Article 13 of the Penal Code, which despite being an exemplary list, does not conceptualize the theory adopted in the Brazilian legal system. Thus, the theory of objective imputation was formulated based on the study of concrete cases that made it possible to analyze throughout history the construction of a model for interpreting the attribution of criminal responsibility to someone. In this sense, cases such as these portray the importance of this study, to understand, within the context of a Democratic State of Law, what the limits of the extent of punishability are.

To this end, it is necessary to understand the previous theories that gave rise to this study, such as Causalism. Thus, this theory cannot be fully applied, as its conditions of application are not sufficient to fully conceptualize the notion of the causal link. Likewise, adequate causality faces problems such as crimes qualified by the result, since the most suitable condition for producing a result cannot always be applied. Likewise, the generic suitability provided for in this theory to produce a typical result cannot be established as a mere analysis of the seriousness of the result, since in this case it would be necessary to assess its foreseeability. In both cases, there is still a problem of imputation.

In this sense, the Criterion of Posthumous Prognosis present in this theory is characterized by a third party who stands in the place of the agent at the time of the fact and can be divided into two types. The first, the ontological, deals with knowledge that changes the response, while the second, the nomological, deals with causal relationships that presuppose the social notions that a given subject has and which is variable. The problem with this criterion lies precisely in the fact that awareness of another fact can change and that there is no established criterion for defining this change.

Gradually, causality ceased to be the core of the crime, so that from Welzel onwards the discussion on objective imputation returns to be analyzed, although not completely, since the theory of action is studied from the beginning on a new methodological basis that now limits causality to the ontological terrain.

Following on from this, Neokantism, which was later used by Functionalism with certain differences, adopted the Theory of Legal Relevance to carry out criminal imputation, which defined that the values established by the system itself, that is, by the Law itself, underpin the attribution of criminal responsibility. In other words, the answer is given by an analysis of criminal law, of the *ratio legis*, as a function of the legislator. The legal good, therefore, should not only be analyzed by the criminal type, but by the elements of the crime and its purpose, thus initiating the correct interpretation, which has teleological analysis as its method. However, the criticism of this theory assumes that there are no expressly defined values, considering axiological relativism as a criterion. The evolution, however, is in the legal relevance of the action according to the result, i.e. the analysis is

no longer causal but normative. Bernd Schünemann said of these theories:

> "While naturalism dominated criminal law from the appearance of the first edition of VON LISZT's Treatise in 1881 for approximately two decades, just after the turn of the century a new phase of criminal-legal thinking began, during which the theoretical ingenuity of naturalism was revealed and the foundations for its improvement were laid." [5]

In other words, it is important to note that the analysis of objective imputation does not start directly from finalism, but from neo-Kantianism (Roxin) and the Hegelian philosophical foundation, preceded by Wetzel's theory of social adequacy. These changes occurred due to the historical context that Europe was going through, valuing the search for philosophy, and leaving the realm of description and entering the realm of understanding. Thus, objective imputation leaves the natural context of the action to enter the sense of the typical fact.

From this perspective, the paradigm shift that led to current Functionalism must necessarily understand and study the function of the penalty, after all, the requirements for its application depend

[5] SCHÜNEMANN 1991, 47

directly on the analysis of the elements of the crime. Therefore, the theory of criminal imputation adopts an objective point of view, which analyzes the norm concretized in judicial decisions that are different from the norm provided by law or doctrine. Thus, the normative content of a given decision is sought through objective criteria in view of the Risk Principle and its Corollaries.

To do this, we need to consider the reduction of risk; legally irrelevant risks; the increase in risk and the aim of protecting the rule. Furthermore, the fundamental bases of this theory depend on factors that still involve the analysis of risk. The creation of a legally disapproved risk depends on two factors. The first deals with the creation of a risk itself, considering it to be legally irrelevant and its reduction. The second deals with the legal disapproval of the risk, considering the permitted risk and the self-placement and hetero placement in consented danger. The realization of the legally disapproved risk in the result also deals with two factors. The first refers to the norm's aim of protection in view of the damage resulting from shock, late damage, and the subsequent behavior of third parties. The second refers to alternative behavior in accordance with the law, in view of the theory of Avoidability and the increase in risk.

Still about risk and putting the victim in danger, it is possible to give an example of a practical case that took place in Rotterdam, Germany, when in March 2001 Bernd Jürgen B. volunteered to have certain parts of his body cannibalized by Armin Meiwes.

It is important to point out that in a democratic state, the criminalization of risks in an exacerbated manner is not and should not be common, given that the legal system provides for the right and guarantee of individual freedom. Furthermore, the idea of not doing

something does not mean that it will be less risky, so the answer cannot be to indiscriminately criminalize risks either.

Thus, by measuring the methodological implications for the theory of crime of the theories analyzed, Causalism starts from the assumption that elements of the system are formed by empirical and describable facts, while Neokantism and Functionalism understand that it is a value or a purpose that will form a system.

Having analyzed the previous theories, it is necessary to delve deeper into the Theory of Objective Imputation, which cannot be understood without analyzing the rhetorical imputation of truth, words and letters. To this end, the search for this understanding must come even before the idea of imputation in the sense of applying the law, but in the sense of imputation that differentiates literality from legality. In relation to this reality in criminal law, Mir Puig said: "The linguistic meaning of the word 'imputation' is more appropriate for expressing a judgment of attribution made by man (even intersubjectively, that is, socially) than for reflecting something previously given." [6]

Functionalism allowed imputation to be constructed beyond the linguistic limits of the type, as a mechanism for excluding the solution envisaged by the legislator, based on the criminal policy of the specific case. Roxin, based on positive general prevention, increases the restrictions on the recognition of wrongdoing - using the criterion of risk - and the recognition of guilt - using the criterion of the need for punishment. It should be noted that here - in the cases of objective imputation (explained above) and subjective imputation now

[6] MIR PUIG 2003, 05

mentioned, the solution chosen was to increase the scope of freedom, with the consequent non-recognition of the crime. Therefore, imputation will be the criterion of the major emphatic premise.

4. ANALOGY AS AN ALTERNATIVE TO IMPUTATION.

Analogy is a process of integrating the law based on an argument of similarity. There are, therefore, countless contradictions arising from these gaps, and it should also be emphasized that many of the changes made to the wording of the law are made with the sole aim of providing society with a quick response to social justice, ignoring all the normative and legal elements necessary for the construction of a law.

Analogy can be a major premise chosen by the judge to solve a specific case. However, in criminal law there is a limitation to this process of integration. Punishing outside the law, by analogy, violates a fundamental guarantee of the Democratic Rule of Law. Jescheck says

> "The guarantee function of criminal law in its prohibition of analogy includes all the elements that determine the merits of the penalty and the legal consequence, i.e. the elements of the type of injustice and guilt, the personal causes of exclusion and annulment of

> the penalty, the objective conditions of the penalty and all sanctions." [7]

The gaps left by these changes are, once again, in the hands of the Judiciary, because the Legislative Branch has acted excessively or because it has omitted itself, thus favoring judicial activism and the abuse of certain rights and guarantees. Regarding the limitation of the Judiciary in the expansion of criminal conduct, we have that:

> "The judge is forbidden to impose a penalty on conduct other than that described by the type, even if they are very similar to it and there is therefore the same reason for punishing them."[8]

Respect for the Principle of Legality sometimes seems to give way to the unbridled punitivism that occurs at all levels of judgment, when we cannot have access to all the decisions in most cases, especially in situations where the figure of the law enforcer represents, from a social point of view, justice, and the state.

An example of this judicial activism to broaden criminal punishability can be seen in ADO 26, which dealt with cases of analogy by fitting, by means of a hermeneutic and rhetorical manoeuvre, the

[7] JESCHECK 1993, 121
[8] E. CURY 1975, 25

criminalization of homotransphobia into Law 7.716 of 1989, which deals with crimes of racism. The method used to criminalize this conduct was analogy, which can be considered illicit[9] .

Analogy *in malam partem in* this case once again expresses how there are not enough normative conditions to bar judicial activism. Analogy, in this sense, must be understood as a choice, and so we have: "The application of analogy abandons the scope demarcated by the legal precept, by submitting to the legal rule also certain precepts of life situated outside the said scope, because it is similar in meaning (parallel) with the fact taken into account by the legal precept." [10]

In this context, João Maurício Adeodato also teaches:

> "It should be emphasized that seeing human reality as a rhetorical phenomenon, a dominant account in whose constitution law in general and legal decision in particular have remarkable weight, does not imply defending that the decision-maker of the case is free from constraints and affirming judicial activism in

[9] It should be noted that it would be possible to use another hermeneutical resource to achieve the same end, other than analogy "in malam partem". The article 5 of the Federal Constitution establishes that human rights norms have immediate applicability, which allows, in theory, a recourse to those norms to achieve the protection of the legal good under analysis.

[10] R. MAURACH & HEINZ ZIPF 1994, 160

> the terms of following the - obviously own - "conscience". [11]

However, it is not necessary for this example to reach a Supreme Court decision, as is the case above. In a reality closer to a jury trial, and now talking directly about the notion of criminal imputation, the Kiss nightclub case demonstrates how literalness is not enough to apply the law. In this specific situation, but which encompasses several others, the denunciation of members of the band and the owners of the very establishment where the tragedy took place demonstrates how dangerous it is to use rhetoric only as a means of attributing a fact to someone without there being effective elements for this justification.

But even the tendency to use criminal law as a foundation and means to bring about social change is dangerous and finds similarities in other contexts, such as Nazi Germany. Therefore, the reflection brought about by the search for the spirit of the law must seek logical and objective criteria for doing so, in order to preserve the primary function of Criminal Law, which is to protect the individual against the State and its arbitrariness without dispensing with the questions regarding the study of the Theory of Crime and Penalty.

5. CONCLUSION

Thus, the method of applying law and criminal law is not syllogistic, but entymatic, since rhetoric is the means used to subsume the

[11] ADEODATO 2017, 35

concrete case to the norm, and the average term cannot be perceived in this realization. In this way, the major premises that the judge can choose from, and which can justify his decision outweigh the imputation in cases of lacuna with the use of analogy *in malam partem*. However, the Democratic Rule of Law limits analogy, since this type of gap-filling cannot occur when the defendant is prejudiced, and even more so when the punitive scope is extended.

The law, in its formal sense, is therefore not capable of becoming effective as a syllogism, considering the rhetoric present in the application of the rule. It can thus be seen that imputation, in the sense of assigning meaning to a norm, does not observe normative criteria, but rather the choice of the judge according to their pre-understandings. This can be seen in the case of the homophobia ruling as an analogy *in malam par*tem in a situation where there is a gap not only in the law, but also a social problem, which is limited by the Constitution itself.

In this context, the analogy *in malam partem* in homophobia is harmful to the defendant and violates the democratic rule of law. In this way, the model of types that limited the extent of punishment has been altered by the judiciary, in a way that threatens even consolidated principles, such as the principle of legality, provided for in the Federal Constitution. It is therefore necessary to rethink how and in what terms the extraction of the norm will be carried out, in order to understand the effects of rhetoric - entimema - on Brazilian legal certainty.

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