PENAL METHOD AND MADNESS: THE LEGAL IMPUTATION OF THE INSANE OFFENDER BASED ON THE ANALYSIS OF GUILT

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Abstract

This article is based on the exercise of *jus puniendi* exercised by the State against those not attributable to the practice of a typical offense. In this way, the history of ideas around the considered "crazy offender" will be outlined, with the object of research being the capacity for guilt as a condition for imputation and the imposition of a security measure as the criminal response given in the face of such a factual situation. . The methodology used is based on the hypothetical-deductive method with an emphasis on literature review. The present research is justified, given the importance of studying guilt and its location in the theory of crime and respective rationalization developments regarding the responsibility of the subject who is not attributable for mental illness. In the end, it is concluded that the study of guilt is of utmost importance in criminal dogmatics. Thus, based on the premise of the importance of studying guilt, there is an urgent need to restructure the institute of security measures in Brazil, through the rationalization of madness, with the consequent recognition of the responsibility of the unaccountable, through legal imputation, in the field of dogmatics, considering these subjects as subjects of rights.

Keywords

Guilt. Crazy offender. Criminal method. Security Measure.

Summary

1 INTRODUCTION

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Initially, the genesis of the topic presented in this research is rooted in criminal liability and the exercise of jus puniendi by the state on the body and spirit of those who commit a crime. However, we turn our eyes to those who are understood to be "insane offenders", that is, individuals who, at the time of the action or omission, were unable to understand the illicit nature of the fact, or act in accordance with that understanding, characterizing them as unimputable.

The main premise of the state's jus puniendi is the safeguarding of the legal good, especially in the dogmatic-penal branch, the epistemology of which comprises the essence of the coercive-sanctioning scope, being guided by strict legality and the taxative prescription of the law.

In this vein, the general theory of crime is structured around a judgment of disvalue that falls on a human fact or act and a judgment of disvalue made about the perpetrator of the fact. This first judgment is called antijuridicity and the second is called guilt, the latter being the focus of this research.

This study sought to present the history of ideas surrounding the mentally ill, more specifically, when they commit an act contrary to the law, consisting of typical, unlawful, non-culpable conduct - a criminal offense, with the object of research being the capacity for guilt as a condition for imputation and the imposition of a security measure as the criminal response to those who, although unaccountable, commit conduct that is typical and unlawful.

This research is therefore justified by the importance of the study of guilt and its allocation in the theory of crime, with its rationalizing consequences for the accountability of the subject who is incapable of punishment due to mental illness, protected by the application of the penal sanction of a security measure, of an indeterminate nature, based on the binomial guilt-periculosity, leading to a scenario of guilt as a reflection of a therapeutic illusion, as a way of justifying the state control apparatus and the rational pretext for the existence of *jus puniendi.*

Thus, the institute of the security measure in Brazil must be restructured, through a rationalization and humanization of madness, with the consequent recognition of the responsibility of the unaccountable, with a reasonable and proportional duration, through legal imputation, in the dogmatic-penal field, considering these subjects as subjects of rights.

It should be noted that there is no intention of exhausting the subject, but rather to contribute to studies on the penal method and imputability. To this end, the issue of legal imputation to the insane offender will first be outlined, based on an analysis of guilt. Subsequently, the criminal unimputability of the mentally ill, the security measure and its dogmatic-criminological intersections will be unraveled.

In terms of methodology, the research carried out belongs to the broad area of critical-methodology, and its methodological strand is legal-sociological. The reasoning developed was hypothetical-deductive

and the generic type of research adopted was legal-propositional.

2 LEGAL IMPUTATION AND ITS ASPECTS

Legal imputation[2] is made up of three levels: typicality, unlawfulness or antinormativity and guilt. However, it is worth remembering that these judgments form part of the unity that is imputation.

"You can only make a judgment of unlawfulness if the judgment of typicality is already perfect; you can only make a judgment of guilt if the judgment of typicality and unlawfulness is already perfect."[3] .

It has been pointed out that "it is generally accepted - leaving aside minor differences - that 'crime is human behavior that is typically unlawful and culpable', often adding the requirement that it be punishable"[4] . But when we talk about typicality, unlawfulness and guilt, we cannot make the mistake of considering each of these theoretical categories as dissociated judgments, because we are only talking about "levels of imputation"[5] . We can thus speak of a multi-phase theory of imputation[6] .

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[2] The term "imputation" is one of the most representative of the language in which the current legal theory of crime is expressed. MIR PUIG, 2003.
[3] BRANDÃO 2010, 130.
[4] MIR PUIG 2007, 115.
[5] BACIGALUPO 2005, 192.
[6] WESSELS 1976, 45.

Legal imputation is not exhausted in the judgment of typicality, and it is necessary to investigate the judgments of antijuridicity and guilt with which the analytical theory of crime is composed, adding in turn the requirement of punishability[7] .

The understanding of the unlawfulness of the act and the self-determination of conduct is called imputability by the criminal sciences. It should be noted that the concept of the elements of guilt is indispensable for understanding the very idea of guilt, since we believe that imputability is a presupposition, and not an element of guilt[8] .

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[7] MIR PUIG 2007, 115.

[8] Regarding the constitutive elements of culpability in finalism, Callegari states the following: "Concretely, the content of culpability is constituted in finalism by the following elements: 1) Imputability, under this denomination, includes those requirements that refer to the psychic maturity and capacity of the subject to motivate himself (age, mental illness). Clearly, if you don't have sufficient mental faculties to be able to motivate yourself rationally, there can be no culpability. 2) The possibility of knowledge of antijuridicity or potential awareness of unlawfulness. Dolo passes to the unjust only as "natural dolo", because it does not include knowledge of the prohibition (which in causalism belongs to dolo as *dolus malus*). The examination of this aspect is left to culpability, but not with the psychological content of actual knowledge, but as a normatively determinable possibility of said knowledge. It must be proven whether the subject could have known the prohibition of the fact, as a condition for being able to adapt the conduct to the norm. The lack of this possibility does not exclude intent, but excludes culpability (invincible error of prohibition). 3) Requirement of different conduct. It is required that in the circumstances of the fact the subject had the possibility of carrying out other conduct, in accordance with the legal system. The conduct is only

From this perspective, we seek to define the concept of legal imputation within the scope of guilt, as the third element of the analytical theory of crime, substantially in relation to its first requirement, that is, criminal imputability.

A priori, it is necessary to ascertain the imputability of the subject responsible for committing the typical offense before entering the imputation judgment, since the capacity for guilt is investigated for the condition of imputation itself.

It is understood that typicity and antijuridicity are value judgments that deal with the fact and shape what is called criminal wrongdoing, so that it is only with guilt that the antijuridic action becomes a crime[9].

In fact, historically, the concept of imputability[10] arose as a limitation on the criminal responsibility of people who had minimal mental faculties to participate fully in the life of social relations[11] .

reprehensible when, although the subject could have behaved differently in accordance with the legal system, he does so in a way that is prohibited"(CALLEGARI 2009, 178-179).

[9] FLORÊNCIO FILHO 2017.

[10] The capacity for guilt or imputability refers to the possibility of the perpetrator being aware of the nature of the act they are carrying out and its legal consequences (FLORÊNCIO FILHO 2017).

[11] CONDE 1988, 137.

Regarding the distinction between imputability and capacity for guilt, Tavares points out that from a pragmatic perspective, which is of interest to the theory of investigation, its analysis is even procedurally anticipated, guiding the other phases. In other words, it is a question of distinguishing an a priori excluded capacity for guilt from an only a posteriori excluded capacity for guilt[12] .

In this respect, although dogmatics analytically situates this issue at the end of the judgment on the offense, from a pragmatic point of view pertinent to the discussion here, it is inevitable to start by considering the subject responsible for the illicit act, because in the case of those who cannot be imputed, imputation takes different paths

It is worth pointing out that the conduct that is important for imputation does not only have a natural sense in its physical expression, because in addition to involving omission, it also has a final and social sense, but above all a legal sense, qualified by the ends of the law. As a starting point, let's take Welzel's original conception of the "fundamental structure of action" as the center of the discussion, since it emphasizes the purpose of action, investigating what causal knowledge man has about his conduct, the direction of which can be consciously directed towards an end[13] .

[12] TAVARES 2018, 456.
[13] WEZEL 2001, 187.

This conception can be discussed in various aspects, above all regarding the claim of an ontological structure prior to law, as well as its foundations based on the idea of a rational subject, freedom of action and consciousness. In this last regard, it is necessary to consider free and conscious action, since those who do not possess it are excluded as subjects.

As such, Wessels explains that "action in the sense of criminal law is, according to this construction represented here, socially relevant conduct, dominated or controllable by human will"[14] . But that's not all, rather than being considered in its individuality or sociality, human conduct has a specifically legal meaning for the law which, although it does not dispense with prior questioning about individual or collective empirical elements, has its meaning in the agent's capacity as a person who deliberates about committing the illicit act in a communicative relationship with others who assimilate each behavior as something significant to all[15] .

The conceptual turn in the theory of crime came about with Hans Welzel's finalism, responsible for restructuring the elements contained in typicality and guilt, with the displacement of intent to typicality, and the explanation of guilt based on pure normative theory[16] .

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[14] WESSELS 1976, 22.
[15] TAVARES 2018, 456.
[16] FLORÊNCIO FILHO 2017.

In modern times, the understanding of guilt is based on the normative theory developed from Welzel's finalism, whose dogmatic analysis took care to separate the psychological elements from the normative ones. As such, this theory stopped considering the psychological elements - intent and guilt - to consider the normative elements, namely imputability, potential knowledge of unlawfulness and the requirement for different conduct. Therefore, the reproachability and application of the criminal reprimand to the agent will presuppose consideration of these elements.

3 CRIMINAL IMPUTABILITY AND GUILT

According to Brazilian doctrine, crime is made up of a tripartite form - a typical, illicit and culpable fact - according to the analytical theory of crime, which is based on the answer to the questions of whether human conduct is illicit and whether the perpetrator is culpable[17] . In this vein, guilt[18] , as one of the elements present in the analytical theory of crime, aims to analyze the objective and subjective imputation of the perpetrator in relation to the wrong.

[17] ZAFFARONI; PIERANGELI 2001, 388-392.

[18] For Maurach, culpability is "the reproachability of an antijuridically disapproved act or omission, or, more briefly, it is a reproach based on the author" (MAURACH 1962).

In addition, it should be noted that guilt[19] has two developments - the possibility of guilt by the fact or guilt of the perpetrator - the first being based on the conduct committed by the perpetrator, disregarding the perpetrator's behavior prior to committing the conduct, while the second considers the social behavior of the perpetrator before and after the fact committed by the perpetrator. The first is based on the idea of the perpetrator's free will and has retributive implications with greater guarantees, while the second is based on the idea of special prevention, which takes into account the perpetrator's personality and dangerousness.

In this way, it is pointed out that those who are incapable due to mental illness suffer a judgment of imputation for the criminal offense committed, however, due to the dangerousness-guilt binomial, their capacity for guilt is removed, and a penal sanction of a kind (security measure) is applied to them, unlike penalties, which have a retributive character. Regarding criminal imputability:

Guilt is based on the fact that the perpetrator of the criminal offense, of the type of wrongdoing, of the typical and unlawful act, has the minimum psychic and physical faculties required to be able to be motivated in their actions by the normative precepts. The set of these minimum faculties required to consider an author culpable for having

[19] To impute the crime in its entirety means to "blame" someone and also the perpetrator (if to impute is to attribute something to someone, when what is imputed is something ethically or legally devaluable, to impute is to blame them). MIR PUIG 2003.

committed a typical and unlawful act is called imputability or, more modernly, the capacity for guilt. [20]

As a consequence of the deterministic findings, Zaffaroni and Pierangeli warn of the risk of a criminal law based on dangerousness when they say that "within this thinking, guilt will be an entelechy, the reflection of an illusion". [...] This will thus be the criminal law of dangerousness, for which the penalty will have dangerousness as its object (and as its only limit)"[21] .

Therefore, in a guarantor system, the category of dangerousness has no place, and guilt must be understood as a guarantee in criminal law, a guarantee that opposes positivist perversions aimed at giving autonomous criminal relevance to the personality of the accused[22] .

Under the aegis of finalism, criminal imputability is understood to be the ability to impute guilt to those who carry out a typical and unlawful action, contrary to the law, presupposing the individual's deliberate will, and is therefore liable to sanction, with the action considered to be the exercise of the final, second activity. In this way, the will is part of the concept of crime, since it is considered a factor that triggers the final action, as well as being pre-eminent for the characterization of the illicit act, given that in its absence, there is no

[20] CONDE 1988.
[21] ZAFFARONI; PIERANGELI 2013, 110-11.
[22] FERRAJOLI 2002.

conduct, and without conduct, one of the structural elements of the structure of the crime is impaired, and therefore the crime itself does not occur[23] .

Unimputability, characterized by the exclusion of guilt, exempts the perpetrator from criminal sanction, in the form of a penalty, but does not exempt them from a security measure. It follows, therefore, that the exclusion of guilt must be preceded by the certainty of imputability, assessed by an expert during the criminal proceedings, or even during the investigation. In this sense:

We must therefore abandon the concept of injustice and guilt as two separate aspects of the crime, which should only be examined successively. For this reason, it is preferable not to reserve the term 'fault' for individual or personal imputation, which in reality is only the third element of imputation and therefore of fault necessary to complete the process that begins with the verification of non-typical result attributable to typical conduct, attributable in turn to fraud or typical fault. This does not mean that the concept of imputation should end up absorbing all the elements of the crime.[24]

Thus, it can be concluded that people with mental illness are legally charged for the disvalue of their conduct, which is typical and illicit,

[23] The linguistic meaning of the word "imputation" is more appropriate to express a judgment of attribution made by man (even intersubjectively, that is, socially) than to reflect something previously given (MIR PUIG 2003).
[24] MIR PUIG 2003.

culminating in the commission of a criminal offense, since it is not culpable. Thus, the criminal consequence applied to these people is a criminal sanction, of a preventive and therapeutic nature, of an indeterminate nature, as a form of state response and reproachability to the conduct committed.

However, the institute of the security measure, as it is implemented in Brazil, is inconsistent with the constitutional framework, especially with the Democratic State of Law itself and its constitutional principles, especially with regard to the systematic violation of human rights and, above all, with regard to its relative indeterminacy of the maximum term, appearing as an affront to the constitutional provision that prohibits life sentences (art. 5, item XLVII, *b*, CF/88)[25] .

Since the power of the State is limited and regulated, the security measure can only be applied within the boundaries previously defined by criminal legislation, and cannot be totally indeterminate in its duration, under penalty of perpetual intervention. If the law does not set a maximum limit, it is the interpreter who has the obligation to do so."[26] .

From now on, even if the perpetuity of the individual's dangerousness is attested to, it should be noted that in Brazil, under the aegis of criminal guarantorism, perpetual sentences are forbidden. Since the penalty is a type of criminal sanction, just like the security measure, it will not last indefinitely.

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[25] BRAZIL, 1988 [2023a].

[26] ZAFFARONI and PIERANGELI, 2004 *apud* GRECO 2007, 681.

4 UNIMPUTABILITY DUE TO MENTAL ILLNESS: THE SECURITY MEASURE AND ITS DOGMATIC-CRIMINOLOGICAL INTERSECTIONS

The inimputable is currently understood to be not criminally responsible for their conduct, but is held accountable for that action, even though it is typical and unlawful (criminal wrongdoing[27]).

Unable to benefit from the absence of conduct or of typicality and antijuridicity, the incapacitated person is left with the exclusion of guilt through imputability, which characterizes the formation of criminal wrongdoing, one of the preconditions for the application of the security measure.

The notion of dangerousness, in theory, stigmatizes the agent who commits the crime, but on the other hand, when properly assessed, it serves as a protective barrier for the rest of society, as well as a social benefit for the individual with a mental disorder, who most of the time does not have the economic resources to pay for specialized medical treatment.

Harshly criticized by Foucault in his work "The Abnormal", this power to normalize the abnormal, as an instance of control, does not concern the criminal subject or the sick individual, which makes it an important theoretical-political problem. In short, "what is most serious is that, in reality, what the psychiatrist is proposing at that moment is not the explanation of the crime: in reality, what has to be

punished is the thing itself, and it is on it that the judicial apparatus has to fall"[28] .

It is worth mentioning that the institute of the security measure, as a criminal sanction, embodied in a criminal policy based on special prevention - curative treatment, acts as a legitimate mechanism, applied to those who have committed typical and unlawful conduct, not suffering a counterpart from the State, as a penalty, because it has a cause of exculpation, that is, exclusion of criminal imputability.

It should be noted that criminal legislation is more rigorous and revanchist when it comes to the inimputable, since they are subjected to coercion and restriction of freedom for an indeterminate period. In addition to this indeterminacy, it should be emphasized that the subject of criminal law has several benefits safeguarded in the jurisdictional framework, such as regime progression, the possibility of remission, detention, and other rights.

In this respect, applying the security measure for an indefinite period or even releasing those who are subjected to it from treatment because the maximum period of internment has been reached does not seem to solve the problem.

For Ferrajoli, what is most serious is the lack of definitive determination by the enforcement authorities, nor the duration of security measures. Due to the absence of any guarantees of certainty about when they will end, the legal system is at its most vexatious

[28] FOUCAULT 1975.

when it comes to personal security measures, sentencing the individual with the illness to a sentence akin to life imprisonment[29] .

Under the terms of art. 97, §§ 1 and 2 of the Brazilian Penal Code (1940), the security measure must last until the agent's dangerousness is confirmed by medical expertise[30] . Based on this information, it is necessary to analyze dangerousness as a condition for the release of the interned subject, avoiding a return to the premises of Cesare Lombroso's positivist criminology. In other words, getting rid of social stigmas that establish criminal preconditions for the population group being researched.

In the words of Lombroso, in his work "The Delinquent Man"[31] , the abundance of the morally insane in prisons is finally an indirect proof of the identity of criminality with moral dementia, together with the presence of all its systems in the course of many mental illnesses. Such a conception is associated with the idea of a pathological being, different and sick, who is predestined to crime and, consequently, to the need for treatment"[32] .

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[29] FERRAJOLI 2002.

[30] BRAZIL 1940.

[31] A concept given by the psychiatrist and criminologist Cesare Lombroso in his work "The Delinquent Man", who defined the pericidal agent as: the criminal would be like a variety of the human species defined by the constant presence of certain anatomical and physiopsychological characteristics, a series of stigmata which, on the surface of his body, expressed the dispositions of his soul, as indicators of an original ferocity and not properly of an organic anomaly.

[32] LOMBROSO 2010, 195.

The seriousness of this judgment can be seen in the fact that the security measure is not linked to the seriousness of the crime, but rather to the dangerousness of the perpetrator. For this reason, it is essential to observe the principles of guarantee, such as adequacy, reasonableness, and proportionality, in order to achieve the most appropriate treatment for the incompetent, moving away from the social and personal values of health professionals, according to the STJ's understanding in newsletter no. 662[33] .

From now on, even if the perpetuity of the individual's dangerousness is attested, it should be noted that in Brazil, under the aegis of criminal guarantorism, perpetual sentences are forbidden. Since the penalty is a type of criminal sanction, just like the security measure, it will not last indefinitely.

In this sense, with the publication of Law No. 10.216 of 2001, the maximum term of the security measure will be 30 years. The Federal Supreme Court (STF) also takes the same view, establishing the same time limit in an analogous interpretation in relation to the imputable, without distinction according to the crime committed. It should be noted that after Law 13.964, of December 24, 2019, the maximum term is 40 years.

However, when the STJ issued Precedent No. 527, it established that the maximum penalty for the crime should not be exceeded. Due to the lack of a concrete decision on the subject, there are still decisions

[33] See fact sheet. BRAZIL 2020.

by Brazilian courts that link perpetuity only to a positive report indicating the cessation of dangerousness[34] .

It is in this sense that the STJ[35] , under the aegis of the constitutional principles of legality, isonomy, proportionality between the criminal conduct and the sanction applied, as well as in line with human rights and the entire constitutional guarantee corollary, in one of its judgments, suggested the search for the civil interdiction of the individual under security measure when the term of this is over.

Thus, the rules that regulate the security measure, in addition to constituting an arbitrary power to punish, exclude the unaccountable from society and return to the idea of social cleansing present in the Middle Ages, as well as referring to criminological positivism and the classical schools of Criminal Law, since they do not consider the insane offender as responsible and recipient of the penal apparatus, and manipulate their treatment, masquerading as a penal sanction with therapeutic purposes.

Therefore, it can be concluded that adequate and humane means must be offered for the psychiatric treatment of the incapable offender in order to provide adequate and proportional treatment, with the

[34] The duration of the security measure must not exceed the maximum limit of the abstract penalty for the offense committed. (THIRD SECTION, judged on 05/13/2015, DJe 05/18/2015)

[35] See judgments: HC 130.162/SP, Rel. Minister MARIA THEREZA DE ASSIS MOURA, SEXTH COURT, judged on 08/02/2012, DJe 08/15/2012 and HC 135.271/SP. 3rd Panel. Rel. Minister SIDNEI BENETI, THIRD COURT, judged on 17/12/2013, DJe 04/02/2014 (BRASIL, 2012).

necessary duration for the incapable offender, in order to avoid a perpetuity of the penal sanction, as well as to legitimize a reasonable penal power, of ultima ratio, adequate and suitable for the incapable offender.

5.CONCLUSION

In fact, legal imputation as a state response in the dogmatic penal field, preceded by the fragmentary theoretical analyses of modernity, presents argumentative schemes to justify legal-penal intervention. Thus, there is a difficulty in situating and establishing a concept of guilt as a presupposition for an analysis of legal imputation to the agent, from an individual perspective.

In this respect, the discussion of guilt in the analytical structure of crime is fundamental to making imputation judgments - objective and subjective - about conduct committed by an agent, since the analysis of the subject's capacity for guilt presupposes and compromises all other imputation judgments.

From this perspective, the attribution of responsibility for the commission of an illicit act operates in the same way, e.g. by evaluating, within a tripartite analysis, the occurrence of the typical, unlawful, and culpable fact, namely in the light of a value judgment on the subjective element of the conduct of the person held responsible for the result contrary to the law.

In a true democratic state governed by the rule of law, the axiological field must not be separated from the dogmatic one to achieve a certain and fair definition of imputation.

The *jus puniendi*, however, requires justifications to give it legitimacy so that the population will agree to submit to this repressive and purifying penal apparatus. The institute of the security measure made it possible to reduce the intelligible terms of crime without reason, into an apparent and non-punishable motive, transforming it into an act of positive pathological mechanism, the main piece of knowledge-power in psychiatry and the exercise of the power to punish in law.
In this sense, the fragile relationship between madness and dangerousness leads to the security measure being enforced in a way that justifies the exercise of *jus puniendi*.
This work is in line with the above understanding, as it explains that one should not aim for the penalty or the security measure, but rather seek the most convenient alternative that allows the criminal sanction to fulfill its function.

Therefore, based on the judgment of guilt, with the aim of restricting the *jus puniendi* and curbing the negative legal context provided by medical-legal work, from an institutionalizing and carceral-centric perspective of correctional institutions, the consideration of the abnormal as a person subject to rights, responsible and recipient of criminal law, who should be judged by the acts performed and not by the judgment of the possibility of the acts to be performed, emerges as a possibility .

In addition, in order to guarantee respect for the principle of prohibiting the perpetuity of sentences, the judiciary should join forces with the Public Prosecutor's Office so that, when the time limit has been exceeded and the state's intervention in the criminal sphere has ceased, if the patient's dangerousness is still confirmed, the civil

interdiction process can be sought to determine the compulsory psychiatric hospitalization of the mentally ill person, provided that it is strictly necessary for the protection of the sanctioned person or society.

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