CORRUPTION BETWEEN PRIVATE INDIVIDUALS IN BRAZIL

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Abstract

Criminal law involves the removal of fundamental rights and is the most onerous and last means of exercising social control. In this way, this research seeks to analyze whether there is a need to typify corruption in the private sphere, as provided for in the Draft New Brazilian Penal Code, treating it, for the time being, as an atypical fact in Brazilian criminal legislation. Thus, the scope of the research is delimited, conceptualizing private corruption, and taking the Theory of Objective Imputation as a backdrop, as well as analyzing the criminalization of conduct from the perspective of basic criminal principles, such as legality.

Keywords

Corruption between private. Palermo Convention. New Brazilian Penal Code

Summary

1. INTRODUCTION

This paper aims to study the criminalization of corruption between private individuals, as determined by the Palermo Convention, in the Brazilian penal system.

Corruption between private individuals or private corruption is *prima facie* the practice of the verbs "give", "promise" and even "accept" and "receive" an undue advantage in a private setting. By way of example, it involves the conduct of an agent who, to succeed in a certain business deal, offers an advantage to the person responsible for accepting or handling the deal.

From another perspective, it can also be conferred on the agent who, perceiving strong competitive interests, requests or receives undue advantages to favor a certain legal entity.

Such conduct violates competition issues such as free competition, as it allows the entity with the greatest economic power to obtain private advantages more easily, a situation that creates an economic imbalance for competitors, generating possible monopolies.

One of the key points in the study of the subject is the determination, via an international norm, of the criminalization of conduct, from the perspective of the principle of legality and the theory of imputation.

Consequently, the decision by several countries to make corruption between private individuals a crime was motivated by international agreements mainly involving the fight against corruption, including corruption between private individuals, as can be seen from the

content of the Palermo Convention, which was internalized in the Brazilian legal system through Decree No. 5.015/2004[1] .

Regarding the Palermo Convention, which will be extremely important in our analysis and research, Juarez Tavares says that under the terms of the Convention, "although it contains rules that must be applied by States in the prevention of acts of corruption in the private sphere, it is not mandatory that these acts be criminalized here".[2] The Convention itself makes the proviso: "when it proceeds" (article 12) and "shall consider the possibility" (article 21), which means leaving it up to the discretion and convenience of each state to carry out the process of criminalizing private corruption.

In a preliminary conclusion, the insufficiency of the Palermo Convention to conceptualize the crime of corruption between private individuals is because this normative instrument "*clearly violates the principle of legality, since, by admitting indirect private corruption, it does not clarify how this form of execution can be identified*." [3]

The methodology used during the research was based on a bibliographical survey and analysis of sources, using the deductive-inductive method.

2. REGARDING PRIVATE CORRUPTION

[1] BRAZIL Decree 5.015/2004.
[2] TAVARES 2017.
[3] TAVARES 2017.

Dealing with the criminalization of corruption between private individuals means first and foremost dealing with the issue of legality. It is in this respect that one cannot work on criminal types without working on legality, since criminal law thinks and acts through types.[4]
De *lege ferenda*, there is currently a draft of a new Brazilian Penal Code underway in the Brazilian parliament[5] , in which one of the new legal classifications would be the crime of private corruption, which in the aforementioned draft is called corruption between private individuals, an expression we prefer to use instead of the expression "*private corruption*", for the sake of understanding and covering the subject.
Thus, it can be seen from the bill mentioned above, as well as the signing of the Palermo Convention - which establishes the definition of corruption between private individuals in the domestic sphere - that there is currently a movement in favor of its inclusion in Brazilian criminal legislation, in view of the intolerance of this type of conduct in the corporate sphere of unethical acts that may, in fact, generate a risk to the activity, which we intend to explore further.
An intermediate answer and conclusion is that it is essential to observe the criteria contained in the constitution of the country in which the rule is being incorporated, also in view of its sovereignty, even if this is not in accordance with the treaty or convention.

[4] BRANDÃO 2014, 59
[5] BRAZIL. Senate Bill 236/2012.

3. NOTES ON THE NECESSARY OBSERVANCE OF THE PRINCIPLE OF LEGALITY

A logical consequence of legality is the principle of maximum taxability which, according to Zaffaroni and Batista, serves to "*limit resources so that only the formal law is the source of primary criminalization, and the judge cannot complement its presuppositions*".[6] It is therefore up to the legislator to exhaust all resources so that the rules are as precise as possible linguistically.

For a long time now, the golden rule of criminal law has been to "aim for and prevent idiosyncratic judicial interpretations[7] , with determination being the main legislative effort in the criminal field."[8]

If criminal law involves the withdrawal of fundamental rights, and is therefore the most severe and last means of social control (*ultima ratio*), the principle of legality or legal reserve constitutes an effective limitation on the state's punitive power: "*nullum crimen, nulla poena sine lege*". [9]

In this respect, in the next topic we will work on the question of the legality and literality of the law, from a philosophical-hermeneutic perspective.

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[6] ZAFFARONI; BATISTA 2003

[7] SANTOS 2014, 23

[8] SANTOS *apud* FERNANDES 2019, 16

[9] "Undeniably, in current law, criminal law is the branch of the legal system that makes the most use of legality." OLIVEIRA; BRANDÃO 2017, 29.

4. LEGALITY AND LITERALITY OF THE LAW (LEX AND JUS)

At the outset, it should be mentioned that there is a distance between legality and literality, since in the Roman word, "*lex*" and "*jus*" are different things. Let's see.

In Roman law, law was said through formulas. It was during this eastern period of Roman Law that the main faculties emerged in Constantinople and Beirut, with the "*digests*" being a collection of the opinions of the jurisconsults of the time.

> [...] in today's legal panorama, it is common to point to the written law as the protagonist among those so-called sources, as the main means of formulating legal norms [...][10] although, the authors remind us that in Roman Law, the law was not the main source of Law, citing as an example the formulation of the concepts of malice and guilt, which arose "through the interpretative activity of the judges, not the laws", given that the objective was to construct a good and fair decision in the specific case.[11]

The key turning point is the change from "*jus*" to "*directum*",

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[10] OLIVEIRA; BRANDÃO 2017, 27

[11] OLIVEIRA; BRANDÃO 2017, 28 and 30

> While the jus represents the construction of the legal decision based on the art of the praetor, who was the Roman judge, seeking to base the good and fair decision on the specific case, the *directum*, which means straight path, sought to give a general direction, which would serve as an abstract model for all the cases that fell within its hypotheses. The *directum*, therefore, is not compatible with the freedom of the judge to construct the decision, as was the case in the jus, but supposes the attribution of a path to be followed by the judge, who fits his decision into the previously given hypotheses. [12]

In this respect, criminal law must seek to achieve the greatest possible clarity through the type, since the law,

> [...] as the main source of law, it contains pre-established rules of conduct, true paths to be followed. In this regard, it is essential to pay attention to the fact that the general prescriptions of the law are expressed through language. It is therefore crucial for the Law to extract from the legal linguistic signs the rule

[12] OLIVEIRA; BRANDÃO 2017, 31

> of conduct to be applied to regulate concrete cases. [...] According to this Christianity, the dichotomy of letter and Spirit (*gramma-Pneuma*) is a key problem for the application of the law. It is these questions that reveal the meaning and scope of the norm, which is laid down in the law. [...] [13]

Thus, it can be affirmed, through the lessons of OLIVEIRA and BRANDÃO, that Law looks to Theology for meaning and the search for proportionality, as well as expressing itself through language.

In this context, we can't lose sight of the fact that the Bible is the most studied book in the world, and with Christianity, there is continuity and rupture with Judaism (where the law begins). It should be mentioned at this point that Christ Jesus himself did not have a fair trial, being judged for transgressing Jewish law.

Therefore, still about Jesus' judgment, it is necessary to differentiate between *gramma* and *pneuma*[14] . Having made this distinction, Jesus did not go against the law, but against the various regulations created

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[13] OLIVEIRA; BRANDÃO 2017, 32

[14] Pneuma (v.) or animating breath, accepted by Stoic physics and passed from there to various ancient and modern doctrines. This is the original meaning of the term, from which all the others derived. This meaning still remains in the expressions in which E. means "that which enlivens". [...] It is with this meaning that the word E. has remained in common usage, where it is sometimes contrasted with "letter", to indicate what enlivens or, without metaphor, the authentic meaning of something. (Dictionary of Philosophy - Nicola Abbagnano, digital version)

by the Jews of the time (such as washing hands). The confrontation with the law led Jesus Christ to death, as well as the Christians.
Thus, the Germanic-based Criminal Dogmatics[15] searches through the History of Law and Philosophy of Law for concepts such as "will", "conscience", "freedom", etc.

5. IMPUTATION AND ITS AXIOLOGICAL SUBSTRATUM

It can be said that imputation has its axiological substrate in the "legal good". Thus, every type has an evaluative substrate, with an axiological basis.
Using hermeneutics, we can situate the role of imputation in Torquato Castro Júnior:

> [...] The letters of the written sentence, whose "literalness" rhetorically poses as an empirically verifiable object (the words of the law being the law itself), gives renewed legitimacy to the belief in legal certainty as a belief in the neutrality and stability of certain written words. [...] [16]

[15] Zaffaroni teaches us that dogma exists to give predictability to judicial decisions, as well as limiting jurisdiction and the exercise of power.
[16] CASTRO JÚNIOR 2013, 25

The concept of imputation gave rise to the theory of crime, but it was put on the back burner in favor of other theories, returning to prominence soon after, with Claus Roxin.
Therefore, although the law does not use syllogisms, there is nevertheless a need to attribute meaning to things.

6. LEGAL ASSET AND THE ROLE OF THE LEGISLATOR

From a constitutional point of view, Zaffaroni attributes to the Legislative Power the important role of protecting the legal good, *which makes the commination via criminal policy, even without taking into account the preventive function of the penalty, with negative results for the* legal-penal *dogma* [17].This reductionism of the legislator's role is criticized by Zaffaroni for discrediting knowledge and not helping to reduce the exercise of punitive power [18].
In this sense, the Argentine author names the irrationality and lack of recourse to technique as technical alienation of the discourse[19] , while the political alienation of the theorist, Zaffaroni teaches us that since every legal-penal concept is a political concept, if the technical character is removed, only the political discourse remains, and the rational content of the norm is missing[20] and finally, as for the technical alienation of the politician, Zaffaroni conceptualizes it as the

[17] ZAFFARONI 2005, 71
[18] ZAFFARONI 2005, 73
[19] ZAFFARONI 2005, 73
[20] ZAFFARONI 2005, 75

discourse elaborated by the politician away from the technique[21] . In either case, there is a pure void of political discourse[22] .
Therefore, typicality depends on a non-alienated legislator since the penalty is a form of deprivation of fundamental rights. [23]

7. THE PLACE OF PRIVATE CORRUPTION IN MIR PUIG'S THEORY OF IMPUTATION

Santiago Mir Puig considers the study of imputation to be of current relevance and to be at the center of the publications of leading German scholars such as Roxin, Jakobs and Hruschka, although in the past there was no such concern to study the subject[24].
The naturalist school focused the study of the theory of crime on causality, as that caused by any voluntary impulse capable of generating a change in the outside world. After the two world wars, the study of objective imputation re-emerged and gained importance in penal doctrine through the neo Kantianism.
In the 1930s, influenced by Welzel's finalism, there was a break with the causalist theory, with the focus on analyzing the criminal type and human action, delimiting the cause of causality prior to legal valuation.
This evolution took place at the beginning of the 20th century, from

[21] ZAFFARONI 2005, 76
[22] ZAFFARONI 2005, 77
[23] BRANDÃO 2014, 60
[24] MIR PUIG, 2003

the 1930s onwards, based on the evaluative sense of the categories of the theory of crime, by removing unpredictable results from the study of the theory of crime, since they were not caused by the one who is called the author, unlike what was at the heart of the causalist theory, in view of the impossibility of legally devaluing conduct, Mir Puig points to the initial milestones of the theory of objective imputation, first with the publication of Larenz's work (1927) and later with Honig (1930), surpassing naturalism and effectively giving birth to Welzel's finalist theory, with the publication of "*Naturalism and Philosophy of Values in Criminal Law*".

Welzelian finalism focuses on two basic premises: the final essence of human action (typicality and antijuridicity) and its freedom to act otherwise (culpability). The overcoming of the causalist theory takes place precisely in the ontological analysis of action and the necessary objective predictability of the result (conduct directed towards an end, hence the expression finalism), adding a new concept to the concept of action, called the social concept of action. In this respect, conduct that did not contain this finalistic action, due to its lack of suitability for the criminal type (such as killing someone), would be irrelevant from a legal-penal point of view. The change in the theory of the criminal type has greatly influenced the study of objective imputation. Any conduct with unpredictability would be disregarded in the study of typicality, and based on its evaluation, the conclusion would be reached that typicality is, in itself, a legal concept. As early as 1957, Gimbernat saw objective imputation (which he called reproachability) as a possible criterion for excluding the typicality of conduct that causes unforeseen results. In Larenz, Honig and Helmuth Mayer, objective imputation is the prerequisite for analyzing the

action.

In this way, Gimbernat presents, in Mir Puig's view, two premises that are so important today in the study of objective imputation, namely: the exclusion of results not rationally foreseen by a prudent person; the absence of typicality in actions which, although dangerous, contain within themselves the permitted risk of the result; failure to comply with the duty of care could only be punished by way of fault, never intent; and last but not least, the absence of the duty of care and causing the result to be punished only if it is precisely the result that the legal rule seeks to prevent.

For Mir Puig, understanding objective imputation requires a return to the study of philosophy in order to first understand action in the naturalistic sense and then action in the legal sense. In the linguistic sense, imputation, for the author, is closer to the attribution made by the interpreter, in the aspect of the ought to be of things, based on the philosophical interpretation of expressions and the legal meaning given by the norm. Therefore, there is no single valid legal meaning for the action, and it is up to doctrine and jurisprudence (criminal dogmatics) to interpret, i.e. impute, as expressed by the author, the verbs provided for by the type (kill, steal, extort, corrupt, threaten, etc.).

According to the author, the starting point for his theory is to verify whether, at the moment of making a decision, human behavior has the conditions to be governed by the legal norm, in other words, the conduct expected of a prudent person with the ability to mentally foresee the final objective of that conduct. This negative value judgment of conduct in accordance with the norm is what we know

as antijuridicity.

It is for this reason that Mir Puig states that criminal law makes a policy choice not to punish conduct that has no criminal relevance or is socially licit or of low gravity, if practiced within the scope of permitted risk, as is the case with corruption between private individuals. This ability to punish only conduct that is serious and practiced within the limits of foreseeability is what differentiates criminal law from other branches of law, such as civil and administrative law, which have the scope to seek economic reparation for damage caused, even if it is minor.

Another important point concerns the meaning of words given by criminal law, thus prohibiting analogy "*in malam partem*", restricting the scope of punishment, all *in* respect for the principle of legality, imputing "*ex ante*" conduct as typical. The theory of objective imputation, for the author, is the attribution of legal-penal meaning (legal interpretation) that is given to typical conduct.

8. CONCLUSION

In a final word, since Brazil is a signatory to the United Nations Convention Against Corruption, we believe that the internalization of the Palermo Convention alone is insufficient to criminalize conduct, especially corruption between private individuals, which is the subject of our research.

As we have mentioned, it is essential to comply with the criteria set out in the Brazilian constitution to criminalize private corruption, in addition to respecting the country's sovereignty. Such criminalization

can only be admitted into our legal system, if there is strict compliance with criminal typicity, after a legislative process, such as the New Penal Code project currently underway in the Brazilian legislature.

In this respect, comparing the draft New Penal Code and the Palermo Convention, without losing sight of the fact that criminal law is one in which fundamental rights are taken away, and that it is the last means of social control, we have the principle of legality or legal reserve as an effective limitation on the state's punitive power.

It is in this respect that the theory of objective imputation is used to prevent the new law from using syllogisms, thus assigning meaning from a legal-penal point of view, by returning to the study of philosophy in order to understand the ought to be of things, through the philosophical interpretation of expressions and the legal meaning given by the norm, the role of criminal dogmatics being to interpret the meaning given by the draft New Penal Code with regard to corruption between private individuals, restricting the scope of punishment at any cost.

We therefore conclude, drawing on the lessons of Santiago Mir Puig, that the criminal policy choice made by criminal law is not to punish conduct that has no criminal relevance or is of low gravity, as in our opinion is the case with private corruption, leaving only the other branches of law, such as civil, business and administrative law, to provide economic reparation for the damage caused by corruption practiced between private individuals.

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