AUTONOMOUS CRIMINAL TYPE OF JOINING A CRIMINAL ORGANIZATION: OFFENSE AGAINST THE PROHIBITION AND CRITERIA OF OBJECTIVE IMPUTATION

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Abstract
This study explores the criminal legal framework surrounding associative crimes, particularly the crime of promoting, constituting, financing, or integrating a criminal organization under Brazilian Law 12.850/13. While the law sets out objective criteria for the existence of criminal organizations, the generic nature of the nuclear verbs used opens the door for potential misapplication in jurisprudence. To address this issue, the study proposes the application of the theory of imputation as developed in modern legal dogma, particularly through the contributions of scholars like Claus Roxin and Santiago Mir Puig. By examining the (in)definition of "organized crime" as a legal and criminological concept and the historical background of imputation theory, the research aims to construct more precise dogmatic criteria for attributing criminal responsibility to members of criminal organizations. The study also critiques the open-ended conceptualization of organized crime in international legal frameworks, such as the Palermo Convention, and its limitations in Brazilian jurisprudence. Ultimately, this work contributes to the discussion on how the theory of imputation can rationalize punitive power in associative crimes, creating a clearer legal framework that respects fundamental rights.

Keywords
Criminal organization. Organized crime. Objective imputation.

Summary
1. Introduction 2. The (in)definition of criminal organization as a concept and an autonomous crime. 3. The theory of imputation and its application as an instrument to contain punitive power. 3.1 The precursors of the theory of imputation. 3.2 Claus Roxin´s objective imputation. 3.3 Imputation in Mir Puig and its application to associative crimes. 4 Conclusion

1. INTRODUCTION

The fight against crime has always been a lucrative tool that has fueled and driven various initiatives, turning violence into a consumer experience and spectacle. There is no shortage of immediate and simplistic solutions to the issue. Criminal law has been mistakenly used as a *prima ratio* tool by those who are unintentionally or deliberately unaware of the dogmatic constructions that underpin the criminal sciences.

In this sense, associative crimes are proliferating in the Brazilian legal system and, among them, the crime of promoting, constituting, financing, or integrating a criminal organization stands out, provided for in art. 2 of Law 12.850/13. This type of crime establishes relatively rigid objective presuppositions for the existence of the organization, but provides for open-ended nuclear verbs, so that the link between the conduct of each of its members and the associative body can be easily abused by case law. It is therefore necessary to create understandable dogmatic assumptions that condition the attribution of this type of crime to the alleged members of the criminal organization. To this end, the research will make use of the theory of imputation according to its most current dogmatic evolution.

2. THE (IN)DEFINITION OF CRIMINAL ORGANIZATION AS A CONCEPT AND AN AUTONOMOUS CRIME.

Although the term "organized crime" and its variables are used daily in journalistic, procedural, political and academic manifestations and

it is possible to see, in various nuances, the externalization of acts by criminal groups with considerable levels of violence, articulation and complexity, it is imperative to note the existence of profound obstacles to its criminological and legal definition.

For Zaffaroni[1] , who severely criticizes the categorization of organized crime, characterizing it as frustrated, false and unlimited, the plurality of agents has been the subject of countless studies in Europe, especially after the Paris Commune and, in more recent times, linked to the criminalization of workers' unions. On the other hand, according to the author, the North American matrix for categorizing *organized crime* has linked the concept to the prohibition of illegal goods and services and to the conspiracist vision of the mafia paradigm and the external enemy. Reducing a dynamic and still poorly understood reality to a watertight concept is, above all, foolhardy.

When analyzing the American matrix, Juarez Cirino dos Santos[2] , in the same vein, states that the concept is a myth, a category without content and an unnecessary label. If it is empty of content, it ends up fulfilling, in the words of Carla Sirlene[3] *, the desired political function of legitimizing the internal repression of ethnic minorities and justifying external restrictions on the sovereignty of independent nations in order to impose their local criminal policy guidelines.*

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[1] ZAFFARONI 1996, 46.
[2] SANTOS 2003, 216-217.
[3] GOMES 2019.

This conceptual abstraction has not prevented populist initiatives, especially in the field of criminal law, to create criminal types that relativize fundamental rights in favor of a supposed fight against crime. The shift from a still incipient discussion to criminalization processes reveals an authoritarian face which, in essence, will continue to be marked by selectivity, discrimination and stigmatization of specific groups, now labelled "organized crime agents".

Zaffaroni[4] points out that the first important works of criminology on the subject derive from the Chicago School[5] . Edwin Sutherland, who later theorized the contribution of differential association and white-collar crime, stated that due to the weakness of the state, organized crime grew in unity and opposition to society[6] . Despite these efforts, criminology has not (and perhaps could not) come up with a sufficient conceptual framework.

Among the initiatives to legally define the phenomenon, the Palermo Convention established four characteristics capable of identifying a manifestation of organized crime: a) a structured group of three or more people; b) a previous associative bond ("existing for some time); c) the purpose of committing one or more serious offences and d) the

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[4] ZAFFARONI 1996

[5] BULMER 1984.

[6] SUTHERLAND 1978, 270.

intention to obtain, directly or indirectly, economic or other material benefit.

On the grounds that international conventions do not qualify, constitutionally, as a direct formal source of legitimacy for normative regulation concerning the classification of crimes and the imposition of criminal sanctions and that, in criminal matters, the dogma of the constitutional reserve of law in the formal sense prevails, the Brazilian Supreme Court[7] has ruled out the possibility of using the concept of organized crime in the Palermo Convention to classify the preceding offence in money laundering in practical cases.

Although the first Brazilian legal framework for the concept of criminal organization came from Law No. 12.694/12, the current definition is found in art. 1, §1 of Law No. 12.850/13[8] .

With this delimitation, the Brazilian legal system has innovated by creating an autonomous criminal type, provided for in art. 2 of the law, which punishes with imprisonment, from 3 (three) to 8 (eight) years, and a fine anyone who *promotes, constitutes, finances or*

[7] STF, AP 470/MG, Rel. Min. Joaquim Barbosa, j. 17.12.2012, dje 22.04.2013.

[8] § Paragraph 1. A criminal organization is considered to be an association of four (4) or more people who are structurally ordered and characterized by the division of tasks, even if informally, with the aim of obtaining, directly or indirectly, an advantage of any kind, through the commission of criminal offences for which the maximum penalty is more than four (4) years, or which are transnational in nature.

integrates, personally or through an intermediary, a criminal organization.

The unquestionable use of expressly generic terms to create a serious offense reveals, from a dogmatic point of view, significant objections to the correct and legitimate criminal imputation.

In this sense, Cláudio Brandão[9] states that *criminal law, in the context of the Democratic State of Law, is prohibited from making general prohibitions and associating them with a penalty, without the prohibited conduct being individualized, that is, without this conduct becoming the template for a specific action, for which a penalty is imposed*.

To integrate, for example, is to be part of, to be inserted into a coherent whole. It is, in some way, being incorporated into something. Being part of a criminal organization, in this context, requires objective criteria for imputation, otherwise an incriminating criminal type will be evidenced that is dissociated from what dogmatics demands, hindering the very understanding of the prohibition.

In short, there is a pressing need to provide objective imputation criteria in order to rationalize and give legitimacy to the punitive power of the aforementioned criminal type.

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[9] BRANDÃO 2014, 50.

3. THE THEORY OF IMPUTATION AND ITS APPLICATION AS AN INSTRUMENT TO CONTAIN PUNITIVE POWER

The need to contain punitive power, specifically about the crime of criminal organization (and incidentally to other associative crimes in Brazilian criminal law), leads us to the theory of imputation and all its potential to imbue criminal injustice with rationality through legal dogma.

As Santiago Mir Puig teaches[10] , imputation is one of the most important legal institutes through which the current legal theory of crime is expressed, so much so that some German functionalists use it as the fundamental core of their dogma. It is necessary to investigate the assumptions and vectors of the theory of imputation to deduce how (and if) it can instrumentalize criteria for punitive reduction and imputation of the objective type of criminal organization.

3.1 THE PRECURSORS OF THE THEORY OF IMPUTATION

During the 20th century, two notable authors helped build the legal theory of imputation. The first was Karl Larez[11] who, taking a Hegelian perspective, stated that the imputation judgment must relate the will to the result, thus contemplating everything that is objectively foreseeable, resulting in liability only for facts that are proper and not

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[10] MIR PUIG 2003, 01.
[11] MIR PUIG 2003, 03.

accidental. Larez, however, was a civil lawyer and his work was concerned with the construction of appropriate legal assumptions for attributing harmful results as elements of civil liability. Richard Honig is credited with bringing the theory of imputation to criminal law. According to Luís Greco, Honig created a theory of action that emphasizes that every typical result is based on a final will, so that only results that fall within the objective possibility of understanding could be imputed. Objective persecution is the criterion by which results can be imputed or considered the work of chance[12] .

Despite the merits of the jurists mentioned above, the dogma they created is not well-developed enough to structure imputation criteria for associative crimes. In addition, the ontological basis of finalism provided a deep sleep for the theory of imputation until Claus Roxin's teleological functionalism.

3.2 CLAUS ROXIN'S OBJECTIVE IMPUTATION

The modern theory of objective imputation is credited to the German jurist Claus Roxin and can be conceptualized as the set of criteria that condition the relationship of imputation of a legal result to a given human behavior.[13] It was first formulated in the 1970 text *Reflections on the Problem of Imputation in Criminal Law.*

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[12] HONIG, apud GRECO 2013.
[13] ROXIN 2008, 104.

Roxin states that the theory of the equivalence of causal antecedents was an unfortunate methodological choice made by the "classic" German criminal law system, which, under the influence of the natural sciences, based the investigation of the typical fact on the principle of causality.[14]

Roxin's proposal is, based on Honig's contributions, to construct the objective imputation nexus using evaluative criteria that are independent of the subjective type and which are connected to the fundamental mission of criminal law: to protect the legal good in a subsidiary way against concrete risks of injury. In this way, criminal law is brought closer to the criminal policy of the social and democratic rule of law.

Based on the analysis of groups of jurisprudential cases and years of theoretical development, Roxin structured the general lines of objective imputation, summarized in three imputation criteria. In its most simplified form: a result caused by the agent should only be imputed as his work and fulfills the objective type only when the author's behavior creates an impermissible risk for the object of action (1), when the risk is realized in the concrete result (2) and this result is within the scope of the type (3).[15]

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[14] ROXIN 2008, 105.
[15] ROXIN 2008, 104.

The first level of imputation requires the agent to create a relevant risk prohibited by the legal order. Otherwise, there will be no imputation of the result produced, even if there is causality in the strict definition of the theory of equivalence. A number of conclusions follow from these premises. Firstly, whenever dangerous actions are permitted by the legal system due to their preponderant social utility, even if damage is eventually caused, the result will not be imputed. The reduction in risk caused by the conduct means that the results created are not imputed.[16] Irrelevant risks, also known as general life risks, also rule out imputation. Finally, Roxin states that the principle of trust also belongs to the first level of imputation. Widely used in traffic criminal law, this principle states that one can trust that others will behave in accordance with the law if there are no concrete points of support to the contrary.

The second level of imputation consists of analyzing whether the risk produced by the agent was directly reflected in the result or whether the result was created by other causal factors. Unforeseeable causes or extraordinary or hypothetical causal courses must be excluded from the causal relationship.[17] In addition, risks that had no influence on the result are also excluded by this level of imputation.

Finally, criminal types, according to Roxin, have a sphere of protection that does not include all types of results that are harmful to

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[16] ROXIN 2008, 109.
[17] ROXIN 2002, 331.

the legal goods they protect. In intentional crimes, the author states that there are mainly three groups of relevant cases in which the sphere of protection of the incriminating norm is not comprehensive enough to allow the result to be imputed: the contribution to intentional self-endangerment, consensual hetero endangerment, and the imputation of a result to another person's sphere of responsibility.[18]

The Roxinian theory provides us with effective criteria for beginning to build a comprehensive system of imputation in associative crimes. However, it must be recognized that it was not created for this purpose, since it presupposes an injustice that allows the temporal distance between conduct and result. However, the first assumption of imputation can be used to build minimum assumptions of prohibited risk to the legal good protected by the incriminating norm. It is the theory of imputation constructed by Mir Puig, however, that will help us the most in our attempt.

3.3 IMPUTATION IN MIR PUIG AND ITS APPLICATION TO ASSOCIATIVE CRIMES

Drawing on all the previous contributions, Santiago Mir Puig[19] presents a well-defined perspective on the theory of imputation that allows us to arrive at the desired construction. For this author, the

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[18] ROXIN 2002, 352-353
[19] MIR PUIG 2003, 10

word imputation expresses a judgment of attribution that contains the necessary requirements to attribute to a subject the injury or danger of injury to a legal good.

Mir Puig[20] states that the imputation judgment is divided into three stages. Objective imputation, which refers to the attribution of the meaning contained in the objective type to human conduct, subjective imputation, which presupposes prior proof of intent as a conscious will compatible with the injury or danger of injury contained in the objective type. These imputations must not be limited to the type, but to the whole wrongdoing, including the causes of justification. Finally, individual imputation presupposes the analysis of culpability, as a judgment of personal disapproval of the criminal offense, which is part of the process of attributing meaning to the subject.

The first level of imputation, according to Mir Puig[21] , is applicable to both crimes of result and those of mere activity. In the latter, it is necessary not only to have conduct that meets the objective and subjective type, but also to have the potential to harm the legal asset, embodied in the *ex ante* suitability of the conduct to present a danger of injury covered by the criminal type.

Applying these dogmatic contributions to the problems of associative crimes, specifically about the crime of joining a criminal organization,

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[20] MIR PUIG 2003, 11
[21] MIR PUIG 2003, 16

we can conclude that the actions or omissions that allow a judgment to be made about the conducts that lead to joining the organization must have the autonomous ability to expose legal assets to the risk of injury. These assets must not be limited to abstract and incomprehensible values such as "public peace" but must be linked to the crimes for which the organization is structured. In this sense, Roxin himself had already taken a position, stating that the suitability of the violation of public peace depends on an empirically founded value judgment[22] . Thus, neutral, or ancillary behavior would not allow the objective type to be imputed.

In this sense, integration into a criminal organization should not depend on ancillary or circumstantial conduct related to the structuring of the organization, as is commonplace in Brazilian jurisprudence. The judgment of imputation presupposes conduct that is harmful and unlawful to the assets linked to the criminal activity that is the object of the organization.

Furthermore, the subjective level of imputation requires a conscious will be aimed at the permanence and stability that the association presupposes, which also depends on maintaining actions that conflict with legal assets.

[22] ROXIN 2018.

Imputation is ruled out for conduct that is merely ancillary from the perspective of damaging the legal assets threatened by the organization, even if it is essential to its existence.

4. CONCLUSION

The following conclusions can be drawn from the above.

I) The Brazilian legal system has a criminal type of criminal organization which, despite establishing objective presuppositions for the existence of the organization, lacks imputation criteria for the conduct of its members.

II) The theory of imputation, as an evaluative method of assigning meaning, was brought to legal theory by Larez and to criminal law by Honig, and developed modernly by authors such as Roxin and Mir Puig, and provides a legal basis for creating comprehensive criteria for imputing the crime of criminal organization.
III) The imputation to the objective type, in the crime of criminal organization, presupposes autonomous suitability, visualized *ex-ante,* of exposing the legal assets vulnerable by the organization's end activity to the concrete risk of injury.

IV) The imputation of the crime of joining a criminal organization also depends on a mental element aimed at the permanent and stable maintenance of the associative bond.

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