

# THE NON-REQUIRABILITY OF DIFFERENT CONDUCT DUE ECONOMIC CRISIS AND ITS APPLICATION BY THE INSTITUTIONS OF JUSTICE SYSTEM

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## **Abstract**

The aim of this study is to understand the institute of the non-requrability of different conduct, as an exculpatory defense, and its application by the justice system institutions. Using the methodology of a bibliographical and jurisprudential review, the research is justified by the serious economic crisis the country is undergoing and the state's greed for revenue, seeking more tax income in every way. This study is concerned with establishing the non-requrability of different conduct as a means of containing criminal law so that it does not become a mere tax collector.

## **Keywords**

Economic crisis. Tax debt. Non-requrability of different conduct.

## **Summary**

1. Introduction. 2 The non-requrability of different conduct in Brazil. 3. The non-requrability of different conduct in tax crimes and its application by the institutions of the justice system. 4 Conclusions

## 1 INTRODUCTION

The purpose of this paper is to analyze the legal and criminal institute of the non-requrability of different conduct and its application as

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a supralegal exculpatory defense in crimes against the tax order by the justice system institutions, in particular to study its relevance in a financial crisis situation, such as the one Brazil is going through today.

Faced with a lack of financial assets, many entrepreneurs had no choice but to stop paying the taxes due to the tax authorities of the Federal, State and Municipal governments. In this case, they preferred to pay their employees' and suppliers' salaries rather than pay the taxes due to an absolute lack of cash.

This is the real-life fact that leads the debtor, faced with unexpected and unwanted circumstances, to have no other conduct than to try to save the company to the detriment of paying the tax debt, which is one of the hypotheses for the application of the non-requirability of different conduct.

The non-requirability of different conduct application by the justice system institutions, especially the judiciary, still causes surprise when it leads to the acquittal of those accused of committing a tax evasion crime. This is because in crimes against the tax system there is a tendency to impose a conviction based on objective liability, i.e. only needing materiality and authorship to be proven, without concern for the state of mind element of intent or negligence.

It cannot be denied that there is a debate as to whether the criminal liability in tax offenses is objective or subjective because there is an intertwining of conduct in the criminal and administrative spheres. This proximity and similarity in the classification of crimes has led to disagreements, as there are advocates in the criminal sphere of applying the same criteria as in the administrative sphere.

It is assumed that the institute of the non-requirability of different conduct was proposed dogmatically by Berthold Freudenthal, a disciple of Reinhart Frank<sup>3</sup>, at a time of serious economic crisis in Germany.

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<sup>3</sup> It was up to Goldschmidt and Freudenthal to develop Frank's ideas further. This, in fact, is Goldschmidt's position when he states in his work that "Freudenthal and I have taken

It is not forgotten, however, that the concept of culpability is quite old, dating back to Roman Criminal Law, with the investigation of intent to punish crimes.

In this respect, one cannot fail to recognize that the institute of the non-requirability of different conduct has evolved within the scope of Criminal Law, so that it is understood not only as a simple exculpatory defense, but as a general principle of Criminal Law.

Therefore, our objective, in addition to analyzing its application by the justice system institutions, is to understand whether the institute of the non-requirability of different conduct is supported by the Fundamental Principals of the Constitution of the Federative Republic of Brazil, especially when analyzing the economic situation Brazil is experiencing.

The research is justified because, in the face of the country's serious economic crisis, many companies (and entrepreneurs) have ended up committing economic crimes in order to keep the company running, thus generating jobs and keeping suppliers paid, to the detriment of paying taxes, for example. This is where the aim of our research lies: to know and understand the legal limits of the non-requirability of different conduct, as a supralegal exculpatory defense, and its application at a time of economic crisis in the country.

The methodology used was qualitative, with bibliography analysis on the subject and on decisions of the Brazilian higher courts regarding the application of the non-requirability of different conduct in the trail of concrete cases.

## **2 THE NON-REQUIRABILITY OF DIFFERENT CONDUCT IN BRAZIL**

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Frank's work as our starting point." (GOLDSCHMIDT, James. *La concepción normativa de la culpabilidad* [The normative conception of culpability]. Montevideo-Buenos Aires: BdeF, 2002, p.86).

The non-requirability of different conduct emerged in the doctrine as an exculpatory defense with the psychological-normative theory developed by Frank<sup>4</sup> in opposition to the pure psychological theory that only foresaw intent and negligence as elements of liability.

The concomitant circumstances defended by Frank were the basis of the principle of non-requirability, which later developed in the doctrine of Goldschmidt and Freudenthal, who differentiated between reproach and non-reproach based on the idea of requirability.

While analyzing Frank's words, Jakobs says that intent and negligence are of secondary importance, because culpability is the reproach of behavior, divided into "normal psychic constitution" plus "psychic configuration with the fact" plus "normal configuration of the circumstances in which the author reacts"<sup>5</sup>.

Attempting to understand the reproach of the infraction of a specific norm of duty, as well as to locate the justification defense within a specific area of culpability, Goldschmidt sought to definitively elaborate the theory of the normative element of culpability<sup>6</sup>.

Goldschmidt<sup>7</sup> says that, alongside every explicit rule of law that demands a certain external conduct from the individual, there is, implicitly, an internal rule of action, which corresponds to the demands that the legal system makes regarding external action. The external rule of conduct would be the legal aspect, while the internal rule would be the requirability, corresponding or not with the rule of duty.

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<sup>4</sup> FRANK, Reinhard. La estructura del concepto de culpabilidad [The structure of the culpability concept]. Montevideo-Buenos Aires: BdeF, 2004, p. 30.

<sup>5</sup> JAKOBS, Günther. Derecho penal: parte general [Criminal law: general part]. 2<sup>a</sup> ed. Madrid: Marcial Pons, 1997, p. 569.

<sup>6</sup> GOLDSCHMIDT, James. La concepción normativa de la culpabilidad [The normative conception of culpability]. Montevideo-Buenos Aires: BdeF, 2002, p. 97.

<sup>7</sup> GOLDSCHMIDT, James. La concepción normativa de la culpabilidad [The normative conception of culpability]. 2. ed. Coleção Maestros del Derecho Penal, n. 7. Buenos Aires: Editorial B de F, 2002, p. 97.

Infringement of rules of law determines unlawfulness while disobedience of rules of duty determines reproach, which is necessary for culpability. However, it is possible to disobey a rule of duty without acting culpably, when it is possible to invoke an exculpatory defense, just as it is possible to infringe a rule of law without acting unlawfully, when alleging a defense of lawfulness.

For Goldschmidt<sup>8</sup>, reprehensibility is not allowing oneself to be motivated by the representation of duty, despite the fact that such motivation is required of everyone, and that is why requirability is a duty that always presupposes power, which exists when there is imputability, a known or knowable meaning and normal motivation<sup>9</sup>. A complex system of exculpatory defenses has developed on this basis, distinct from the justification defenses and the causes of exclusion of penalties.

It was Freudenthal<sup>10</sup> who, at the time, best developed the issue of the non-requirability of different conduct, emphasizing that the circumstances are configured when, in order not to carry out the fact, such a force of resistance is required that it cannot normally be demanded of anyone, since reprobation and power, and consequently culpability, are lacking, due to the absence, at the time of the fact, of the duty or the power.

According to Freudenthal, criminal requirability (*Zumutbarkeit*) is a general requirement of culpability<sup>11</sup>. Freudenthal's legal construction of the requirability of different conduct institute is very enlightening, as he

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<sup>8</sup> GOLDSCHMIDT, James. La concepción normativa de la culpabilidad [The normative conception of culpability]. 2. ed. Coleção Maestros del Derecho Penal, n. 7. Buenos Aires: Editorial B de F, 2002, p. 100.

<sup>9</sup> Cf. CORREA, Teresa Aguado. Inexigibilidad de outra conducta en derecho penal [Non-requirability of different conduct in criminal law]. Granada: Editorial Comares, 2004, p. 13.

<sup>10</sup> FREUDENTHAL, Berthold. Culpabilidad y reproche en el derecho penal [Culpability and reproach in criminal law]. Coleção Maestros del Derecho Penal, n. 11. Buenos Aires: Editorial B de F, 2003, p. 71.

<sup>11</sup> GOLDSCHMIDT, James. La concepción normativa de la culpabilidad [The normative conception of culpability]. Montevideo-Buenos Aires: BdeF, 2002, p. 86.

starts analyzing practical cases to create this concept, which he believes to be central to culpability<sup>12</sup>. He even informs us that the Supreme Court analyzes the requirability of different conduct individually, in each specific case<sup>13</sup>.

Freudenthal criticizes the way in which criminal law is conceived through abstractions, stemming from its scientificity, which has resulted in a distancing between the people and the law, and stresses that it is up to jurists to be aware of this phenomenon in order to avoid it<sup>14</sup>.

Freudenthal also points out that culpability, both for the German Supreme Court and the doctrine of the time, is based on two main criteria: **i)** the first, of an objective nature, concerns to the duty of care. If the actor is careful, there is no need to speak of culpability. However, if due care was not taken, then it must be analyzed; **ii)** the second criterion, which is subjective, is manifested by subjective avoidability, i.e. whether the perpetrator was in a position to not commit the crime. Only when these two

<sup>12</sup> Muñoz Conde's lessons on the avant-garde theory developed by Freudenthal are interesting: "Behind this theory was the serious economic and social situation that the working masses had to endure at the time. Freudenthal himself doesn't hide the fact that, with his theory, you could absolve people like the midwife who registered children born on public holidays or weekends as born on working days, so that their parents, miners in the Ruhr basin, could have a paid day off; or the traveling salesman who, faced with the greed of the firm he represents, is forced to keep money in order to meet the travel expenses he incurs on its behalf and not lose his job; or the young Sicilian woman who kills her uncle who has dishonored her to prevent her husband from finding out. Previously, the Reichsgericht (RGSt., 30, 25 ss.) had acquitted a coachman who, following his boss's orders and in order not to lose his job, had hitched his cart to a mare with a tendency to stray, which in fact ran over and seriously injured a pedestrian." MUÑOZ CONDE, Francisco. *Edmund Mezger e o direito penal de seu tempo: estudos sobre o direito penal no nacional-socialismo* [Edmund Mezger and the criminal law of his time: studies on criminal law under National Socialism]. *Lúmen Júris*: Rio de Janeiro, 2005, p. 20).

<sup>13</sup> FREUDENTHAL, Berthold. *Culpabilidad y reproche en el derecho penal* [Culpability and reproach in criminal law]. Montevideo-Buenos Aires: BdeF, 2003, p. 88.

<sup>14</sup> FREUDENTHAL, Berthold. *Culpabilidad y reproche en el derecho penal* [Culpability and reproach in criminal law]. Montevideo-Buenos Aires: BdeF, 2003, p.63-64.

criteria are combined will the perpetrator's reprobation be configured, without which the actor's conduct will not be culpable. We can therefore clearly see that reproach and culpability are not to be confused, since reproach is a prerequisite for assessing culpability<sup>15</sup>.

It should also be pointed out that the concept of non-requirability is being developed based on certain abnormal circumstances, which are found neither in incapacity nor in error<sup>16</sup>.

Even though culpability is materially conformed to the verification of the capacity for culpability and the awareness of unlawfulness, in order for the legal order to establish reproach, it is necessary to analyze the possibility of acting in accordance with the legal norm<sup>17</sup>.

Certainly, the possibility of the perpetrator behaving in accordance with the legal norm is a relevant element in perfecting the conduct's reproach, since it is linked to the idea of freedom. It is only possible to censure the conduct of the perpetrator who could have acted in accordance with the legal norm but freely chose to act contrary to the law.

In Brazil, the requirability of conduct in accordance with the law is provided for as a legal exculpatory defense – based on irresistible moral coercion and hierarchical obedience (Article 22 of the Brazilian Penal

<sup>15</sup> FREUDENTHAL, Berthold. Culpabilidad y reproche en el derecho penal [Culpability and reproach in criminal law]. Montevideo-Buenos Aires: BdeF, 2003, p. 77-78.

<sup>16</sup> OLIVÉ, Juan Carlos Ferré. Et. Al. *Direito penal brasileiro: parte geral, princípios, fundamentais e sistema* [Brazilian criminal law: general part, principles, fundamentals and system]. According to Maria Carolina de Melo Amorim, "The requirement that the subject act in accordance with the established legislation is not listed in criminal law, it is deduced from the legal imperative itself. This requirement, however, is linked to the normality of the circumstances of the fact, and finds its concrete foundation in this normality. It is the abnormality of these circumstances that defines the exculpatory defenses." (AMORIM, Maria Carolina de Melo. *The non-requirability of different conduct: the grounds for the application of supralegal causes in Brazilian criminal law*. Belo Horizonte: Del Rey, 2014, p. 68)

<sup>17</sup> PRADO. Luiz Regis. *Curso de direito penal brasileiro: parte geral* [Brazilian criminal law course: general part]. São Paulo: RT, 2000, p. 276.

Code<sup>18</sup>) - or as a supralegal exculpatory defense, for example in crimes against the tax order.

It should be noted, however, that until recently, Brazilian criminal law only recognized the exculpatory defenses provided for in Article 22 of the Brazilian Penal Code. Brandão points out that it was only after the studies carried out by Francisco de Assis Toledo that the non-requirability of conduct in accordance with the law began to be accepted outside the hypotheses of hierarchical obedience and irresistible moral coercion<sup>19</sup>.

It is clear that Brazilian courts have discussed irresistible moral coercion. By way of example, we transcribe below an excerpt from a ruling published by the Superior Court of Justice, which despite not recognizing it in the specific case, admitted the debate in the lower courts:

CRIMINAL AND PENAL PROCEDURE. INTERLOCUTORY APPEAL ON THE INTERLOCUTORY APPEAL ON THE SPECIAL APPEAL. AGGRAVATED ROBBERY. IRRESISTIBLE MORAL COERCION, NON-REQUIRABILITY OF DIFFERENT CONDUCT AND STATE OF NECESSITY. LACK OF PROOF AND EVIDENCE. RE-EXAMINATION OF FACTS AND EVIDENCE. PRECEDENT N. 7/SCJ. SENTENCING. JUSTIFIED. NO DISPROPORTIONALITY. APPLICATION OF

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<sup>18</sup> “Article 22 - If the act is committed under irresistible coercion or in strict obedience to an order, not manifestly illegal, from a superior, only the responsible for the coercion or order is punishable.”

<sup>19</sup> BRANDÃO, Cláudio. Curso de direito penal: parte geral [Criminal law course: general part]. Rio de Janeiro: Forense, 2008, p. 231.

PRECEDENT N. 7/SCJ. INTERLOCUTORY APPEAL DENIED. 1. Analysis of the irresistible moral coercion theses, non-requirability of different conduct or state of necessity require examination of the evidence in the case file, which is impeded in this case, since the Court of origin expressly stated that no evidence was produced to support these theses and that there was no evidence to this effect. To review this statement, therefore, would run up against the obstacle of Precedent No. 7 of this Court. 2. As for the sentencing, there are no reasons to change the state judgment, since the appellant only maintains that the amount applied to the recognition of mitigating factors was not broken down. It so happens that the Court of origin applied the mitigating factors of spontaneous confession and infancy and reduced the sentence by 1 (one) year, 6 (six) months for each mitigating factor, which is therefore neither unjustified nor disproportionate, considering the amount of the minimal sentence applied, which was 5 (five) years' imprisonment. 3. Interlocutory appeal denied. (AgRg no AgRg no AREsp [Interlocutory Appeal on Interlocutory Appeal on Special Appeal]1066593/SE [Sergipe], Rel. Minister JOEL ILAN PACIORNIK, FIFTH PANEL, decided on 10/24/2017, Official Journal of State Courts 11/08/2017)<sup>20</sup>

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<sup>20</sup> BRASIL. Superior Court of Justice. AgRg no AgRg no AREsp [Interlocutory Appeal on Interlocutory Appeal on Special Appeal] 1066593/SE [Sergipe], Rel. Minister Joel Ilan

Irresistible coercion (the first part of Article 22 of the Brazilian Penal Code) is moral (*vis compulsiva*) and not physical (*vis absoluta*). In other words, physical coercion affects intent, it removes the actor's will to carry out the action defined as a crime. As such, it is a defense of lawfulness.

The irresistible coercion as a justification is therefore moral. Thus, the perpetrator practices conduct that is criminalized and unlawful, but not culpable.

To characterize irresistible moral coercion, the actor's freedom of action must be taken away, based on a threat or danger that affects the very personal property of the person being coerced.

If the moral coercion can be resisted, criminal culpability will not be excluded, although it does function as a mitigating circumstance (Article 65, III, c, first part, of the Brazilian Penal Code)<sup>21</sup>.

Hierarchical obedience (the second part of Article 22 of the Brazilian Penal Code) will only function as an exculpatory defense if it is related to the hierarchy/subordination relationship in public law. The reason for this is that, in administrative law, there is a relationship of subordination between the boss and their subordinates. The head is invested with a hierarchical position in relation to the subordinates by the competent power.

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Paciornik, Fifth Panel, decided on 10/24/2017, DJ [Official Journal of State Courts] 11/08/2017.

<sup>21</sup> "Article 65 - These are circumstances that always mitigate the penalty:

(...)

III - the actor has:

(...)

c) committed the crime under duress which he could resist, or in compliance with an order from a superior authority, or under the influence of violent emotion provoked by an unjust act of the victim;"

The Superior Court of Justice has had the opportunity to rule on the characterization of hierarchical obedience, as can be seen in the summary below:

CRIMINAL. COMPLAINT. LACK OF CAUSE. COMPLIANCE WITH SUPERIOR ORDER. - DISMISSAL OF THE ACTION. DECISION THAT IS SUFFICIENTLY BASED ON ARTICLE 22 OF THE PC, WITHOUT ANY OFFENSE TO ARTICLES 647 AND 648, I, OF THE CRIMINAL PROCEDURE CODE. SPECIAL APPEAL DISMISSED. (REsp 90.340/DF, Rel. Minister JOSÉ DANTAS, FIFTH PANEL, decided on 11/18/1997, DJ [Official Journal of State Courts] 12/15/1997, p. 66479)<sup>22</sup>

Thus, the transgression of an order leads to the action of the public administration's disciplinary authority, which manifests itself through the imputation of an administrative sanction to those who violate the duty of subordination. The hierarchical superior's order must be manifestly illegal to exclude the subordinate's culpability, and then the following requirements must also be met: the superior's competence to issue the order; the subordinate's competence to comply with it; and that the order has legal provision<sup>23</sup>.

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<sup>22</sup> BRASIL. Superior Court of Justice. REsp [Special Appeal] 90.340/DF [Federal District], Rel. Minister José Dantas, Fifth Panel, decided on 11/18/1997, DJ [Official Journal of State Courts] 12/15/1997, p. 66479.

<sup>23</sup> BRANDÃO, Cláudio. Curso de direito penal: parte geral [Criminal law course: general part]. Rio de Janeiro: Forense, 2008, p. 233.

In the case of hierarchical obedience, the individual who gave the order will be held criminally responsible, while the subordinate, despite having committed an unlawful conduct defined as a crime, will not be, as they acted without culpability.

Although Freudenthal developed the non-requirability of conduct in accordance with the law based on an employment relationship – derived from the relationship between the coachman and his employer, who saddled the unruly horse at the employer’s behest and caused bodily injury to a third party<sup>24</sup> - the Brazilian Penal Code only recognized relationships arising from administrative law, without paying attention to the subordination of labor law.

However, even if there is no legal provision for the non-requirability of conduct in accordance with the law, when the order comes from an employer to their employee, the supralegal exculpatory defense arising from the non-requirability of conduct in accordance with the law must be recognized. According to Brandão,

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<sup>24</sup> Muñoz Conde’s lessons on the avant-garde theory developed by Freudenthal are interesting: “Behind this theory was the serious economic and social situation that the working masses had to endure at the time. Freudenthal himself doesn’t hide the fact that, with his theory, you could absolve people like the midwife who registered children born on public holidays or weekends as born on working days, so that their parents, miners in the Ruhr basin, could have a paid day off; or the traveling salesman who, faced with the greed of the firm he represents, is forced to keep money in order to meet the travel expenses he incurs on its behalf and not lose his job; or the young Sicilian woman who kills her uncle who has dishonored her to prevent her husband from finding out. Previously, the Reichsgericht (RGSt., 30, 25 ss.) had acquitted a coachman who, following his boss’s orders and in order not to lose his job, had hitched his cart to a mare with a tendency to stray, which in fact ran over and seriously injured a pedestrian.” MUÑOZ CONDE, Francisco. *Edmund Mezger e o direito penal de seu tempo: estudos sobre o direito penal no nacional-socialismo* [Edmund Mezger and the criminal law of his time: studies on criminal law under National Socialism]. *Lúmen Júris*: Rio de Janeiro, 2005, p. 20).

If the employee obeys an order they don't want to carry out, coerced by the threat of losing their job, without obtaining any personal benefit from the situation, it cannot be recognized that they *freely* chose to do so. As we have seen, if there is no freedom to make the choice to behave contrary to or in accordance with the law, there can be no requirability of different conduct.<sup>25</sup>

Alongside irresistible moral coercion, hierarchical obedience is a legal exculpatory defense, as it is provided for in Article 22 of the Brazilian Penal Code. If the hierarchical superior gives an order that is not manifestly illegal, within the limits of their competence or attribution, the attitude of the hierarchical inferior who obeys it is not censurable.

In this case, if there is a crime as a result of carrying out the order, only the hierarchical superior will be punished, while the person carrying out the order who is not manifestly illegal is exempt from punishment.

### **3 THE NON-REQUIRABILITY OF DIFFERENT CONDUCT IN TAX CRIMES AND ITS APPLICATION BY THE INSTITUTIONS OF THE JUSTICE SYSTEM.**

We also see that the non-requirability of conduct in accordance with the law can function as a supralegal exculpatory defense in cases of tax crimes<sup>26</sup>.

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<sup>25</sup> BRANDÃO, Cláudio. Curso de direito penal: parte geral [Criminal law course: general part]. Rio de Janeiro: Forense, 2008, p. 232.

<sup>26</sup> Crimes against the tax order are part of what doctrine has called economic criminal law. Economic Criminal Law is based on supra-individual criminal law, where the criminality of corporate business nowadays requires a review of the functionality of criminal law.

We do not dispute that taxes play a fundamental role in the provision of essential public services, including education, health, security, leisure, welfare, assistance, among others<sup>27</sup>. Hence, we affirm that the legal

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(SILVEIRA, Renato de Mello Jorge. Direito penal supra-individual: interesses difusos [Supraindividual criminal law: diffuse interests]. São Paulo: RT, 2003, p. 143). According to Roberto Veloso, “Economic Criminal Law is one of the areas of expansion of Criminal Law, indicating that its rules are occupying spaces previously reserved exclusively for other branches of the legal system. This occupation does not imply the revocation of the civil or administrative rule, since there is an overlapping of rules, and Criminal Law describes as a crime the same conducts already described as infractions by the other branches. In effect, the individual who was previously only liable to administrative or civil punishment for committing a conduct now has the concomitant possibility of a criminal penalty involving deprivation of liberty.” (VELOSO, Roberto Carvalho. Crimes tributários [Tax crimes]. São Paulo: Quartier Latin, 2011, p. 57). According to Renato Silveira, “The current state of Economic Criminal Law is symptomatic. Various criticisms are being leveled. Many of the disagreements concern the structuring of this new Criminal Law. The starting point of the analysis is that Economic Criminal Law is dealing with criminal intervention in a supra-individual field, that is, a diffuse field, where there are no recognizable victims, nor can it admit the occurrence of real damage to the protected legal asset. The crime defining that has been criticized, as well as the dubious need to expand criminal treatment in these cases, has led to various questions in this regard. Among many other positions, it is argued that criminal enforcement should be limited to core Criminal Law, and that new areas should be dealt with by other branches of the law. Nevertheless, there is an irrefutable weighting: the construction of Economic Criminal Law ends up being the protection of a Criminal Law of the powerful.” (SILVEIRA, Renato de Mello Jorge. Direito penal econômico como direito penal de perigo [Economic criminal law as criminal law of danger]. São Paulo: RT, 2006, p. 22-23).

<sup>27</sup> There is no doubt regarding the importance of taxes and their protection at constitutional level. As Heloísa Estellita Salomão states, “when we analyzed the functions of taxation in the Constitution, we were able to see how the constitutional model of the Rule of Law, Democratic and Social, is reflected in the structuring of the national tax system. A system designed, essentially, to serve as an instrument for achieving the goals of social justice and equality” (SALOMÃO, Heloisa Estellita. A tutela penal e as obrigações tributárias na constituição federal [Criminal protection and tax obligations in the federal constitution]. São Paulo: RT, 2001, p. 180-181).

asset<sup>28</sup> protected by criminal tax legislation is tax property or tax collection<sup>29</sup>. This is because it is through this legally protected value that the state promotes its actions.

In a scenario of a globalized economy in which market fluctuations, a high tax burden and the absence of tax incentives are determining factors in business life, sometimes one or all of these circumstances can lead a company to enter financial instability in which the only solution for its survival would be tax evasion. According to Veloso,

In this situation of thin market, entrepreneurs – industrialists, traders and selfemployed

<sup>28</sup> We have already stated that “The original formulation of legal interest was due to Birnbaum, who was involved in the Enlightenment and liberal ideas that surrounded the 17th and 19th centuries. The legal interest emerged as a way of ruling out punishments for conduct that did not violate legal goods, in other words, values recognized by the state as worthy of more vigorous protection. These values, therefore, differed from moral, religious and political values.” (FLORÊNCIO FILHO, Marco Aurélio. *A tipicidade no direito penal: uma abordagem sobre os seus diversos aspectos e sua importância a nível constitucional [Criminalization in criminal law: an approach to its various aspects and its importance at a constitutional level]*. In: SILVA, Ivan Luiz; CARDOZO, Teodomiro Noronha; FÖPPEL, Gamil. *Ciências criminais no século XXI: estudos em homenagem aos 180 anos da Faculdade de Direito do Recife [Criminal sciences in the 21st century: studies in honor of the 180th anniversary of the Recife Law School]*. Recife: UFPE University, 2007, p. 389). On the concept of legal interest, read PRADO, Luiz Regis. *Bem jurídico-penal e constituição [Criminal legal interest and constitution]*. São Paulo: RT, 2003, p. 44-50.

<sup>29</sup> For Germano Marques da Silva, “We believe that the legal-penal interest protected by tax crimes, in a comprehensive system such as Portugal’s, which includes crimes of a fiscal, customs and social security nature, is not only tax assets, since, as already mentioned, the tax function is not limited to collecting taxes to meet the financial needs of the State (Article 103 of the CRP), but can also pursue other purposes such as discouraging consumption of certain products (Article 104, n.º 4, of the CRP) or becoming an instrument of economic policy [Article 81 item B, of the CRP]. That’s why we consider the legal interest being protected from a functional perspective, even though in most crimes tax assets are the synthesis or most visible component of the legal interest being protected” (SILVA, Germano Marques da. *Dirito penal tributário [Criminal tax law]*. Lisbon: Catholic University, 2009, p. 52).

professionals – have no choice but to stop collecting contributions and taxes to pay employees and loan obligations to financial institutions, in order to guarantee the company's survival. There is an extraordinary situation of motivation, the impossibility of collecting taxes to the detriment of the survival of the business, in which the ability to act in accordance with the legal norm is severely diminished.<sup>30</sup>

Consequently, the businessperson, by acting in non-requirability of different conduct, is practicing an unlawful act defined as a crime, but not a culpable one. Therefore, we can say that the actor is in breach with the tax authorities, but not that they have committed a crime.

In fact, in the current economic crisis Brazil is experiencing, judges must carefully observe the incidence or not of culpability in the specific case, as well as the presence of the non-requirability of different conduct to rule out the objective criminal liability of illicit conduct carried out by businesspeople.

Veloso offers some objective criteria for the magistrate to apply the non-requirability of different conduct in crimes against the tax order:

1) there is only a conflict situation when it is proven that the company's financial health is precarious to the point of bankruptcy or pre-bankruptcy; 2) that the choice made was effectively for the preservation of the company and not for leisure or to increase the partners' assets; 3) that the precariousness of the resources is motivated by the

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<sup>30</sup> VELOSO, Roberto Carvalho. Crimes tributários [Tax crimes]. São Paulo: Quartier Latin, 2011, p. 243.

general economic situation or by a fact outside the responsibility of the partners and not by wasteful spending and poor management<sup>31</sup>.

Although the financial situation must be very well demonstrated, it is not necessary to prove the absolute impossibility of paying the tax, because “the impossibility of different conduct is not the same as the non-requirability of different conduct. It is clear that what is impossible is non-requirable, but what is non-requirable may not be impossible.”<sup>32</sup>

A Democratic State governed by the Rule of Law, such as Brazil, cannot legitimize the punishment of businesspeople who, for example, fail to pass on to the National Social Security Institute the social security contributions deducted from their employees, if this attitude has served to keep the company running and generating jobs, and thus fulfilling the social and economic roles enshrined in the Federal Constitution.

The non-requirability of different conduct in crimes against the tax order has constitutional protection and can be seen in Article 1 of the Federal Constitution, which deals with the pillars of the Federative Republic of Brazil, i.e. its fundamental principles.

Article 1 of the Federal Constitution states that:

Article 1 The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, is a

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<sup>31</sup> VELOSO, Roberto Carvalho. Crimes tributários [Tax crimes]. São Paulo: Quartier Latin, 2011, p. 245.

<sup>32</sup> FULLER, Paulo Henrique Aranda. Dos crimes contra a ordem tributária (Lei n. 8.137, de 27-12-1990) [Crimes against the tax order (Law no. 8.137, of 12/27/1990)]. In: JUNQUEIRA, Gustavo Octaviano Diniz. Legislação penal parte especial [Criminal law especial part]. Vol.2. São Paulo: Saraiva, 2010, p.449-572.

Democratic State governed by the Rule of Law and has as its grounds:

I - sovereignty;

II - citizenship;

III - the dignity of the human person;

IV - the social values of work and free enterprise;

V - political pluralism.

Well then, the wording of the aforementioned article shows that the Federative Republic of Brazil is grounded on the social values of work and free enterprise, as set out in section IV. Consequently, when a businessperson keeps their company running in an attempt to pay their employees and suppliers, to the detriment of paying taxes, because it was not requirable of them to do otherwise in the circumstances, they are complying with the constitutional precept of valuing work and free enterprise.

It should be noted, moreover, that tax collection has no legal provision in Article 1 of the Federal Constitution, so it is not a country ground. Nor could it be, because tax collection is not an end in itself, but rather a means of providing public services. Like so, a country that does not value work and free enterprise and prioritizes tax collection cannot progress, as it is trapped in its own chains and does not advance with national development. In an analogy, it would be like a dog chasing its tail.

It was with this in mind that the constituent legislator elevated the valorization of work and free enterprise to the category of fundamental principle, to the detriment of tax collection.

Accordingly, if the judge denies the acceptance of the non-requirability of different conduct in crimes against the tax order, as a supralegal exculpatory defense, they deny the Federative Republic of Brazil itself, by not respecting its grounds, which are the valorization of work and free initiative.

Article 193 of our Magna Carta also states that: “The social order is based on the primacy of work, and its objective is welfare and social justice”.

Would it be in the State’s interest, then, to collect taxes and unemploy workers? Would the State want to violate the constitutional provision of the Social Order and use criminal law to collect taxes from entrepreneurs who have chosen, due to the crisis their companies have gone through, to keep their employees employed to the detriment of tax collection?

We believe not. Hence the central role of judges in safeguarding constitutional rights and rejecting any legal uncertainty that may arise.

INTERLOCUTORY APPEAL. TAXATION. ARTICLE 135, ITEM. III, NATIONAL TAX CODE. ACTIONS CONTRARY TO THE LAW TAKEN BY THE MANAGING PARTNER. IRREGULAR DISSOLUTION OF THE COMPANY. ARTICLE 168-A OF THE CRIMINAL CODE. NON-REQUIRABILITY OF DIFFERENT CONDUCT. FINAL JUDGMENT OF THIS COURT ACQUITTING THE AGGRAVATING PARTY. REDIRECTION OF THE EXECUTION. NOT SUITABLE. 1. This Court, in successive precedents, has consolidated its understanding that the general rules on tax liability are a matter reserved for Complementary Law, as expressly provided for in Article 146, III, “b”, of the Federal Constitution, and are currently regulated in the National Tax Code, Law no. 5.172/66. 2. Article 135 item III of the National Tax Code provides that managing partners are liable for the company’s tax debts in the strict event that they have acted in

excess of their powers or contrary to the law, the articles of organization or the articles of incorporation. 3. It is the understanding of this Panel that the irregular dissolution of the company, in itself, does not give rise to the redirection of enforcement. Recognizing this possibility would be tantamount to considering non-payment of taxes to be a breach of the law that would make the partner personally liable, since full payment of taxes is one of the requirements demanded by the tax authorities for the regular dissolution of the company. 4. The redirection of tax enforcement, based on Article 135, III, of the NTC, however, does not require full proof, and it is sufficient that the conduct described is, in theory, offensive to some legal precept, or falls under some type of illicit act. 5. In the present case, criminal proceedings were brought against the appellant, who was accused of violating Article 168-A of the Criminal Code. However, the sentence handed down in the criminal proceedings, taking stock of the series of vicissitudes faced by the then defendant in the administration of the company, dismissed the complaint, concluding that there were sufficiently convincing elements for the recognition in favor of the accused Zilmar Henrique, of the non-requirability of different conduct, as a supralegal exculpatory defense, in view of the social security default found in this criminal proceeding, in relation to the company, considering the financial difficulties that demonstrably plagued the company during the same period as the debt. 6. Since this Court's

judgment acquitting the appellant party of the act contrary to the law enshrined in Article 168-A of the Criminal Code has become final and unappealable, excluding his culpability due to his good faith in running the company, there can be no question of his acting in excess of his powers, which would authorize the redirecting of the tax execution. (AG - INTERLOCUTORY APPEAL 2006.04.00.037595-2, MARIA HELENA RAU DE SOUZA, RFC 4 – SECOND PANEL, D.E. 04/25/2007.)<sup>33</sup>

Furthermore, Article 170 of the Federal Constitution deals with the general principles of the economic and financial order, stating verbis:

Article 170. The economic order, based on valuing human work and free enterprise, aims to ensure everyone a dignified existence, in accordance with the dictates of social justice, subject to the following principles:

(...)

VIII - the pursuit of full employment.

In other words, according to the abovementioned constitutional articles, it is clear that the Federal Constitution aims, both in the social order and in the economic order, to value work.

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<sup>33</sup> BRASIL. Regional Federal Court for the Fourth Region. Ag – Interlocutory Appeal 2006.04.00.037595-2, Maria Helena Rau de Souza, TRF4 [RFC4] – Second Panel, D.E. 04/25/2007

As follows, the application of the non-requirability of different conduct in crimes against the tax order as a supralegal exculpatory defense is based on the Constitution of the Federative Republic of Brazil.

## 4 CONCLUSIONS

The analytical concept of crime is all conducts that are criminalized, unlawful and culpable. Criminalization is a judgment that the fact fits the regulation, it is defined as a crime. Unlawfulness is a judgment of disvalue that qualifies the fact as contrary to the law. And culpability is a judgment of personal reproach given to the perpetrator of a criminalized and unlawful act, as being able to behave in accordance with the law, the actor freely chose to behave contrary to the law.

As illustrated, culpability is the only value judgment within the theory of crime that deals with the perpetrator of the punishable act, since criminalization and unlawfulness deal with the act.

Frank was responsible for the initial conception of the psychological normative theory of culpability, which was later developed by Goldschmidt and Freudenthal. With Frank, culpability was no longer limited to the psychic link between the perpetrator and the result, but for the first time received the qualification of reprehensibility.

It was Freudenthal's task, based on the analysis of cases in the German Constitutional Court, to develop dogmatically the non-requirability of different conduct institute, configured as an exculpatory defense.

In Brazil, there are the legal defense hypotheses due to the non-requirability of different conduct (hierarchical obedience and irresistible moral coercion) and also the supralegal exculpatory defense due to the non-requirability of different conduct, such as its application in tax crimes.

When the entrepreneur acts in non-requirability of different conduct, he is practicing a criminalized and unlawful act, but not, it should be emphasized, a culpable one. Therefore, it can even be said that the actor is in default with the tax authorities, but it cannot be said that they have committed a crime, given that their conduct is not culpable.

It is also important to point out that the non-requirability of different conduct in crimes against the tax order has constitutional protection and is regulated in Article 1 of the Federal Constitution, which deals with the pillars of the Federative Republic of Brazil, i.e. its fundamental principles.

There is still no unified position in the courts on the application of the non-requirability of different conduct to crimes against the tax order, and the attitude of the judiciary in deciding in favor of the accused when they claim financial difficulties in their favor is very reserved.

But the best position should be to analyze it based on the financial crisis that Brazil is going through, with the reduction of the industrial park, the closure of commercial establishments and, as a result, the emergence of millions of unemployed people, who, with difficulties in consuming, cause more crisis and more unemployment.

Along these lines, tax collection cannot serve to increase unemployment and consequently the crisis, since sometimes the entrepreneur is forced to close the company in order to pay the taxes due. For this reason, it is important to analyze in detail the financial situation of the commercial or business activity in criminal proceedings for tax crimes.

As a result, the entrepreneur, by valuing work and free enterprise over tax collection, as they were not requirable to act differently due to their bankruptcy or prebankruptcy situation, comply with the fundamental precepts enshrined in our Magna Carta.

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