LEGAL ASSET AS AN ELEMENT OF TYPICALITY AND OBJECTIVE IMPUTATION

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Abstract

In a democratic and social state of law, where the criminal legislator has an ambivalent role, that is, while it has the legitimacy to create criminal laws based on the selection of the most important legal assets, it must also limit the state's role of criminalizing where there is no effective threat or harm to legal assets. To this end, within the scope of the guaranteed system, the fundamental principles of the democratic and social state model of rights are used, which stand out but are not limited to: Legality, in the formal and material aspect, as well as Taxativity, which guide the legislative content of criminal law in contemporary times. In the view of the majority doctrine, the analytical concept of crime as being a typical, unlawful and culpable fact, which has prevailed since its constitution to the present day, must undergo adjustments so that, starting from the analysis of the offensiveness of the most important legal asset and always taking as prerequisites of the offense, *ex antes,* the assessment of the conduct and, *ex post* , the legal result, therefore, analysis regarding the objective imputation increases the analytical concept of crime mentioned above, notably regarding the aspect of the first material type element, with the express need to also include the relevant criminal legal asset as a typical element. In fact, after the proposal now made, the concept will be included as follows: Typical, Unlawful and Culpable Fact, and in the element of the objective type, the relevant criminal legal asset will be explicitly included.

Keywords

Criminal Law. Analytical Concept of Crime. Legal Asset and Objective Imputation

Summary

1. Introduction 2. Notes on Crime Theory. 3. Formal and Substantial Legality, Guarantees and the Concept of Legal Asset 4. Brief Aspect of the Type, Objective Imputation and Criminal Legal Asset. 5. Conclusion

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1 INTRODUCTION

The hypothesis of this study is to demonstrate the need to increase the material criminal type with the express presence of the *Legal Asset* as an integral element of criminal typicality. The proposal that is now made, although without exhausting the topic since space is limited and the subject has a certain complexity of epistemological nature, does not innovate the perspective of what is understood by material type, since it is believed to be common sense, with the exception of a few within the dogmatic doctrine, the presence at least implicit of the Legal Asset as an integral element of typicality.

Being the majority in the doctrine and a well-known fact that the Legal Asset is an element that is implicit, especially in the material aspect of the type, it is necessary, however, and in this sense it clarifies in the formal aspect, the necessary and urgent increase within the type of the element of the legal asset that is pertinent to criminal law in an express manner, which is what we propose here.

To this end, aspects of formal legality, material legality and material typicality will be addressed, from their origins to the modern analytical concept of crime.

Moving on to the core of the hypothesis according to which the legal asset must expressly compose the typical material element, we will also address aspects of the theory of the legal asset, its concept in the sense of restriction of the state's power to incriminate the legislator, as well as the theory of objective imputation as an objective species of the criminal norm, especially if we consider the subsidiary protection of legal assets as a function of criminal law.

This brief essay concludes with the correlation of the theory of objective imputation by the assessment of conduct and the result on which compliance with the content of the norm depends, thus affirming the hypothesis proposed here of the elementary function of the material type in the sense of subsidiary protection of legal assets, even if expressly provided for in the material type.

2 NOTES ON CRIME THEORY

Throughout the 19th century and into the 20th century, the analytical and tripartite concept of crime as a typical, unlawful, and culpable act still prevailed. Since the focus of this work will be to demonstrate the need, *sine qua non* , to increase the objective material criminal type with the element of *legal interest relevant to criminal law* , it is worth going back in time to learn about the origin of the first element that analytically composes the concept of crime.

In 1906, Ernst von Beling was the first to formulate the concept of typicality. For this author, the criminal type is an *objective description* free from any value judgment[2]. However, despite the importance of the concept formulated by Beling, which represented a great advance at the time, it still lacked a theoretical element, which was only possible in 1915 with the studies of Max Ernst Mayer.

Thus, although there were other authors at the time who questioned Mayer's proposal regarding the link between typicality and *the ratio congnoscendi* of unlawful, it is not possible to think of the type without the evaluative character proposed by Mayer, given the presence of the action within the scope of typicality. Advancing in

theories, it was the merit of Hans Welzel's finalism to link the notion of purpose to the concept of action.

In fact, for Welzel, action is not limited to the mere causal transformation of the external world, as Beling proposed in the naturalist causal system, since, for that author, all conduct has a will directed towards an end, that is, *to be* consistent with the end. [2]Among other criticisms that stand out, but are not limited to, the naturalist causal system did not provide a solution for crimes of mere conduct or omissions, in which any voluntary behavior transforming the external world is absent.

Since the objective of criminal law is to protect against harm or threat of harm to the most relevant legal assets, finalism realized the need to think of behavior as directed towards a purpose. Welzel's famous phrase *is that causality is blind to purpose,* [3]because finalism saw the purpose of the content of the rule and advanced the concept of conduct that best served the interests of criminal law, which, however, was not seen by Beling/Lizt's causalism, despite its importance in the historical aspect of criminal law.

In addition to developing a model of action aimed at a specific end, Welzel also advanced the theory by proposing the displacement of subjective elements (intention and guilt) to conduct and consequently to the type, since this is the first element of the analytical concept of crime. In this sense, if in finalism the conduct was directed towards an end, this end had to consider the will or the means of the agent to

[2] BRANDÃO 2014, 116.

[3] WELZEL 1964, 59-60.

achieve a certain desired or achieved result. Therefore, it was not logically coherent, as in causalism, to maintain the subjective elements in guilt since these elements should belong to the conduct.

Once the subjective elements (intent and fault) have been transferred to the conduct, the type appears as the *locus* in which the conduct is treated in the first conceptual element of the crime, that is, in the type we move on to the analysis of the conduct itself as the first element of the objective type. In this way, it becomes clearer to think about formal, *descriptive typicality and material, evaluative* typicality , through their normative content, because as *a ratio ltima,* the purpose of criminal law will always be the protection of relevant legal assets. In this sense, and dealing specifically with typicality, Cláudio Brandão says: Thus, typicality has a systemic meaning in criminal law, because, as a condition, it is interrelated with the other elements of the crime; 2) the action, which is the link between the criminal institutions of the crime, is described in the type; and 3) the criminal type contains the initial disvalue on which criminal law is materially based, because it is from the criminal type that the legal asset is revealed.[4]

Therefore, starting from Beling/Lizt's causalism, passing through Mayer's evaluative elements and arriving at Welzel's finalism, we can see that there have been advances in the analytical and tripartite aspect of crime. Without disregarding the contributions of causalism and Mayer's evaluative elements, however, Welzel's finalist theory of action stands out as the first model to develop a notion of purpose-directed behavior. In addition, finalism also saw that the subjective

[4] BRANDÃO 2014, 117.

elements of culpability should be displaced to the type, thus enhancing the final theory.

Having demonstrated through this brief historical perspective the advances that have occurred in the analytical concept of crime from the 19th century to the present day, especially with emphasis on the finalist theory of action proposed by Welzel, it is important to remember, from a historical perspective, the form of punitive "justice" in Antiquity.

At that time, punitive justice was divided into three stages, summarized as follows: first, the crime against the gods; second, the violent crime against one tribe or another; and third, the crime became a transgression against the legal order. From the third stage onwards, and already in modern times, from the perspective of the Enlightenment, especially from the perspective of the social contract, the protection of crimes, which at the time were divided into private and public, the latter consisting of crimes against the State and those against the individual, had as its function, in Feuerbach's view, the defense of subjective rights based on the defense of the individual rights of the State and of people. However, it was Birnbaum in the 19th century (1843) who introduced the concept of good in the criminal context. From then on, with the studies of Franz Von Liszt, a material dimension of the concept of injustice was reached, thus developing the irrevocable idea of the legal good as a definitive substitute for the defense of subjective rights proposed by Feuerbach.

Therefore, instead of the idea of subjective law proposed by Feuerbach, the good, initially idealized by Birnbaum and the legal good by Franz Von Liszt, gained space in the criminal context, becoming the object of criminal protection from the 19th century

onwards, replacing Feuerbach's theory of subjective law, thus limiting the State's incriminating power, since from the legal good in the context of the norm, the process gains material content and objectivity and, therefore, the subjectivism that existed at the time is buried.

3 FORMAL AND SUBSTANTIAL LEGALITY, GUARANTEES AND THE CONCEPT OF LEGAL ASSETS

It is important to draw a parallel with the principle of legality, the basis of criminal law, because only law in the formal and material sense, therefore, a guarantor or normative model of law, that is, of strict legality, can foresee in the normative plan a containment of violence to the detriment and maximize the freedom of the citizen through the selection of conduct that threatens or harms non-insignificant legal assets [5].

However, for a conception of democracy, that is, a proper conception of guarantees, a distinction is required between the formal dimension, a condition for the validity of the norm, and a substantial dimension, that is, respect for fundamental rights and guarantees that must satisfy, among others, the right to freedom, this dimension being, therefore, the only meaning of guarantees in democracy.[6]

Still on the aspect of guarantees, in a work entitled: The reasons for Penal Positivism in Brazil, Ricardo de Brito relates the concept of the

[5]FERRAJOLI 1995, 851

[6] RUIZ MIGUEL 2005, 25.

Formal Rule of Law through the notion of formal and substantial legality:

> "The first concept of legality corresponds to what is known as legality in a broad or formal sense. The second is called legality in a strict or substantial sense. Legality in a broad sense is related to the formal concept of the Rule of Law and is that which requires only that those who hold power and the ways in which they exercise it are predetermined by law. On the other hand, legality in a strict sense is that which, in addition to the predetermination characteristic of legality in a broad sense, implies requiring that questions of competence and decision-making criteria be legally pre-ordained and circumscribed, by means of obligations and prohibitions."[7]

In fact, the substantial rule of law is synonymous with the principle of legality in both its broad and strict aspects. In this sense, the same author warns, citing Ferrajoli in his work, The Reasons for Penal Positivism in Brazil:

[7] FREITAS 2002, 10.

"The legal guaranteed system, as I said before, is synonymous with the substantial rule of law, based on the principle of legality in the broadest sense. As the doctrine states, the rule of law corresponds to the legal guarantee system and does not simply designate a "state of law" or "regulated by law", but a model of state born with modern constitutions and characterized: a) on a formal level, by the principle of legality, by virtue of which all public power — legislative, judicial and administrative — is subordinate to general and abstract laws, which regulate the ways in which they are exercised and whose observance is subject to the control of judges separate and independent from it... b) on a substantial level, by the functionalization of all the powers of the state in the service of guaranteeing the fundamental rights of citizens, through the limited incorporation in its constitution of the corresponding public duties, that is, the prohibitions of violation of the rights of freedom and the obligations to satisfy social rights, as well as the related

> powers of citizens to activate judicial protection."[8]

In the Modern Democratic State, the principle prevails according to which: " *there is no crime without a prior law that defines it, nor is there punishment without a prior* legal conviction" [9]in the scope of formal legality, the norm that aims to foresee typical conduct, that is, deserving of punishment, must pass the sieve of legislative competence, validity and normative effectiveness for the purposes of protecting typical conduct. In the material scope, however, it is not enough to merely meet the requirements of competence, validity and effectiveness, that is, formal, but, above all, it must also pass the sieve of constitutional content with special attention to the values and principles that founded Fundamental Rights and Guarantees. Thus, in the modern social and democratic state of law, criminal law, formally and materially committed to fundamental rights and guarantees, there will be no crime without effective injury or offense to legal assets subject to criminal protection in compliance with the Principles of Injury or Offensiveness that arise from modern criminal law [10], since it is not possible to construct a theory of crime dissociated from the consequences, the Principle of Legality.

[8] FREITAS 2002, 10.
[9]Article 5, item XXXIX Federal Constitution/1988.
[10]GOMES 2002, 14.

Therefore, the same law that provides for the type of prohibited behavior (general positive prevention) also provides for the consequence in the form of punishment (general negative prevention).

Still in terms of the material content of legality, it is important to highlight the Relevant Criminal Legal Asset that justifies the protection of criminal law. But which asset? How to conceptualize it? The doctrine presents two concepts of legal property, one of a dogmatic nature and the other of a political-criminal nature, which will be briefly addressed only for the purpose of delimiting the object of the research.

According to Luís Greco, in Modernization of Criminal Law, Collective Legal Assets and Abstract Danger, from a dogmatic perspective, " *every rule will have its legal asset, that is, it would be no more than the interest protected by a given rule and where there is a rule there will be an interest"* . [11]However, the same author adds that this dogmatic concept of legal asset transfers to the legislator the power to determine which legal asset is protected without, however, delimiting the scope of the legislator's power, which would only be possible based on the criminal political concept of legal asset. Therefore, due to the limited space of this essay, we will limit ourselves without exhausting the scope of the criminal political concept of legal asset.

[11]GRECO 2011, 77.

For the defenders of the political-criminal concept of legal good, this derives from the constitution, which binds the legislator by a criterion of constitutional hierarchy. [12]Legal goods would therefore be: " *fundamental data for the personal fulfillment of individuals or for social subsistence, within the limits of a constitutional order* ".[13]

In a democratic state governed by the rule of law, not any infringement against a legal asset will legitimize criminal intervention, but only those infringements that are not insignificant, that are relevant and that offend or put at risk the relevant legal assets of third parties.

It is important to clarify, however, that the legal asset is not the main limiting factor of the State's incriminating power and, therefore, it must be analyzed with criteria and in dialogue with the first conceptual element of the crime, which is the type, as this will be influenced by formal and material legality, in addition to the theory of objective imputation, which will be analyzed from the perspective of the legal result.

Therefore, in modern times, the type, the objective imputation and the legal asset are part of the constitutional criminal method that will restrict the State's criminal limitation to incriminate, thus ensuring a criminal law committed to the Social and Democratic State of Law, based on the correlation between the methodological institutes mentioned above, which will be better addressed below.

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[12]GRECO 2011, 82.

[13]GRECO 2011, 89.

4 BRIEF ASPECTS OF THE TYPE, OBJECTIVE IMPUTATION AND CRIMINAL LEGAL PROPERTY

The question being tested in this study can be formulated as follows: for how long and how should we deal with contemporary criminal issues using the idealized concepts and theories of the 19th century? Does the concept of material type, idealized as the first element of the analytical concept of crime since the 19th century, meet the issues of criminal law in contemporary times or does it need to be adapted, especially considering the values, interests, and assets of today's society?

First, it is necessary to keep in mind that, as João Maurício Adeodato warns, "a normative theory has the future as its vector, for which it seeks to prescribe optimizations, improvements in the vision of its author, that is, it seeks to modify, direct, influence the environment and people's conduct".[14]

Well, it can be said that, with the evolution of the analytical concept of crime, conduct is a bodily movement aimed at a purpose. This purpose is the object of interest to which criminal law is directed, that is, the protection of crimes or threats of crimes against the most important legal assets for criminal law. The aim here is to demonstrate that, when going through the analytical concept of crime and specifically analyzing the first element of material typicality, it should be verified that the concept does not stagnate only in what Welzel revealed in finalism, but must evolve in light of the theory of objective

[14]ADEODATO 2017, 16.

imputation, which, through the evaluation of conduct and the result, ascertains whether or not there is in fact a crime or threat to relevant fundamental legal assets. In this sense: The theory of objective imputation therefore has a broad theoretical basis and perfectly meets the requirements of a system founded on a political-criminal purpose. In this sense, Luis Greco:

> And now we can come to the present day, to the theory of objective imputation. What this theory does is to relegate the subjective type and purpose to a secondary position and to place the objective type back in the spotlight. This objective type cannot, however, be exhausted in the mere causation of a result – something more is needed to make this causation an objectively typical causation. This something more is fundamentally composed of two ideas: the creation of a legally disapproved risk and the realization of this risk in the result.[15]

In any case, the theory is far from being just a label for a series of diverse and unconnected problems, as Hirsch believes. Contrary to Hirsch's view, it seems to me that it is precisely the theory of objective

[15] GRECO 2014, 25-26

imputation that also demonstrates that modern criminal law dogmatics is not limited to the knowledge acquired by Welzel and finalism.[16]

It is also worth highlighting that Claus Roxin's theory of objective imputation is directly related to the principle of protection of legal assets and that the theory establishes the measure of protection through the set of rules, rationally as necessary [17]. In other words, if the function of criminal law is the subsidiary protection of the most relevant legal assets, the analysis of the creation of risks not tolerated by the criminal justice system through human conduct must consider the reference point of purpose attributed to the law.

Thus, Roxin links in his theoretical construction the demonstration and correlation between the theory of legal property, type and objective imputation as a domain not only of criminal policy but also of the theory of injustice: My conclusion is that the protection of legal property not only governs the criminal policy task of criminal law, but also the systematic theory of injustice. Within the scope of its criminal types, criminal law protects legal assets from unacceptable risks. For this reason, the protection of legal assets and the theory of objective imputation are often irrevocable in a social process of weighing up the question of prohibition.[18]

[16]ROXIN 2002, 30-31.
[17]ROXIN 2002, 43.
[18]ROXIN 2002, 61.

Metaphorically speaking, Castro Júnior, in his approach to the relationship between legality and literalness, demonstrates the strength of the imputation method, as criminal law has an abstract axiological called legal asset that goes beyond logic:

> The letters of the written sentence, whose "literality" rhetorically presents itself as an empirically verifiable object (the words of the law being the law itself), give renewed legitimacy to the belief in legal certainty as a belief in the neutrality and stability of certain written words. At the same time as the first instances of legislation, however, the inevitable problems of interpreting and concretizing these sentences of and in the law came into play. Along with the ability to take the law as written, a rhetoric of the sacredness of certain textual formulations, their "canonization," developed correspondingly.[19]

Notably from the perspective of the theory of objective imputation, Santiago Mir Puig [20]rescues the theory idealized by Larenz in the field of private law and imported into criminal law by the authors Honig and Helmuth Mayer, but not as an element of wrongdoing, but as a

[19]CASTRO JUNIOR 2013, 125.
[20]MIR PUIG 2003.

requirement of the prior concept of action. After the contribution of Hans Welzel's finalism, the action filled the conduct with subjective elements, bringing intention and guilt to typicality. Therefore, after Welzel's finalism, typicality in terms of conduct ceased to be purely objective and began to have a subjective dimension.

With the migration of intention and guilt to conduct — which is behavior directed toward a specific end desired by the agent, in Welzel's words — typicality must be analyzed from this perspective of valuing conduct. In this sense, Roxin proposes an increase in the penal functionalism of the evaluative requirements of conduct and legal outcome.

If, in order to be typical, the conduct must pass the sieve of the assessment of the conduct and if this conduct is pure, that is, with the specific purpose of harming or threatening to harm interests, values and principles that are not insignificant and that are within the scope of the protection of the norm, it is not difficult to understand, therefore, the need for the Legal Asset as an integral element of the material typicality, in view of analyzing in the "*ex ante aspect"* the assessment of the legal assets whose conduct aims to harm. Regarding the aspect of the need to assess the conduct and the result, Greco:

> I can use another perspective entirely, not only formal but also material: focusing primarily not on the naturalist distinction between objective and subjective, but rather on the normative distinction between the devaluation of the action and the devaluation of the result. These two concepts refer to the dimensions of the

> devaluation of criminal injustice, that is, to what the law values negatively in the unlawful realization of a criminal offense. The first is analyzed according to an *ex ante perspective,* that is, taking into account the data known and knowable at the time the action is committed; the second, according to an *ex post perspective* , taking into account the data that actually exists, even those that are only known after the result occurs.[21]

It is clear, therefore, in Santiago Mir Puig's proposal [22]that the term — imputation — is not descriptive, but evaluative, expressing the type and legal asset, the requirements necessary to be able to attribute to a subject the injury or threat to a legal asset provided for in a crime, these requirements being necessary to establish the relationship that must exist between said injury or danger and, ultimately, with the perpetrator of a crime.

This, then, is the original meaning of the term 'imputation'. Recall Kant's famous passage according to which "imputation (*imputatio*) in the moral sense is the judgment by which someone is considered the author (causa libera) of an action" [23]. Both subjective imputation and

[21] GRECO 2014, 26
[22]MIR PUIG 2003.
[23]KANT 2003, 70.

individual or personal imputation are necessary to be able to consider someone guilty of a typical injury or danger.

The first reason why an act is classified as criminal is that it involves an injury or threat of injury to a right that is not justified by the need to save another preferential legal interest.

This content is the first basis for the objective devaluation of injustice. Typicality, therefore, is based not only on action, causality, and the requirement of a result (separate or not from the conduct) but also presupposes other requirements, such as objective imputation:

> "It should be noted, however, that finalism did nothing more than add the subjective component to the concept of type of naturalism. The objective type of finalism (action + causality + result) is identical to the type of naturalism. This is exactly what is modified by objective imputation. Objective imputation modifies the content of the objective type, saying that it is not enough for the elements of action, causality and result to be present to consider a given fact objectively typical. In addition, a set of requirements is necessary. This set of requirements that make a given causation a typical causation, violating the norm, is called objective imputation.[24]

[24]ROXIN 2002, 7.

In the fundamental pragmatic aspect of the Democratic and Social State of Law, the Federal Constitution [25], article 5, item XXXIX, stipulates the following: " *There is no crime without a prior law that defines it, nor is there punishment without a prior legal conviction* ", thus adopting the principle of strict legality. In turn, article 13 of the Brazilian Penal Code, to correspond to the constitutional mandate, provides the following: " *The result, on which the existence of the crime depends, is only attributable to the one who caused it. The cause is considered the action or omission without which the result would not have* occurred." [26]In turn, the conduct, punishable conduct, is that which passes the sieve of injustice, that is, evaluative in the *ex ante aspect* and the result, *ex post* of the possibility of imputation (intersubjective, subjective or personal) demonstrates in the objective criminal type substantial actual harm or threat of harm to a fundamental legal asset not insignificant to justify the indispensability of criminal law.

After all this, some outlines can be drawn to answer the above questions, which we will replicate below for didactic purposes, to better answer them.

The question being tested in this study can be formulated as follows: until when and how should we treat contemporary criminal issues with the idealized concepts and theories of the 19th century? Now, in

[25]BRAZIL 1988.
[26]BRAZIL 1940.

this first question, it is important to highlight, but not limit, the importance of the concepts brought by causalism about the concept of action as a bodily movement that transforms the external world. It is worth noting that he was the first embryo to delimit the concept of punishable act at the time and that he also brought correlation with the principle of strict legality in terms of delimiting the scope of what was prohibited. Later, but still in the 19th century, the concept of action underwent other evaluative and finalistic influences that led to the modern analytical concept of crime that is applied to this day. Thus, from a historical, epistemological, and original perspective, it is important to look to the past to continue to understand and advance towards the future in criminal dogma, which dates back to difficult times, but which served as the basis for all criminal dogma and, therefore, for the scientific nature of the subject. From this retrospective, the issue of criminal law must be treated with discretion and criticism, always seeking an understanding that supports criminal law for a future that is better harmonized with a criminal law committed to freedom and the protection of fundamentally guaranteed assets, values, and interests.

Does the concept of material type, idealized as the first element of the analytical concept of crime since the 19th century, meet the issues of contemporary criminal law or does it need to be adapted, especially considering the values, interests and assets of today's society? In this second question, no less important than the first, after briefly considering the theory of type, objective imputation, and legal interest, it was possible to see that the concept of type initially idealized was important for the discussion and evolution of the theory, but it needed to undergo changes during its idealization until today.

In this regard, it is interesting to show that, although it occupies the status of the first analytical element of the concept of crime, typicality was conceived later than the other two elements of crime, unlawfulness and culpability, and the justification came from the very concept of action conceived by Beling.

It is important to remember that since the concept proposed by Beling in his work *The Doctrine of Crime* , in 1906, the author reduced the scope of the type, or in his words *Tatbestand* would thus have a merely descriptive function in the penal method, separated, therefore, from unlawfulness and guilt, [27]since typicality would have been stripped of value.

For the author, the main function of the concept of action is negative, that is, the exclusion from criminal law of any manifestation that does not have a will linked to the modification of the external world through causality [28].

Thus, the concept of material type, devised as the first element of the analytical concept of crime since the 19th century, does not serve the contemporary concept of crime, given its exclusively descriptive function at the time, extracted from the law. It was necessary to advance to introduce the concept of action into typicality, which was only possible through Mayer's doctrine, thus enriching the function of criminal dogma, which allowed bringing together in a single element of the structure of crime the issues already discussed since the

[27]BRANDÃO 2023, 94.
[28]BRANDÃO 2023, 95.

19th century, such as: causality, the subject of the crime, the material object and the legal object of protection, which, I repeat, was only possible through Mayer [29].

Therefore, the concept of type idealized in the 19th century is important for the historical context and understanding of the topic, but for the reasons explained above, it does not meet the conceptual model to respond to contemporary criminal issues. Hence the importance of the evolution of the concept and, in this sense, of the object of protection of the legal asset together with the modern theory of objective imputation, which will correlate the causal link together with the assessment of the conduct and the result, will be essential to think of a theory that meets the methodological and guaranteeing requirements of the crime committed in the modest social and democratic state of law.

In a very pragmatic way, it was only possible to arrive at the dogmatic model with typical, illicit and culpable methods committed to the joint analysis of the causal link, assessment of conduct and result, that is, objective imputation and criminally protectable legal asset, after going through the entire evolution of the aforementioned theory of crime, but which today guarantees indispensable criteria for a contemporary criminal law effectively committed to the social and democratic Rule of Law in the defense of fundamental assets.

5 CONCLUSON

[29]BRANDÃO 2023, 103.

In the modern social and democratic state of law, the legislator is constitutionally authorized to legislate on criminal matters, but only if he respects the criteria of competence, validity and effectiveness (formal legality) and respects the fundamental values and principles of the federal constitution (material legality). The current federal constitution states that: " *there is no crime without a prior law that defines it, nor is there a penalty without a prior judicial conviction."* Principle of Legality. The norm, which must necessarily pass the test of legality in both its formal and material aspects, can only protect conduct whose object of protection is a relevant legal asset and that is within the scope of protection of the norm, since not just any legal asset can be protected by criminal law in compliance with the harmfulness, offensiveness, and *ratio ltima of* criminal law.

Among the various values, interests and principles protected by the federal constitution, the criminal law of last *instance* must use the criteria extracted from the concept of legal asset to limit state action in the criminal power to incriminate. *In this* sense and for this main reason, the legal asset: " *fundamental data for the personal fulfillment of individuals or for social subsistence, within the limits of a constitutional order* " has the function of limiting state action in what concerns the criminal power to incriminate.

The objective is to demonstrate that the limitation of the power to incriminate has a correlation from legality, through the substance of the constitution to the very concept of crime demonstrated above.

In terms of the material concept of crime, from causalism, through finalism, to the present day, the analytical model can be applied in contemporary times, but must undergo changes to achieve the true meaning and scope of contemporary constitutional values.

Furthermore, the theory of objective imputation, based on the criterion of valuing conduct and results, requires an adjustment in the aspect of objective material typicality, in order to increase the scope of criminal law to the realization of the crime or threat of crime to the relevant criminal legal asset, since, in Welzel's words, all behavior is directed towards an end that materializes in the assets, values and interests of contemporary society, that is, legal assets.

Therefore, in the model of a democratic and social state under the rule of law, in which the principles of legality and taxability prevail as a condition for the validity and effectiveness of the criminal law norm to address contemporary criminal issues committed to this state model, it will be necessary to advance on a theoretical level from the perspective of the objective material criminal type, to include the criminal law asset as an integral element thereof, in order to meet the current model of punishable fact committed to a theoretical and methodologically constitutional criminal science.

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