

RHETORICAL-DOGMATIC ANALYSIS OF THE FACT DOMAIN THEORY AND ITS APPLICATION BY THE FEDERAL SUPREME COURT IN CRIMINAL ACTION N. 470.

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Abstract

The present work aims to analyze the application of the fact domain theory by the Federal Supreme Court in the scope of the Criminal Action No. 470. The decisions coming from the Supreme Court have effects on the entire legal system, influencing other instances through the discursive parameters presented as decision-making reasons. The work begins by historicizing the fact domain theory, to understand its function in the legal system for which it was designed. The investigation verifies contemporary developments and the theoretical contours outlined by the scholars cited as the main reference in the Supreme Court's winning report. After analyzing the application of doctrinal parameters, the research uses analytical rhetoric to understand the process of presenting the production of law, in the form of a case study and bibliographic review. It was found that the Federal Supreme Court used foreign theory in a non-judicious way and resorted to rhetorical strategies to justify an apparently pre-defined result.

Keywords

Fact domain theory. Analytical rhetoric. Production of law

Summary

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1 INTRODUCTION

The pioneering development of the theory of the domain of fact was designed by Hegler, in order to understand its origins and function in the legal system, aiming to establish an understanding of the institute in its historical and legal foundations. The theory has its origins in 1915, and was later restructured by Hans Welzel and Claus Roxin, the latter of whom was responsible for giving greater scope to the term, enabling its consolidation in contemporary criminal dogma.

The analysis look at Welzel's provisions, as well as Roxin's theory of dominance, which is necessary to establish the concepts and different applications that he proposed for his doctrinal construction. Aspects linked to the domination of the will through organized apparatuses of power will be listed, historicizing their criteria, in order to verify the author's most current positions on the subject.

The study of the *Organisationsherrschaft* modality investigates the application of the criteria listed by Roxin, used to legitimize decisions by the Federal Supreme Court, especially those handed down by the Full Court, the highest court of jurisdiction in Brazil. Since the judgments of the Supreme Court serve as a parameter for national law, the importance of verifying the compatibility of doctrinal criteria with the legal system contributes to the debate in the legal community on issues related to criminal authorship.

The Brazilian criminal code adopts a unitary system of authorship to analyze co-offending phenomena; however, it does not define the concept. Likewise, the term crime does not have its meaning explained by the normative text. According to the Penal Code, all agents are liable, in principle, as perpetrators of the conduct typified, and there is multi-subjectivity.

The generic nature of normative provisions indicates the existence of informal rules of external sanction, the materialization of which occurs in the form of vague legal concepts, according to Stefan Voigt³. In this context, many inaccuracies are inherent in human communication, which does not allow for a less indeterminate meaning⁴. The dogmatic tradition to this day understands that the jurist's job is guided by a judgment of subsumption, making interpretations capable of identifying factual occurrences suitable for abstract and generic normative hypotheses, in other words, verifying whether a certain action should be opposed to a rule⁵.

³ VOIGT 2018.

⁴ ADEODATO 2022.

⁵ PARINI 2010, 133.

Emphasizing the importance of syllogism and deductive reasoning as a legal parameter for articulating *opinio juris*, law without reasons tends to be considered illegitimate or arbitrary. The importance of giving an appearance of rationality is so important that the Brazilian Magna Carta of 1988 prescribes the need to give reasons for decisions, in its article 93, item IX⁶.

From a rhetorical-analytical perspective, it is important to examine the law based on its models for presenting the legal production of decisions. Western legal thought attaches great importance to the structuring of decision-making judgments in the form of a logical chain, appearing to be discursively rational and avoiding making explicit the emotional elements that may have guided the decision⁷. Neutrality and impartiality are ideas capable of regulating judicial activity (in the sense of *regulative Idee*, developed by Ulfrid Neumann⁸).

For Luís Greco and Alaor Leite, the domain of fact theory is a case of problematic legal transplantation, since it was conceived and managed as a dogmatic reason, providing decision-making elements for Germany's legal system of co-authorship, which is different from Brazil's. When it was applied by the Federal Supreme Court, the theory was introduced no longer as a reason, but as a falsification. When applied by the Federal Supreme Court, the theory was introduced into the legal system no longer as a reason, but as a forgery⁹.

João Maurício Adeodato approaches the question of falsification raised by Greco and Leite from the point of view of analytical rhetoric, specifically from the perspective of *eristics*. For the philosopher of law, Brazilian procedural practice is marked by the absence of any attempt at persuasion, since the discourse already begins in an *eristic* way¹⁰.

Thus, he believes that it is important to identify the grounds that are confessable and capable of convincing, as opposed to those that are used merely with the aim of winning and are therefore not brought to light, as is the case with fallacious strategies¹¹.

⁶ PARINI 2018, 99.

⁷ PARINI 2018, 99-107.

⁸ NEUMANN 2016, 311.

⁹ GRECO; LEITE 2015, 387-388.

¹⁰ ADEODATO 2022.

¹¹ ADEODATO 2022.

2 HISTORIZING THE CONCEPT OF DOMINANCE: AUGUST HEGLER AND THE CHARACTERISTICS OF CRIME

The term - *Tatherrschaft* - translated by the Brazilian doctrine as dominion of the fact, was mentioned in these writings in its own translation, because it found a word more appropriate to the message conveyed by the language of origin: *Tat* - the German word is indicative of action¹², meaning act, deed. Its translation into Portuguese presents a certain incongruity in what has come to be called "dominion of the fact" in Brazilian criminal doctrine. In the traditional vocabulary of legal dogmatics, it is customary to differentiate between facts and acts, since facts are natural occurrences, derived from both human action and natural phenomena, as understood in Portuguese. Since criminal law is concerned with conduct, the name "theory of the domain of fact" is also coherent.

In a legal sense, *Tat*¹³ is a word defined as an action (*Handlung*), execution/actuation (*Ausführung*), act (*Handeln*). Criminal definitions in German therefore always carry the mark of human action in their definitions, such as *Tatbestand* (*der mit Strafe bedrohte Handlung* - the action punishable by penalty) or *Täter* (author), for example. *Tatherrschaft* is a word composed of the words dominion (*Herrschaft*) and act (*Tat*) in a German linguistic construction, meaning to be master of one's actions (*Herr über die Taten*).

As developed by Hegler in his 1915 work *Die Merkmale des Verbrechens* (*The characteristics of crime*), the concept of *Tatherrschaft* has a meaning linked to the systematization of the criteria necessary to link the agent to the crime. In this pioneering version, a doctrine is structured that aims to surpass the parameters of its time, by breaking with causalism¹⁴ and the predominant understanding of criminal sciences from the perspective of the methodology of the natural sciences, a phenomenon already contested by several authors of the time, however, Hegler not only criticized the institutes, but proposed to present his own formulation.

The period when the theory was being developed was accompanied by the uncertainties generated by the First World War¹⁵. At this time, the domain of fact theory

¹² DROSDOWSKI 1981, 2567.

¹³ KÖBLER 2003, 700.

¹⁴ HEGLER 1915, 20.

¹⁵ HOBBSAWN 2006, 29.

aimed to reconcile the desire to protect individuals and the interests of the state, with the public administration involved in the war effort. The limitation of the power to punish seeks to implement a criminal law that is only concerned with sanctioning the most socially damaging conduct, avoiding the merely objective subsumption of criminal types. The idea of building a system on teleological pillars is seen by Schaffstein¹⁶ as a work undertaken by Hegler.

Die Merkmale des Verbrechens promotes a debate linked to the characteristics of crime, the role of criminal law, and questions of imputability and punishability. Criminal law is seen as a second-order criminal law, a law that comes into play when there is a violation of a first-order right¹⁷. It should be pointed out that Hegler worked with his own categories, not talking directly about damage to a legal good, but about damage to a social interest¹⁸.

Historical events influenced this author's penal doctrine, insofar as one can see the proposal to defend social interests, national unity and cultural values at a time immediately after the recent German unification and contemporary with the largest armed conflict ever seen at the time¹⁹. Criminal law expanded greatly, incorporating economic domains and starting to incriminate increasingly elite conduct²⁰.

Hegler highlights the elements of crime, with the aim of outlining clear criteria for the jurist's action, in order to reconcile a vision that is capable of guaranteeing freedom for the individual and protection for collective interests, in a dialectical perspective that criticizes the use of methods from the natural sciences and proposes to establish values from culture.

Once it has been postulated that the individual has dominion over the fact, for Hegler, this means that he possesses in his conduct all the objective and subjective elements of the crime, being fully culpable and punishable. The author sees the possibility of applying dominion of the act also to omissive crimes, as he understands that the agent had the intent not to act, which he perceives as conduct equivalent to commissive conduct,

¹⁶ SCHAFFSTEIN 1938, 295.

¹⁷ HEGLER 1915, 25-27.

¹⁸ HEGLER 1915, 39-40.

¹⁹ HEGLER 1915, 39.

²⁰ VORMBAUM 2016, 138-139.

within the dynamics developed in his doctrine²¹. In this specific case, it is possible to see that Hegler's construction registers important issues in law, but does not relate directly to the content developed later.

3 THE FINAL DOMAIN OF THE FACT: HANS WELZEL'S CONTRIBUTIONS

In a later context, however, equally contemporary to an armed conflict of global proportions, the Second World War²², Hans Welzel developed his theory of the domain of fact. His proposal, discussed in his text *Studien zum System des Strafrechts*²³, aimed to establish a systematic view of the criminal sciences, also criticizing the methods of some positivist schools, by using methods from the natural sciences. Welzel also criticized the exclusive attachment to values, and in this period he saw the dialectical method as being better able to answer questions related to criminal injustice²⁴.

Investigating criminal wrongdoing in its objective and subjective elements, an innovation brought about by finalism, since Hegler divided guilt - *Schuld* - into two modalities²⁵, not decisively establishing the subjective elements of wrongdoing, as Welzel did.

In this doctrinal construction, the author promoted a new analysis of criminal wrongdoing (*Unrecht*), based on its subdivision, *Tatbestand* (typicality) and *Rechtswidrigkeit* (illegality, antijuridicity), in 1939. This perspective represented a rupture, since the elements of the *Unrecht* were seen by the dominant doctrine as exclusively objective in content, which was contested by Welzel, who began to integrate subjective elements into this institute²⁶.

One of the main premises of the author's thinking was the ontology of the human will, which is always directed towards a certain end, capable of directing the course

²¹ ROXIN 2015, 60-61.

²² GROSSI 2010, 158.

²³ WELZEL 1939.

²⁴ WELZEL 2013, 86-87.

²⁵ HEGLER 1915, 214-217.

²⁶ GALLAS 1955, 4-5.

of events through the power of intellection²⁷. The question of purpose, the goal to be achieved, the situation or result sought, is the name of the author's theory, known as finalism²⁸.

During developments relating to the subjective aspects of wrongdoing, a factor guided by the will inherent in human action, Welzel constructed the theory of dominion of the fact, naming it the final dominion of the fact²⁹. The author constructed this part of his analysis using nomenclature consistent with his systematization, which has repercussions in the field of mediate authorship, only accepted in very restricted terms by the author³⁰.

The importance of determining the holder of the final domain of the fact is also related to the identification of questions related to criminal authorship, when searching for the will behind the events. However, for the doctrinaire of finalism, the volitional character existing in the being is such that it prevents its direct domination by third parties, with very few exceptions³¹. The attribution of authorship through organized apparatuses of power is an impossibility for Welzel, who perceives in the principal the imputation of instigator (*Anstifter*)³².

Knowledge of conduct, of punishable action (*Handlungslehre*), would be closely linked to the doctrine of crime (*Verbrechenslehre*). From this premise, action began to be analyzed in its pre-legal elements, preventing any injury from being directly classified as a crime, since only socially unbearable actions would be subject to the incidence of the criminal legal system. Like Hegler, the author notes that not every violation of the legal good necessarily implies a criminal offense, believing that some conducts would even pass through a filter prior to the law, remaining within the scope of socially tolerated conduct³³.

The differentiating nature of German legislation makes it necessary to assess the correct subsumption of the criminal agent to the law, whether as a perpetrator or in some form of participation. The doctrine of dominance of the fact, structured by Welzel, is

²⁷ WELZEL 1939, 122-123.

²⁸ BRANDÃO 2015, 27-28.

²⁹ WELZEL 2013, 73.

³⁰ WELZEL 2013, 74.

³¹ MARLIE 2009, 23.

³² WELZEL 1939, 161.

³³ WELZEL 1939, 140-143

commented on by Roxin as the one that first had repercussions on criminal dogma, influencing the authors of his time.

Hans Welzel is defined by Roxin as the author responsible for developing and establishing the term dominion of the fact in German criminal doctrine. The finalist doctrinaire arrived at the development of the term, as has been said, from an analysis of criminal wrongdoing (*Unrecht*), given the presence of subjective elements in typicality, a finding that went against the prevailing thinking³⁴.

Mastery of the fact is a subjective element of the type, involving knowledge and the ability to direct criminal events³⁵, Welzel does not recognize mediate authorship by an individual fully capable of self-determination, as he sees autonomy of will as a fundamental pillar of his doctrine³⁶. Final control of the fact, therefore, would be incompatible with the doctrine later developed by Roxin, in cases linked to *Organisationsherrschaft*.

4 Claus Roxin, the contemporary structuring of the domain of fact theory and Brazilian law - the case of criminal Action n.470.

Less than two decades after the end of the Second World War saw the emergence of Claus Roxin's theory of dominance. This author was responsible for broadening the debate on the institute of criminal authorship³⁷, constructing a complex system that sets out to define the central figure of criminal events in the context of the competition of persons³⁸.

The theory of mastery of the fact (*Tatherrschaftstheorie*), in its version developed by Roxin, originated in Germany during the second half of the 20th century³⁹. The complex doctrinal architecture has several developments, investigating the criminal institute of authorship from various perspectives. The author proposes a new classification for crimes, so that some conducts would be cognizable by a relationship of domination

³⁴ MARLIE 2009, 21.

³⁵ WELZEL 2013, 73.

³⁶ MARLIE 2009, 23.

³⁷ ROXIN 2015, 539.

³⁸ TEIXEIRA; LEITE; GRECO 2014, 24.

³⁹ ALFLEN 2014.

(*Herrschaftsdelikte*), legal or extra-legal duty (*Pfichtdelikte*) and, finally, the author's personal conditions (*eigenhändige Delikte*), penalizing ways of life⁴⁰.

Mastery of the fact applies to the first group mentioned⁴¹, the offenses of mastery⁴², which involve this factor in the doctrinaire's reading; an element capable of determining issues relating to imputation, in the capacity of author. Since the German legal system, in its Criminal Code, clearly defines different forms of codeinquency, there is a need for scholars to establish criteria for delineating the different forms of contribution to the criminal enterprise. In general terms, the differentiating system establishes the figure of the perpetrator and the participant, terms which include subdivisions such as immediate perpetrator, intermediate perpetrator, co-perpetrator, helper and instigator, each with various consequences and specific imputability requirements⁴³.

The domain of the fact can manifest itself in various configurations, which are the domain of action (*Handlungsherrschaft*); the domain of *will* (*Willensherrschaft*) and the functional domain of the fact (*funktionelle Tatherrschaft*), according to Claus Roxin's own theoretical developments. The content of the domain of action involves conduct (*Handlung*, action) and its direct execution, without intermediaries, so that the main criterion for determining authorship in this modality would be normative, the author is always the one who fits the conduct described by the criminal laws.

The immediate perpetrator of criminal wrongdoing has control of the action (*Handlungsherrschaft*), as the central figure capable of determining the course of criminal events, in search of a specific result, by their own actions, i.e. without a third party⁴⁴. Fulfilling the requirements described in the unjust act, therefore, makes the agent directly involved with the subsumed conduct, the perpetrator⁴⁵.

The domain of action (*Handlungsherrschaft*) is the initial starting point of the analysis, verifying whether the individual fulfills the objective requirements listed in the criminal type⁴⁶. However, the volitional component is of central importance, moving on

⁴⁰ ROXIN 2015.

⁴¹ TEIXEIRA; LEITE; GRECO 2014, 31.

⁴² MARLIE 2009, 35.

⁴³ HAMDORF 2002.

⁴⁴ ROXIN 2015, 703.

⁴⁵ ROXIN 2015, 702.

⁴⁶ ALFLEN 2014, 112-113.

to the second moment of the analysis, responsible for occupying most of the work *Täterschaft und Tatherrschaft*, the main writing related to the subject. In this part, the author develops the concept of mastery of will (*Willensherrschaft*), subdividing the term to cover cases related to the criminal legal institute of error, as well as dealing with the actions of people with self-determination problems and cases of coercion, i.e. agents who for some reason do not have free will⁴⁷.

Domination of the will by virtue of organized apparatuses of power (*Willensherrschaft kraft organisatorischer Machtapparate*), or even, domination of the organization (*Organisationsherrschaft*), a doctrinal construction which, as its name indicates, makes up the analysis of criminal issues related to the will and criminal authorship within the scope of criminal organizational structures, aiming at the correct imputation of the various criminal agents⁴⁸.

The doctrine of organizational domination emerged during the post-war period of 1945, when defeat in the armed conflict brought the Germans the need to judge excesses committed by their military and civilians (of the praetorian guard) involved in organizational structures that began to act in disagreement with the legal order⁴⁹.

For the inference of authorship in such a plural context of agents, such as military organizations, governed by principles of hierarchy and discipline, Roxin established criteria capable of determining who, in the chain of command, would be able to indirectly carry out criminal actions, without directly acting in the execution of the conduct described in criminal codification⁵⁰.

The figure of mediate authorship, in this doctrinal development, had three criteria⁵¹ able to determine the central figure of the events, a fundamental point for questions of imputability, since the German legal system works with clear differentiations

⁴⁷ ROXIN 2015, 142.

⁴⁸ ROXIN 2015, 243.

⁴⁹ HÜNERFELD 1987, 244.

⁵⁰ ROXIN 2015, 739.

⁵¹ ROXIN 2015, 739.

of codeficiency, in a differentiating system (or of participation, *Teilnahmesystem*), as opposed to the unitary system of author/authorship (*Einbeitstätersystem*)⁵².

Mediated authorship in criminal law has been analyzed from different perspectives and is far from a consensus among the various scholars. The theorists converge on some points, such as the use of an intermediary as an instrument, when the latter has some defect linked to the capacity for self-determination, for example. In this specific aspect, it is possible to cite congruence between the three main developers of the theories, Hegler, Welzel and Roxin.

A closer look, however, shows that the similar results, on this particular point, are obtained from completely different theoretical developments. An important point is the desire of the three scholars to structure a new criminal dogma, which makes the domain of the fact a particular theoretical construction of its own significance in each author.

Roxin 's doctrinal systematization, with the development of the historical process and the interaction of contemporary legal systems, went beyond the borders of his country of origin, Germany, and began to serve as a doctrinal parameter in various criminal jurisdictions, especially in Latin America, as well as in international criminal jurisdiction, through the International Criminal Court⁵³, arriving in Brazil, where it was applied by the highest jurisdiction, as a parameter of imputation of criminal authorship, in the condition of *legal transplant*⁵⁴.

Organisationsherrschaft - the domain of the organization, although it was thought of in a context of military actions at the end of the Second World War, had recent application at the end of the 20th century, when the German Democratic Republic - GDR (DDR) was dissolved⁵⁵. Also in the jurisdiction of Peru, when President Alberto Fujimori was tried⁵⁶ or in the Brazilian case of Ação Penal 470⁵⁷, cases linked to organized power apparatuses were submitted to the evaluative criteria elaborated by Roxin, already in the 21st century.

⁵² HAMDORF 2002.

⁵³ HERZIG 2013, 196.

⁵⁴ FIGUEIREDO; ARAÚJO 2023.

⁵⁵ ROTSCH 2000, 518-519.

⁵⁶ ROXIN 2006, 565.

⁵⁷ ALFLEN 2014.

As a *legal transplant*⁵⁸, the theory of dominion of the act came to Brazilian jurisdiction, applied to a case of great repercussion, namely Ação Penal 470⁵⁹; since then, the Federal Supreme Court has used the parameters established in this decision to assess the suitability or otherwise of dominion of the fact in other decisions. A quick analysis of the judgments of the Full Court is enough to verify that the Supreme Court, although it cites and bases part of its decisions on Roxin's doctrine, ends up using the expression dominion of the fact as a rhetorical argument without defined content and with mistaken references⁶⁰.

In various parts of the collegiate decision there is confusion regarding the scholars and their assumptions, listing contradictory arguments and authors with conflicting views, such as the aforementioned disagreement between Welzel and Roxin, regarding the possibility of mediated authorship via *Organisationsherrschaft*. This construction proves to be completely unnecessary, since the Brazilian system, which is unitary in nature, allows punishment as the perpetrator for acts carried out by the immediate executor, on the orders of a mediated agent, who is liable as if the acts carried out were his own. The theory of the domain of the act in the Brazilian context, therefore, had a different content to that established by Roxin along the lines of the *Organisationsherrschaft*, demonstrating an arbitrary use of the term, without any methodological concern⁶¹.

5 Dogmatics, analytical rhetoric and the theory of mastery of the fact: the grounds for the Supreme Court's condemnatory criminal decision - Criminal Action 470.

Legal dogmatics can be understood as a kind of rhetorical methodology, in the sense of a practical rhetoric, i.e. a *techné* comprising rules for interpreting, arguing and deciding⁶². The process of producing judicial decisions involves a strategic use of communication aimed, at best, at persuasion, at convincing⁶³, but also only at winning a point of view or imposing an interpretative thesis. One of the characteristics responsible for conferring legitimacy on the process of presenting the judges' decision-making output

⁵⁸ FIGUEIREDO; ARAÚJO 2022.

⁵⁹ BRASIL 2012.

⁶⁰ FIGUEIREDO; ARAÚJO 2023.

⁶¹ FIGUEIREDO; ARAÚJO 2022.

⁶² PARINI 2017.

⁶³ SOBOTA 1990a, 1-3.

is objectivity, understood as a rational, prudential attitude, making people believe that the law is the result of logical, impartial reasoning, based on premises derived from a legal system⁶⁴.

Rolf Gröschner believes that the construction of a legal case is not based on a subsumption judgment, linking facts and normative texts. For the author, the production of a decision involves the judgment of an event linked to the reality of life, generating a conflict between parties with divergent interests. The syllogism would be a way of presenting the production of a legal decision, constructing a chain of reasoning capable of leading to an expected conclusion, structured in the form of a major and minor premise, linked to the normative hypothesis and the facts corresponding to the specific case, respectively⁶⁵.

The understanding of a syllogism constructed from a general proposition related to a specific, singular statement is a formulation that contradicts the Aristotelian understanding of the concept⁶⁶. This criticism is in line with von Schlieffen's thinking, when she highlights the limitations and inconsistencies of the legal syllogism, especially when drawing a parallel with the Aristotelian matrix⁶⁷. For the author, jurists produce their arguments based on a sequence of entymemes⁶⁸. The judicial syllogism is an enthymeme, that is, a rhetorical syllogism⁶⁹.

The application of a deductive process in law is a problematic point of fundamental importance for hermeneutics. There are two distinct moments linked to the application or creation of law in factual situations, namely decision and justification. The appearance of rationality conferred by the syllogism to the jurist's activity aims to establish a pattern of cohesion and structure between the statements produced, by means of logical connectors that link the propositions of fact and law⁷⁰.

Claus Roxin stresses the importance of using the concept of the domain of the fact based on a defined content, since a vague conception of the term is not defensible,

⁶⁴ SOBOTA 1990b, 151.

⁶⁵ GRÖSCHNER 2005.

⁶⁶ GRÖSCHNER 2005.

⁶⁷ SCHLIEFFEN 2022, 174.

⁶⁸ SCHLIEFFEN 2022, 225.

⁶⁹ PARINI 2018 112.

⁷⁰ PARINI 2006, 16.

as it allows for insecurity and arbitrariness⁷¹. Ingeborg Puppe talks about the importance of delineating the meanings of legal institutes, since semantics will have the capacity to generate different consequences at the moment of subsumption⁷².

The reception of the domain of fact theory by the Brazilian legal system, especially in the case of the Supreme Court, is described by Greco and Leite as intriguing, because the Court has created its own figure of imputation and used the doctrinal denomination of the German theory. The authors believe that the practice shows the use of the term and doctrinal citations that are incompatible with each other, with the aim of conferring some scientific authority and immunizing the Supreme Court from criticism. This need to justify the decision taken is a result of the violation of the principles of legality and culpability. A correct interpretation or application of the theory did not matter to the Supreme Court⁷³.

The Supreme Court's decision led to the use of the theory of dominion of the fact to solve cases linked to corporate crime, starting with Criminal Action 470. Aimed at incriminating managers, the German theoretical construction began to justify the presumption of criminal responsibility of those individuals with some power of command, by virtue of their hierarchical position in the structure of a given company⁷⁴. It is important to note that Claus Roxin is opposed to the position adopted by the court, and does not see his theory as applicable to regularly operating business organizations⁷⁵. Legal discourse can be subdivided into various categories of analysis. The use of dogma is seen as the object of strategic rhetoric, due to its quest for persuasion or simple victory. The investigation of discourse has the power to highlight fallacious practices used in the construction of judicial decisions⁷⁶. One of the strategies used in Ação Penal 470 involved the use of sources that could not be verified at the time, weakening the position of the interlocutors linked to the defense and generating effects even at a later date⁷⁷.

The criticisms of Greco, Leite and Roxin point to a misuse of the theory of the domain of the fact, due to its application in disagreement with the doctrine cited by the

⁷¹ ROXIN 2015, 118.

⁷² PUPPE 2019, 25-30.

⁷³ GRECO; LEITE 2015.

⁷⁴ BRANDÃO; RODRÍGUES 2022.

⁷⁵ ROXIN 2015, 748-751.

⁷⁶ ADEODATO 2012.

⁷⁷ ADEODATO 2012.

Supreme Court itself as a theoretical reference. In this sense, practical or strategic rhetoric sheds light on these aspects of dogmatics, linked to legal interpretation and argumentation, determining the meaning and scope of legal dogmas⁷⁸.

In this sense, it is necessary to analyze the construction of law from the perspective of analytical rhetoric, in some cases verifying the role of eristic arguments. The debate in Criminal Action No. 470 demonstrates that the Supreme Court aimed only to convict the parties on trial. Understanding the reasons for decisions involves analyzing a realistic theory of legal decisions, based on the perspective of analytical rhetoric, considering the express and hidden grounds, which are linked to the interests, emotions and environments that produce decisions and shape the behavior of decision-making bodies⁷⁹.

Legal decisions can involve concealment, dogmatic constraints and strategies that would be unacknowledged⁸⁰. The discourse leads us to believe that the result obtained, in the end, is the result of a logical-deductive procedure, however, the decision-making construction can be composed of obscurities and incoherent and discontinuous arguments, reaching a manipulated and illusory conclusion⁸¹.

6 CONCLUSION

Throughout the 20th century and the beginning of the 21st century, the theory of mastery of the act underwent various dogmatic constructions, so it is possible to say that there is no single theory of mastery of the act. Initially, Hegler set out to develop a new model responsible for linking the criminal to the crime, in order to systematize criminal dogmatic knowledge capable of avoiding state arbitrariness.

Welzel and Roxin were also concerned with the development of decision-making parameters capable of regulating the state's power to impute agents, with a view to establishing clear criteria. These doctrines were developed in the context of a differentiated system of authorship, distinct from that present in the Brazilian legal system, which is unitary in nature.

⁷⁸ PARINI; ABREU 2019.

⁷⁹ ADEODATO 2022.

⁸⁰ ADEODATO 2022.

⁸¹ PARINI 2006.

The text is concerned with analyzing the history and consequent use of the theory of dominance of the fact in the Federal Supreme Court, especially in its configuration arising from the dominance of will by organized apparatuses of power, cases in which the doctrine proposes to identify the central figure of criminal events.

The investigation looked at the three fundamental criteria established by Roxin, since it was the most important theoretical reference used by the Supreme Court. The guiding statements are the coercive capacity deriving from the power of command, the institutional disconnection from the legal system and the fungibility of the immediate executor; three component criteria which, in summary, dictate the assumptions necessary to attribute criminal authorship to the accused agents.

The second part of the analysis was concerned with identifying the legal production as a rational discursive presentation. The use of the term mastery of the fact proved to be an argument with an eristic purpose, aiming for a result linked to the conviction of the agents in the specific case. Based on rhetorical syllogism, or entimema, legal production used a stratagem formed by arguments from authority and the impossibility of verifying statements. The criticisms made by dogmatists and analytical rhetoricians denoted a perspective capable of demonstrating, respectively, mistakes in the use of doctrinal parameters and hidden argumentative reasons in the construction of law.

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