

Responsibility Crime: Criminal or Constitutional Offense

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Abstract —Brazil has been undergoing major changes in its policy, leading its population to become more involved in government issues. Brazilians have frequently observed the conduct of their representatives and frequently identified the responsibility crime, which is carried out by political agents. The present work aims to analyze and present a brief discussion about the crimes of responsibility and to identify as a criminal infraction or just a constitutional infraction in face of several positions found in the Brazilian legal system, including the position of the Supreme Federal Court. To this end, bibliographic research was carried out on books, articles, normative provisions, summaries and laws present in Brazilian legislation, in order to present the concept of responsibility crime, its applicability in criminal law with the Superior Federal Court binding legal precedent⁴⁶ and identify a position through its possible punishments, whether such a crime falls within the criminal or constitutional scope. The denomination responsibility crime emerged as a way to reduce criminality in Brazilian politics, committed by those who represent us so much, the political agents. The identification of this crime, which can be reported by any citizen, is imperative to prevent and even combat the unwanted associations of those who represent us. According to the consulted bibliographic, the crimes of responsibility are nothing more than administrative irregularities of a political nature, in which their punishments does not affect the freedom of the agents who practiced them, not configuring a criminal offense, but rather a constitutional offense.

Keywords —Criminal Law, Criminal Offense, Constitutional Offense, Responsibility crime.

I. INTRODUCTION

This scientific article aims to analyze if the responsibility crime should be considered a criminal offense or a constitutional violation.

On one hand, we have art. 85 of the 1988 Federal Constitution, which clarifies that the acts of the President of the Republic that violate the Federal Constitution and its precepts, listed by the Constituent in the following 7 items, are considered responsibility crime. Also, not only for the President, but now regarding the Ministers of State, Ministers of the Supreme Federal Court, the Republic's General Attorney and the Governors, Law N°. 1.079/1950

applies, almost all compatible with the Federal Constitution/1988¹, which brings the typification, processing and judgment of the responsibility crime. There is also Law No. 7.106/83, which states responsibility crimes committed by the Federal District Governor and Secretaries, and Decree-Law No. 201/67, which deals with responsibility crimes committed by Mayors and Municipal Secretaries.

On the other hand, we have in our legal system the Supreme Federal Court binding legal precedent No. 46,

¹ Writ of mandamus 21.564/DF.

which, indirectly, fits the responsibility crime into the criminal legislation, as it defines that these type of crimes and their processes and judgments are Union's private legislative competence.

It is noteworthy that the Penal Code Introduction Law (Decree-Law 3491/41) considers a crime as it follows:

Article 1. A criminal offense is considered a crime those which the law imposes a penalty of imprisonment or detention, either alone, or alternatively or cumulatively with the fine penalty; misdemeanor, the criminal offense which the law imposes, in isolation, a simple prison sentence or a fine, or both, alternatively or cumulatively. (Decree-Law 3491/41, art. 1).

We note that in the criminal sphere, to consider a certain conduct as a crime, it is necessary to impose an imprisonment or detention punishment.

In contrast, the responsibility crime punishments, according to the special laws mentioned above, are political and administrative sanctions, such as impeachment.

Given these many discussions, it is worth asking whether the responsibility crime would be a criminal offense or a constitutional offense. This is what we will discuss later on.

II. METHODOLOGY

In the present work, bibliographic research was carried out on books, scientific articles, normative provisions, legal precedents and laws present in the Brazilian legislation, in order to present the responsibility crime concept, its applicability in criminal law taking into account the Supreme Federal Court binding legal precedent No. 46 content and identify a position through its possible punishments, if such crime falls within the criminal or constitutional scope.

III. THEORETICAL FRAMEWORK

3.1 Responsibility Crime

3.1.1 Constitutional scope

The responsibility crime is a subject that is quite addressed nowadays, due to the focus received after government changes undergone by Brazil in the last decades, which leads us to wonder if the referred crime is a criminal or constitutional offense.

According to the 1988 Federal Constitution, a responsibility crime is understood as any type of action that is politically contrary to the rules established by it,

committed by political agents. So, it is a political infraction, considered a proper crime, in other words, a crime that the active agent is determined, having a special condition/quality.

In the legal literature, the understanding is that responsibility crime concept has already been brought up by the Original Constituent. Nevertheless, Minister Alexandre de Moraes ponders in his book about the responsibility crime legal nature, explaining that it is a political-administrative offense, and after that, he analyses the legal definition brought by the national system. Observe:

Responsibility crimes are political-administrative infractions defined in federal legislation, committed during the function performance, which undermine the existence of the Union, the free exercise of State Powers, the country's internal security, the Administration's probity, the budget law, the political rights, individual and social rights and compliance with laws and judicial decisions. (MORAES, 2007, p. 458).

Similarly, Joseph Cretella Junior teaches:

The responsibility crime can be incurred by the Republic President and any State Minister, within the sphere of the Union, but must, however, be defined in a special law, according to the principle of *nullum crimen nulla poena sine lege* (JÚNIOR, 1991, p. 2,932).

In this light, Federal Constitution's article 85, in an objective manner, points out what a responsibility crime is when practiced by the President of the Republic.

Art. 85. It is Responsibility crime the Republic President acts that violate the Federal Constitution and, especially, against: I - the existence of the Union; II - the free exercise of the Legislative Power, the Judiciary Power, the Public Prosecutor and the Federal units' constitutional Powers; III - the exercise of political, individual and social rights; IV - the country's internal security; V - probity in administration; VI - the budget law; VII - compliance with laws and judicial decisions. Paragraph. These crimes will be defined in a special law, which will establish the procedure's rules and judgment. (art. 85 of the CF)

Following the constitutional command provided by the art. 85's paragraph cited above, there are two special laws and a decree-law, which brings to the infra-constitutional scope the responsibility crime's classification, processing and judgment applied to each political agent. These laws are Law No. 1.079 of April 10, 1950, applied to the President of the Republic, the Ministers of State, the

Ministers of the Supreme Federal Court, the Republic's General Attorney, and the Governors and Secretaries of States; Law No. 7.106/83, applied to the Federal District Governor and Secretaries and the Decree-Law No. 201/1967, applied to Mayors and Councilors.

In all of the aforementioned normative acts, the responsibility crime has a political-administrative infraction's legal nature, as there is a combination of punishments such as the loss of function, disqualification for a determined time so that he or she can exercise a public function again, the revoke of the elective mandate, among other measures. All of these sanctions, on the other hand, do not fall under Article 1 of Decree-Law No. 3.914 of December 9, 1941, the Penal Code Introduction Law (Decree-Law No. 2,848, of 7-12-940) and of the Criminal Misdemeanor Law (Decree-Law No. 3.688, of October 3, 1941), which, when conceptualizing what is a crime, establish that "a criminal offense is considered a crime those which the law imposes a penalty of imprisonment or detention either alone, or alternatively or cumulatively with the fine penalty".

Therefore, it is not possible to consider that the responsibility crime is a criminal offense, since those punishments do not go against the freedom of the individual, through imprisonment or detention, as is clear in the Penal Code Introduction Law. However, it is a real political-administrative infraction, since they attack the republican unity, administrative probity, the use of public money and even the budget, by political acts, which consequently causes the necessary loss of the public function or even revocation of the elective mandate, in addition to political rights suspension.

3.1.2 Penal scope

On the other hand, there is in our legal system the Supreme Federal Court binding legal precedent No. 46, approved on April 9, 2015, as a result of the already published binding legal precedent 722:

Supreme Federal Court binding legal precedent No. 46 – The responsibility crime definition and establishment of the respective procedure and judgment rules are Union's exclusive legislative competence.

The Supreme Federal Court makes it clear, through the aforementioned statement, that only the Union can legislate about a responsibility crime.

The Federal Constitution brings on its article 22, that "the Union is exclusively responsible to legislate on: I - civil, commercial, criminal, procedural, electoral, agrarian, maritime, aeronautical, space and labor law".

Considering that only the Federal Government has the competence to legislate on matters in the criminal sphere (private jurisdiction), and that the STF binding legal precedent n°. 46 states that only the Federal Government has the competence to legislate on responsibility crimes, the Federal Superior Court through its precedent indirectly framed the responsibility crime into the criminal scope.

However, as we saw above by the constitutional determination, the responsibility crime must be defined in a special law. And the legislator, both in Laws 1.079 and 7.106/83, and in Decree-Law No. 201/1967, did not refer to a criminal offense, but to political-administrative violations.

Damásio de Jesus (2010), reinforces this position by stating that Law No. 1.079/50, as highlighted, does not addresses crimes, but political-administrative infractions. Therefore, using the term criminal action would be inappropriate. He also affirms that it can be manifested after a popular complaint, which is not allowed in a public criminal process, as this is the Prosecutor's role.

So, the STF binding legal precedent n°. 46, which states that only the Union has the competence to legislate on responsibility crimes, is not enough to fit this kind of act into the criminal scope, since it is the special laws that should be responsible for it. And, in all legislation available in our system, nothing is said about crime in a criminal sense, but only political-administrative infractions.

3.1.3 Impeachment

Impeachment, which means impugnation, deals with the process that can culminate in the Executive Branch's leaders mandate termination and also people who hold high political positions. This mandate impugnation can start due to a responsibility crime and has been among us since a long time ago, as we will see in a brief historical account.

The impeachment's development was marked by two major historical scopes, the criminal and the political. Originated in England, at the time it was turned to criminal proceedings, but it lost that effect as soon as it was introduced in the United States, where it became a strictly political procedure, as explained by Sérgio Resende de Barros.

[...] Typical of Western law, impeachment was born in England as a criminal case. From there, it passed to the United States, where it lost its criminal nature, becoming a strictly political procedure. These countries marked its development, generating two historical impeachment types: the criminal and the political. [...] Among the English, the impeachment's origins date back to the 13th and 14th centuries, when it emerged as

a means of instituting an investigation in parliamentary houses aiming to punish someone who was accused by the public outcry. In 1283 there was a procedure - that some point to as the pioneer - against a certain David, known as "Llewellyn's brother". Others followed, such as that of Thomas, Earl of Lancaster, in 1322, that of Roger Mortimer and that of Simon of Beresford, in 1330, and that of the Archbishop of Canterbury, John Stratford, who was charged before the Parliament in 1341, based on notoriously defamatory reports. These pioneering cases were not yet the impeachment itself. But then it would appear. [...] More typical cases took shape in the second half of the 14th century. In 1350, that of Thomas de Barclay. In 1376, the proceeding against a London merchant named Richard Lyons reached William, Lord Latimer, which - in addition to giving the institute much greater repercussion - initiated a feature that was later reaffirmed and persisted: the impeachment defendants are political. Furthermore, this was the first case in which the Parliament houses rationalized impeachment, converting it into a definitive process and trial, with the Commons as accusers and the Lords as judges. (BARROS, 2003, chap. 4).

It is possible to realize that throughout the impeachment historical formation process, in the middle of the 12th and 14th centuries in England, the institute had a criminal feature. Only after its incorporation into the legislative and constitutional system of the United States of America it came to present a political scope.

Impeachment, despite centuries past, still deals with accused and accusers, in other words, the accused known as the politicians and the accusers the people, and it is exactly this characteristic that allows any individual to interpose the impeachment process against a politician. In the same way that, in this case, the people are the ones who elect them, they are also the ones who can remove them, making it clear what the Federal Constitution in its article 1, paragraph, tells us: "All the power emanates from the people, that exercise it through elected representatives or directly, under the terms of this Constitution".

Law No. 1.079/50 recognizes that any individual can submit to the National Congress a request for impeachment against a political authority, based on a responsibility crime that he may have committed.

Art. 14. Any citizen is allowed to denounce the President of the Republic or Minister of State, for a responsibility crime, before the Chamber of Deputies. Art. 41. Every citizen is allowed to denounce before the Federal Senate, the Ministers of the Supreme Federal

Court and the Republic's Attorney General, for the responsibility crimes they commit (articles 39 and 40). Art. 75. Every citizen is allowed to denounce the Governor before the Legislative Assembly, or a responsibility crime. (Law 1.079 / 50, in Art. 14, 41 and 75).

3.1.3.1 Impeachment procedure

According to Pedro Lenza, the impeachment procedure is observed in two phases, in other words, it has a biphasic procedure, constituted by the admissibility judgment and the process and judgment procedure. This is what Law No. 1079/50, art. 80, states.

Art. 80. When the President of the Republic and the Ministers of State commits a responsibility crimes, the Chamber of Deputies is the pronouncement court and the Federal Senate, the court of judgment; When the Ministers of the Supreme Federal Court or the Republic's Attorney General commits a responsibility crimes, the Federal Senate is simultaneously a court of pronouncement and judgment. (Art. 80 of Law 1079/50)

So, the admissibility judgment is made by the Chamber of Deputies, described in the article mentioned above as Court of Pronunciation and the Federal Senate, court of judgment. In the case of a STF Minister or Republic's Attorney General cassation procedure, the Pronunciation Court is the Federal Senate, therefore, it will be both the Pronunciation and the Judgment Court.

When it comes to the President of the Republic and the Ministers of State, the process and judgement trial is carried out by the Federal Senate, described in the article mentioned above as the Judgment Court.

It starts with the presentation of a complaint before the Chamber of Deputies, which can be made by any citizen, as we saw above. The Chamber has the prerogative to declare the complaint well-grounded or unfounded. If declared well-grounded, the process goes to the Senators, to be, finally, analyzed if there was or not a responsibility crime.

With the complaint accept, the Deputies Chamber's leader conducts his or her preliminary analysis, and dispatches it to a special commission, which has the function of offering an opinion on the complaint that must be read in plenary, in order to assist the federal deputies in voting on the cassation request. This special commission formation cannot exceed the period of 48 hours, and its composition must be proportional to the number of representatives of each political party.

The quorum required to authorize the process is 2/3 of the Chamber of Deputies members, in order to be processed and judged, after that, by the Federal Senate.

The Federal Senate receives the accusation and initiates the process against the President of the Republic, aiming to verify if there are political-administrative infractions that correspond to a responsibility crime. The impeachment document is then received and read at the next session and, in the same session, a committee will be elected. The elected commission is made up of 1/4 of the Senate composition, and must obey the proportionality of the House.

After all this procedure, the Federal Senate becomes a Political Court with a heterogeneous collegiate body, as the judgment will be chaired by the Minister President of the Supreme Federal Court. When the process starts, the President of the Republic is suspended from his duties for 180 days. It is important to note that if the judgment is not concluded within this time, the suspension is not extended. In this case, the President of the Republic must return to his activities, the process keeps running.

Note that impeachment is an essential institute for the protection of the Constitution itself, as a way of curbing the self-interests of political representatives.

IV. ANALYSIS AND RESULTS

The political-administrative “typification” of the responsibility crime was introduced in the legal system as a mechanism for republican protection aiming to prevent possible political desideratums. The responsibility crime can be reported to the National Congress (in the case of acts practiced by the President of the Republic, Ministers of State, Members of the Supreme Federal Court and the Republic’s Attorney General), by any citizen. The primary objective of this complaint is to combat and, mainly, to prevent the practice of acts that put, the Union and the administrative probity as a whole, at risk, by those political agents who should serve as examples to the country’s citizens, since they occupy the highest positions in the civil service hierarchy.

In this bibliographic research, it was observed that the responsibility crime tends to be a constitutional infraction, brought by Laws 1.079, 7.106/83 and Decree-Law 201/1967. In the analysis of these normative acts, it is clear that the conduct is treated as a political-administrative infraction, and not as criminal offence. This is because their punishments do not harm the political agent’s freedom, or predict any corporal sanction.

V. CONCLUSION

This work aimed to provide information regarding the responsibility crime, allocating it as a constitutional infraction, even though there are opposite jurisprudential positions, such as the Supreme Federal Court’s, described at the binding legal precedent n°. 46.

With the utmost respect, this position is not compatible with the first article of Decree-Law No. 3.914, of December 9, 1941, Penal Code Introduction Law (Decree-Law No. 2.848, of 7-12-940) and the Criminal Misdemeanors Law (Decree-Law No. 3.688, of October 3, 1941), which considers a criminal offense to which the law imposes a penalty of imprisonment or detention as a crime.

Furthermore, considering the conduct defined in art. 85 of the Constitution, and those brought by Law No. 1.079, of April 10, 1950, Law No. 7.106/83, and Decree-Law No. 201/1967, where the sanctions revolve around the function loss, prohibition of exercising a public function for a certain time, among other measures, the political and administrative legal nature of the offense is now crystal clear.

Therefore, it is concluded that, although the Supreme Federal Court seeks to equate the legislative responsibility crime competence with the criminal offense, as stated in the binding legal precedent n°. 46, it should be noted that such an interpretation is not sufficient to equalize the themes, since the responsibility crime’s concept and legal nature are nothing alike criminal offenses themselves.

Therefore, the responsibility crime, despite being extremely serious for standing up against the commonwealth, should not be considered a criminal offense, as it has its own specific rules and sanctions, typical of this kind of political and administrative violation.

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