International Journal of Advanced Engineering Research and Science (IJAERS)
Peer-Reviewed Journal
ISSN: 2349-6495(P) | 2456-1908(O)
Vol-8, Issue-5; May, 2021
Journal Home Page Available: https://ijaers.com/
Article DOI: https://dx.doi.org/10.22161/ijaers.85.41

Treatment of Legal-Criminal Error in Extreme and Limited Theories of Culpability

Sebastião Pinto[1], Rosalina Alves Nantes[2]

[1]Academic Department of Legal Sciences, Fderal University of Rondônia, Brazil – Research Group: Amazonian Study and Research Center (CEJAM) – ORCID: https://orcid.org/0000-0002-5209-8666
[2]Academic Departmento of Legal Sciences, Fderal University of Rondônia, Brazil – Research Group: Amazonian Study and Research Center (CEJAM) – Research Group: Law and Public Policies in the Western Amazon – ORCID: https://orcid.org/0000-0001-8347-7856

Received: 11 Feb 2021;

Received in revised form:

02 May 2021;

Accepted: 15 May 2021;

Available online: 28 May 2021

***Keywords*— Teoria da culpabilidade, erro jurídico penal, direito penal brasileiro.**

***Abstract*—** *The limited theory of culpability, in terms of legal-criminal error, distinguishes between the error that falls on the technical assumptions of the one who recaines on the existence or limits of the causes of exclusion of illegality (putative discrimination). The error that falls on the existence or limits of the justifying causes is a prohibition error and generates consequences similar to those treated in the extreme theory of culpability. However, when the error that falls on the phonic assumptions of the discrimination, they are considered a type error, it excludes the intent, but allows the punishment of guilt if the error was avoidable (absence of non-observance of the duty of care) and there is culpable prediction for the type. If there is exclusion of the intent, it is concluded that there is also exclusion from the typical fact and, consequently, from the antijuricity and guilt, in other words, there is no offense, in the hypothesis of invincible error. If there is no deceit (nor offense), the subject – the target of the error, will not be able to act in self-defense, having to bear the consequences of this fact, because if he reacts, he will have to answer for the delit.*

I. INTRODUCTION

This article brings to the knowledge, doctrinal discussion regarding the theories of culpability in the Brazilian criminal system, its reflections and considerations regarding legal-criminal error, thus bringing the distinctions of legal error, the technical assumptions and the existence and limits of the causes of exclusion of illegality.

It is brought with theoretical foundation of German origin, recommended by Welzel, its conceptualization, as can be inevidenced in the chapters and finally, the conclusions and considerations on the theme presented here.

1.1 CONCEPT OF CULPABILITY AND ITS ELEMENTS

Welzel, conceptualizes culpability as the distaste of the individual antilegal fact, and the object of this distaste is the resolution of the anti-legal will in relation to the individual fact[1]. Thus, the subject will only be attributable when, even though he/she can structure his will according to the norm, he does not, that is, the agent who can act otherwise did not act.

It is important to observe that, in the formation of the deed, two elements compete: one of intellectual, cognitive (prediction) and the other, of a volitional nature (where self-determination is located), remembering that these elements, although located in the conduct, are only valued in guilt. If, for some reason, one of these elements that

direct human action is working poorly at the time of conduct, in such a way that it alters the so-called freedom of will, removing from the individual the power and the power to act differently from how he acted, criminal imputability is removed.

As Bitencourt states, the author must know the unjust, or at least have the power to know him and must be able to decide for a conduct in accordance with the law by virtue of this knowledge (real or possible)[2]. Welzel[3] himself already described that the ability to accept guilt has two specific elements: one intellectual (cognoscivo) and another volitionoror will, which correspond to the ability to understand the unjust and the determination of the will according to that understanding.

Thus only the presence of the two elements together constitute the capacity for culpability, that is, the criminal imputability, which according to that author constitutes the essence of culpability.

The second important element, in the constitution of culpability, is the possibility of knowing the antijuricity of conduct, that is, the awareness of illegality, so that to the knowledge of the type it is necessary to add the knowledge of antijuricity. This knowledge of illegality, in psychological and psychological-normative theory, was in the delo (dolus malus – because it held the consciousness of illegality).

With the advent of pure normative theory of culpability, Welzela removed the deceit from culpability and placed it in the kind, and now as a natural deceit, without any animic-psychological element, making guilt pure normativity. As Tavares, quoting Welzel, says, "culpability is no longer integrated by the deed, but by an autonomous normative element: the potential awareness of illegality." This means that, for someone to be found guilty, it is necessary, in addition to being able to act on another (be attributable), to have knowledge or possibility of knowledge of the prohibition of the fact that it practices.

If for some reason, the subject does not have knowledge (not even potential) that he practices an anti-legal action (prohibited), he cannot be guilty. In imputability, one wonders whether the subject could act otherwise. In the potential awareness of illegality, the subject was questioned by knowledge or possibility of knowledge of the prohibition.

According to the finalist thought, once present the imputability (the power to act otherwise) and the possibility of knowledge of the prohibition, the materiality of culpability would be configured. However, in certain exceptional and concrete situations, even though the subject is attributable and knowing the anti-juridity of his conduct, even so, no reproof can be attributed to him.

This is the hypothesis of non-enforceability of different conduct, because in this case, the subject cannot structure his will according to a legal norm and, therefore, the legal-criminal order must renounce the distaste and exculpe the subject. This argument is very specific to the German legal theory which differentiates causes of exclusion of guilt from exculping causes, in which the punitive system renounces the distaste of the agent, if present concrete circumstances that demonstrate the impossibility of obedience to the law.

II. TYPE ERROR AND PROHIBITION ERROR

These elements of culpability have reached, as well as their applicability, reasonable pacificity, both in extreme theory and in the limited theory of culpability when used in relation to incriminating criminal norms. However, when it comes to justifying criminal norms, there are profound divergences in the two theories, in relation to these elements, especially with regard to the potential awareness of the anti-juridity, when, in the specific case, there is a legal-criminal error.

For the extreme theory of culpability every error that falls on causes of exclusion of illegality, it is a prohibition error, excluding culpability, due to the absence of the possibility of knowledge of antijuricity, in the specific case. When inevitable the error completely excludes, how avoidable, decreases the culpability (reduction of penalty).

The extreme theory makes no distinction between the error that falls on the phonic assumptions of the one that falls on the existence or limits of the justifying causes. In both cases, it is inevitable or avoidable error, the intent remains intact, because even in a situation of invincible error what is excluded is an element of culpability (the potential awareness of antijuricity).

Remaining the will intact, it is possible for the individual - the target of the error, to act in self-defense, because the deceit persists and, objectively, the antijuricity itself; The subject who acted for cognitive addiction (error) could answer by attempt, since he acted with deceit. Likely the participant (without error of cognition or conscience) could answer for the crime, because he acted in a demeanor.

The limited theory of culpability, in terms of legal-criminal error, distinguishes between the error that falls on the technical assumptions of the one who recaines on the existence or limits of the causes of exclusion of illegality (putative discrimination). The error that falls on the existence or limits of the justifying causes is a prohibition error and generates consequences similar to those dealt with in the extreme theory of culpability.

However, when the error that falls on the phonic assumptions of the discrimination, they are considered type error, excludes the intent, but allows the punishment of guilt if the error was avoidable (absence of non-observance of the duty of care) and there is culpable prediction for the type.

Se há exclusão do dolo, conclui-se que há também exclusão do fato típico e, por conseguinte, da antijuricidade e da culpabilidade, em outras palavras, não há delito, na hipótese de erro invencível. Ora se não há dolo (nem delito), o sujeito – alvo do erro, não poderá agir em legítima defesa, tendo que suportar as consequências desse fato, porque se reagir, terá que responder pelo delito.

Likewise, the subject who acted in error (inevitable or even avoidable) will not be able to answer by attempt, since in his action there is no deceit, having to go unpunished. Likely, the participant cannot be punished, on the basis of the principle of limited access that requires the action of the lead author to be typical and anti-legal.

III. CONCLUSION

Comparing the stun theories (of culpability) with the limited theory (of culpability) it is noticeable that the latter can lead, in the concrete case, to situations of injustice and impunity. However, it should be noted that the legal theory is dynamic and, therefore, is dialectically in a constant process of evolution and improvement, which will certainly cause the overcoming of these imperfections in the future.

Our Penal Code, which adopted the limited theory, deals with the prohibition error in Article 21, second part:

... The error about the illegality of the fact, if inevitable, exempt from penalty; if preventable, it may decrease it by one sixth to one third.

As can be seen in the first part, this is an inevitable error, it completely excludes culpability due to the absence of the possibility of knowledge of anti-juridity and, in the second part, deals with avoidable error, which reduces culpability, constituting a mandatory cause of reduction of sentence.

Therefore, Article 21 (prohibition error) regulates both the error that falls on the potential awareness of illegality (in the case of incriminating criminal norms), as well as, it regulates errors that fall on the existence or limits of the causes of exclusion of illegality (in this case permissive criminal norms).

Regarding type error, our Code disciplined in Article 20, Caput (the error that falls on the elements of the typical incriminating fact – incriminating criminal rule) as follows:

The error about constitutive element of the legal type of crime excludes the deed, but allows the punishment for a guilty crime, if provided by law.

So, if the error was inevitable, it excludes the deed and, in turn, the typical fact that, consequently, the antijuricity and guilt. However, if the wrong person acted with no observance of the duty of care, then he may be punished for the wrongful crime, if there is a legal provision.

In Article 20, § 1, he disciplined (the error that falls on the phonic assumptions of the causes of exclusion of anti-juridical (putative discrimination) as follows:

Art. 20 - .....

§ 1 - It is exempt from penalty who, by error fully justified by the circumstances, assumes a de facto situation that, if it existed, would make the action legitimate. There is no penalty exemption when the error stems from guilt and the fact is punishable as a guilty crime.

Let's look at the example of putative self-defense:

Abel threatens to kill his brother Cain. One night, when they meet, Abel takes his hand to his suit pocket. Cain assumed he would draw a gun, shot first and killed Abel, checking after Abel did not hold a gun, but would pick up a handkerchief from his pocket.

Cain incurs an inevitable error about the political assumptions of a justifying cause (so-called putative discrimination).

In the present case, it excludes the deed and the fault, because the error is fully justified by the circumstances which, if it existed, would make the action legitimate. There's no punishment. Shady permissive type error.

However, it is important to highlight that if the error fell on the existing one or the limits of an exclusion of anti-revilcity, it would be an error of prohibition with the consequences that we narrated earlier.

REFERENCES

[1] WELZEL, Hans, El nuevo sistema del Direcho Penal, Barcelona, Ed. Ariel, 1964, p.100
[2] BITENCOURT, Cezar Roberto, Tratado de Direito Penal – volume 1, Ed. Saraiva, São Paulo, 27ª, edição, p.623.
[3] WELZEL, El nuevo sistema, cit., p.100
[4] WELZEL, El nuevo sistema, cit., p.100.
[5] TAVARES, Juarez, Fundamentos Teoria do Delito, Ed.Tirant lo Blanch, Rio de Janeiro, p. 512