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HARMONIZATION BETWEEN BLANK CRIMINAL RULE AND THE THEORY OF OBJECTIVE IMPUTATION: REFLECTIONS ON ARTICLE 268 OF THE CRIMINAL CODE

HARMONIZAÇÃO ENTRE A NORMA PENAL EM BRANCO E A TEORIA DA IMPUTAÇÃO OBJETIVA: REFLEXÕES A PARTIR DO ARTIGO 268 DO CÓDIGO PENAL

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ABSTRACT

Objective: the purpose of this article is to analyze the harmonization between the blank criminal rule and the theory of the objective imputation of the functionalism of Claus Roxin amid the pandemic of COVID-19, addressing the criteria of objective imputation,

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by emphasizing the creation of an unallowed risk, the realization of the risk in the result and the result included in the scope of the type.

Methodology: the research undertaken uses the deductive method, via a qualitative approach to produce in-depth information on the topic; as to the nature, it is an applied research, because it aims to generate knowledge about the blank criminal rule for the practical application, directed to the solution of specific questions; as for the objectives, it is a descriptive research; and, according to the procedure, it is a bibliographic search, by reviewing national and foreign books and journals, and documentary, due to the revision of legislative texts aiming to extract the due deepening of the understanding of the blank criminal norm and its form of application.

Results: two theses can be invoked to justify the harmony between the blank criminal rule and the objective imputation. First, through the idea that the complementary norm is an essential part of the type, being a true element of the objective type; the complementary norm can not only be used, but must also be used to carry out the objective imputation judgment. Second, in the full criminal incriminating rules it is common to analyze the exceeding of the limits of the permitted risk, the realization of the risk in the result and the result included in the scope of the type through the analysis of extra-criminal laws and infra-legal rules, such as: the principle of trust, the notion of prudent man and technical safety standards.

Contributions: The research delves into a current topic, when discussing the applicability of the blank criminal rule in view of infractions committed in this exceptional environment, clarifying that, due to its dual political-criminal utility, it is an effective instrument for the protection of public health in the scenario caused by the pandemic of COVID-19.

Keywords: Objective imputation; Blank criminal law; Preventive health measure; Covid-19.

RESUMO

Objetivo*: o presente artigo tem a finalidade de analisar a harmonização entre a norma penal em branco e a teoria da imputação objetiva do funcionalismo Roxiniano em meio à pandemia do COVID-19, abordando-se os critérios de imputação objetiva, mediante a ênfase na criação de um risco não permitido, a realização do risco no resultado e o resultado incluído no alcance do tipo.*

Metodologia*: a investigação empreendida utiliza o método dedutivo, por intermédio de uma abordagem qualitativa, para produzir informações aprofundadas sobre o tema; quanto à natureza, trata-se de uma pesquisa aplicada, pois objetiva gerar conhecimentos sobre a norma penal em branco para a aplicação prática, dirigidos à solução de questões específicas; quanto aos objetivos, trata-se de uma pesquisa*

descritiva; e conforme o procedimento, é uma pesquisa bibliográfica, mediante a revisão de obras e artigos científicos de autores nacionais estrangeiros, e documental, devido à revisão de textos legislativos visando extrair o devido aprofundamento da compreensão da norma penal em branco e sua forma de aplicação.

***Resultados**: pode-se invocar duas teses para justificar a harmonia entre a norma penal em branco e a imputação objetiva. Primeiramente, por meio da ideia de que a norma complementadora é uma parte essencial do tipo, sendo um verdadeiro elemento do tipo objetivo; a norma complementadora não só pode, como também deve ser utilizada para a realização do juízo de imputação objetiva. Em segundo lugar, na normas penais incriminadoras completas é comum analisar a ultrapassagem dos limites do risco permitido, a realização do risco no resultado e o resultado incluído no alcance do tipo por meio da análise de normas extrapenais legais e infralegais, tais como: o princípio da confiança, a noção de homem prudente e as normas técnicas de segurança.*

***Contribuições**: A pesquisa aprofunda-se em um tema da atualidade, ao debater a aplicabilidade da norma penal em branco ante as infrações cometidas neste ambiente excepcional, esclarecendo que, em razão de sua dupla utilidade político-criminal, é um instrumento efetivo para a proteção da saúde pública no cenário provocado pela pandemia da COVID-19.*

***Palavras-Chave**: Imputação objetiva; Norma penal em branco; Medida sanitária preventive; Covid-19.*

1 INTRODUCTION

Firstly, one must recall that public security is part of the legal assets protected by Criminal Law, the crimes of which are provided for in such Title VIII. Among the various offenses foreseen in such Title, due to the pandemic caused by COVID-19, the crime against public health for the violation of a preventive sanitary measure is highlighted, characterized in article 268 of the Criminal Code.

In the pandemic scenario federal entities were forced to adopt all available means to try to contain the drive of COVID-19. It became common to impose a curfew, restrictions on the working time of economic activities, fines, premises interdictions, suspensions of permits and arrests for committing an offense on preventive health measure.

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The focus of this paper refers to the latter issue, namely the crime typification of Article 268 of the Criminal Code, notably because such an offense is a blank criminal rule.

This study is relevant as the blank criminal rules have an incomplete primary precept, the possibility arises of the absence of harmony between the blank criminal rules and the theory of objective imputation. The existence of a blank in the primary rule would turn the objective type incomplete and would prevent the analysis to assess the presence of the objective imputation criteria (creation of an unallowed risk, accomplishment of the risk in the result and such result included in the scope of the crime typification). This aspect opens necessary parentheses to clarify that the theory of objective imputation by Jakob is not unknown; nevertheless, in this study, the theory of objective imputation by Claus Roxin will be adopted as a theoretical framework.

After the explanation of the previous paragraph, it should be noted that the eventual lack of harmony between the blank criminal rules and the objective imputation could imply a great damage to the protection of public health in the scenario of the pandemic of COVID-19, inasmuch as the offense of violation of preventive sanitary measure is one of the mechanisms adopted by the competent authorities to try to contain the advance of the pandemic.

In view of the existence of such a relevant debate, one must analyze through bibliographic research how the doctrine addresses the issues of objective imputation, the blank criminal rule and the protection of public health.

Finally, it is emphasized that such analysis is essential to answer the central questioning of the present article: to what extent the blank criminal rule is or is not in harmony with the objective imputation, from the point of view of the crime of violation of preventive health measure?

The research undertaken uses the deductive method, via a qualitative approach to produce in-depth information on the topic; as to the nature, it is an applied research, because it aims to generate knowledge about the blank criminal rule for the practical application, directed to the solution of specific questions; as for the objectives, it is a descriptive research; and, according to the procedure, it is a bibliographic search, by reviewing national and foreign books and journals, and documentary, due to the

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revision of legislative texts aiming to extract the due deepening of the understanding of the blank criminal norm and its form of application

2 OBJECTIVE IMPUTATION

Presenting as reference to the theory of the crime proposed by causal and finalist models, it turns out that the objective imputation - a characteristic element of functionalist models, promoted intense changes, mainly in the dogmatic category of typicality. It is important to remember that the causal model developed by Von Liszt and Beling has naturalistic positivism as a philosophical ground and is based on ontological concepts specific to the natural sciences, such as physics (BUSATO, 2018, p. 205).

Due to these assumptions, the type had no subjective element, and the psychological elements were part of the culpability, and the type was “basically understood as the objective and neutral description of a conduct provided for in criminal law, and where they play a main role in the movement of the agent (causal reality) and the result ”(TAVARES, 1980, p. 21).

It is noticed that starting from a strictly mechanical concept of action, based on the law of physics of cause and effect, the type in the causal model followed the same path, observing that the axiological aspects are totally irrelevant.

In turn, the finalist model, whose main representative was Welzel, “appears as a criticism to the causal model and defines action as the accomplishment of a final activity” (SANTOS, 2007, p. 85). In this sense, in finalism the founding idea of the crime analytical system is the human conduct as a final action.

As in the causal model, the finalism model also believed that action as an ontological concept was the basis for the creation of the imputation system (BUSATO, 2018, p. 214). However, while in causalism the conduct was nothing more than a simple voluntary movement (BUSATO, 2018, p. 214), or a “muscular innervation produced by energies of a cerebral impulse, which, commanded by the laws of nature, cause a transformation in the exterior world”(BITENCOURT, 2009, p. 217); in finalism

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one refers to a " conduct previously endowed with a willful or reckless will "(BUSATO, 2018, p. 214). In this perception, the main change brought about by finalism was the displacement of the subjective elements of the crime of negligence to the type.

Negligence has become purely normative, concentrating only on issues of reprobability (BITENCOURT, 2009, p. 219), while the type has been divided into objective and subjective.

The subjective plan of human action contemplates the choice of a purpose (direct willful intent of first degree) and the choice of a means to reach an end (direct willful intent of second degree), while the objective plan of action represents its externalization in the real world (SANTOS, 2007, p. 85).

Claus Roxin recognizes that the finalist theory of action has made intense progress that, however, limited to the subjective type. According to the German jurist, the finalist model remained limited to the causal relationship, along the lines of the theory of equivalence, which is characteristic of the causal theory of action (ROXIN, 2002a, p. 1) in connection with the objective type.

The criticism of Roxin on the models that supported the objective type in causality is exemplified in to forms. In the first hypothetical situation, subject "A" wishes the death of subject "B". Aware that many tourists have been killed in Florida and hoping that "B" has that same fate, "A" recommends that "B" travels to Florida. "B" is unaware of Florida homicide cases, travels to such destination and ends up being the victim of a homicide. Roxin raise questions whether "A" should be punished for intentional murder. If the objective type is reduced to the causal nexus, the answer is affirmative, as "A", by way of his advice caused the death of "B", and he wanted such a result (ROXIN, 2002a, p. 1). In the second form, Roxin also deals with an example that contemplates deviations from causality. The German jurist recalls the situation that subject "A" shoots subject "B" with the intention of killing him, but ends up only causing an injury. Subject "B" is transported to a hospital by an ambulance, which is involved in an accident and "B" ends up dying due to such accident. One asks if "A" should be accused of homicide crime. Again, when adopting a purely causal conception of the objective type, the answer is positive, as "A" caused and desired the death of "B" (2002a, p. 2).

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Roxin then cites the example that subject “A” sells heroin to subject “B”. Both agents are aware that taking a certain amount of drug can be life-threatening and they indeed take the risk. Subject "A" takes such a risk because he has an interest in money, while subject "B" understands that his life is only relevant if he is under the influence of drugs. Should "A" be punished for homicide committed with eventual intent in the event that "B" dies from the injection of the drug? The punishment of "A" will be the measure to be adopted if causality is the sufficient element to fulfill the objective type, since the causality of "A" is present for the death of "B", as well as the respective eventual intent (2002a, p. 2).

As a way to overcome the limits contained in the mentioned examples, Roxin proposes the addition of a new criterion to the objective type: the objective imputation.

2.1 ELEMENTS OF OBJECTIVE IMPUTATION

The theory of objective imputation is not limited to the causal relationship between a conduct and its outcome. The presence of the causal nexus is only a first step that is complemented by an evaluative analysis of legal relevance of the relationship between the conduct and the result (GALVÃO, 2000, p. 27).

In this sense, Fernando Galvão (2000, p. 26) clarifies that

> In the structure of the objective imputation, the causal relationship between the conduct and the result is examined, in the case of material crimes, and the legal relevance of producing this result, from the perspective of realizing a legally unauthorized risk.

Based on the theory of objective imputation, it is fundamental that human conduct creates a legally prohibited risk that is concretely found in the result. In this regard, it is important to highlight that "if the legal system does not prohibit a certain conduct, it is because it does not constitute a risk of injury to the legal good" (CAMARGO, 2001, p. 72).

It is also observed that, despite Jakobs' functionalism not being the object of the present study, it is noted that the theory of objective imputation developed by the

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mentioned author addresses the issue of the absence of imputation by the permitted risk (JAKOBS, 2009, p. 291). Therefore, it is possible to affirm that in the main exponents of functionalism (Roxin and Jakobs) there is a consensus that some risky activities are not sheltered by the penal norm, as they are under the mantle of permitted risk (CALLEGARI, 2009, p. 75).

When talking about risk as an imputation criterion, Paulo César Busato (2008, p. 67) states that, at this moment, Criminal Law can make use of the theses developed within the scope of Ulrich Beck's risk sociology. Although risk is part of the routine and accepted in the most diverse sectors and levels, some risks are not tolerated by society and criminal law is often used to prohibit intolerable risks (BUSATO, 2008, p. 68).

Based on the considerations stated above, one recalls that the objective imputation proposal by Roxin contemplates three basic criteria: a) creation of a danger for the object of the action that is not understood within the limits of the permitted risk; b) when the result corresponds to the accomplishment of the risk created by the author; c) the result achieved must be within the protection range of the type (2002b, p. 308-310).

2.1.1 Creation of a Unallowed Risk

According to the first criterion, the objective type will not remain fulfilled in the hypothesis in which there is no risk creation or increase, so that there will be no “imputation for the conducts that, if carried out within the standards required by the rule, would not have avoided the result ”(BUSATO, 2018, p. 321).

Moreover, with regard to the aspect of creating a unallowed risk, Roxin (2002b, p. 313) explains three hypotheses in which there is no imputation: a) exclusion of imputation by decreasing the risk; b) absence of risk creation; and c) creation of a permitted risk (2002b, p. 313-323).

Imputation is excluded due to the decrease in risk as it is a more beneficial situation for the protected legal good. This hypothesis is very well exemplified by Roxin when subject “A”, who deflects a stone that would hit subject “B” in the head, but the stone reaches another part of the body that is less dangerous (2002b, p. 313).

In addition, it is pointed out that the imputation is removed in cases where the risk has not decreased, but there has also been no significant risk increase. The example hereto is the agent who spills a bucket of water in the dam that is overpassing its border. It is not the case of punishment of the agent for the crime of flooding due to such a small addition of water (ROXIN, 2002b, p. 315/316).

Finally, exclusion from imputation may occur even if there is the creation of a legally relevant risk, provided that such risk is allowed. This possibility is illustrated by the permitted risk arising from driving with the observance of traffic rules. Although road traffic constitutes a relevant risk for life, health and physical integrity, the same is permitted (ROXIN, 2002b, p. 325).

2.1.2 Accomplishment of Risk in the Result

In addition to creating a unallowed risk, the theory of objective imputation requires that the result be presented as the accomplishment of the risk caused by the action (JUNQUEIRA; VANZOLINI, 2018 p. 275). In this regard, Paulo César Busato (2018, p. 323) properly points out that “this correspondence is undoubtedly essential. The fundamental equilibrium of the double devaluation carried out in incrimination (devaluation of the action and devaluation of the result) determines it ”.

If the result is not a consequence of the risk created by the author, the imputation is excluded. Although the result sought by the author has been achieved, it does not arise from the risk created, but from a unpredictable causal course (ROXIN, 2002b, p. 327). For this purpose, Roxin (2002b, p. 328) provides the example of a victim of attempted murder that dies as a result of a fire in the hospital and not because of the aggression.

2.1.3 Result Included in the Type Scope

In addition to creating a unallowed risk and accomplishing the risk in the result, objective imputation requires that the result be included in the scope of the type.

Roxin (2002b, p. 328) clarifies about this aspect of the theme:

> It is increasingly accepted that imputation can stop when, in the specific case, the scope of the type, the purpose of protecting the written rule in the type (namely the prohibition on killing, injuring, damaging, etc.) does not encompass results of the type occurred, i.e., when the type is not determined to prevent such events.

The exclusion of imputation under analysis is precisely which can be applied to the example mentioned above of subject “A”, who sells heroin to subject “B” and the latter one dies as a result of the use of the narcotic substance.

Roxin (2002a, p. 3) explains in this case that the death result is not included in the scope of the type of homicide.

Luís Greco (2005, p. 64) complements the reasoning by arguing that “wanted and self-responsible self-endangerments are not encompassed in the type of a crime of bodily injury or homicide, although the risk to which the victim consciously exposed himself happens".

In summary, the factors above studied are the structural elements of the theory of objective imputation developed in Claus Roxin's functionalism.

3 BLANK CRIMINAL RULE

The structure of the incriminating criminal rule is commonly divided into two parts: a) precept; b) sanction. When analyzing these two aspects, Paulo César Busato (2018, p. 164) explains that “in the precept the norm describes the conduct that is regulated. The sanction refers to the penalty or security measure that is applied in the event of non-compliance with respect to the prohibited conduct ”.

In view of this preliminary analysis, Busato (2018, p. 165) clarifies that the incriminating criminal rule includes simultaneously two normative commands: a primary rule intended for the citizen not to practice the disapproved conduct; and a secondary rule sent to the judge with the legal consequence to be applied due to the typical fact.

By delineating the structure of the incriminating penal rule, it becomes possible to move on to the theme of the blank criminal rule.

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From the beginning, one can state that the blank criminal rule is a “kind of incomplete incriminating criminal rules” (GUARAGNI, 2014, p. 27).

Considering, as provided above, that the structure of the incriminating criminal rule is formed by a primary and a secondary precept, the first question to be answered is which of the precepts needs to be complemented.

The incompleteness of the blank criminal rule is verified in the primary precept, which must be supplemented by another rule.

In this regard, Juarez Cirino dos Santos (2007, p. 50) points out that “blank criminal rules are legal types with a determined criminal sanction and an indeterminate precept, dependent on addition by another legislative or administrative act”.

In the same vein, Enrique Bacigalupo (2005, p. 139) approaches with extreme clarity that the “Spanish theory and jurisprudence use the concept of blank criminal rule, understanding as such the cases in which the prohibition or the precept of action are found in different provisions of the law containing the criminal threat ”.

As a consequence, it can be concluded that in the blank criminal rules the primary command (precept) is incomplete, and the addition is provided by other legal rules.

3.1 THE NATURE OF THE BLANK COMPLEMENT AND THE ISSUE OF LEGALITY

As for the nature of the blank complement, the blank criminal rule can be of a homogeneous or heterogeneous nature. The blank criminal rule in a broad or homogeneous sense is the one in which the complemented rule and the complementary rule are in the same hierarchy. In this case, both rules have the same legal nature and the same origin of production, namely the Federal Legislative Power (JUNQUEIRA; VANZOLINI, 2018, p. 93).

Fábio André Guaragni (2014, p. 31) lists article 178 of the Criminal Code as an example of a blank homogeneous criminal rule, “which incriminates the issuance of deposit or warrant knowledge 'in disagreement with the legal provision', in this case, Law 11,076/2004 ”.

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On the other hand, the blank criminal rule in a strict or heterogeneous sense encompasses a complementary rule of different hierarchy, generally inferior. In such a case, the blank complement will originate from a different organ and a different nature from the rule to be complemented (JUNQUEIRA; VANZOLINI, 2018, p. 93).

It is possible to list article 33, of Law 11,343/2006, as an example of a heterogeneous blank criminal rule, which "criminalizes drug trafficking 'in disagreement with legal or regulatory determination'. Ordinance 344/98-ANVISA is the complementing rule "(GUARAGNI, 2014, p. 31).

Based on the principle of legality, the homogeneous blank criminal rule does not present any major problems, mainly because the complemented rule and the complementary rule are the result of the exercise of the legislative competence of the Union (article. 22 of the Federal Constitution) and are in line with article 5, XXIX, of the Major Law and Article 1 of the Criminal Code. However, still in the aspect of legality, perhaps one of the most relevant questions that are made to the blank criminal rules is related to the hypothesis in which the complementary rule comes from an instance that does not have competence in criminal matters (BACIGALUPO, 2005, p. 140). As stated by Fábio André Guaragni, (2014, p. 46) it happens because

> The reference to a formal normative source other than the law in a strict sense - which generally implies in a reference to a different material normative source - generates friction with the exclusive constitutional competence for the production of a criminal rule reserved for the Legislative Power of the Union.

Although there are doubts about the convergence between the heterogeneous blank criminal rule and legality, certainly the constitutionality of the former should be analyzed in each situation, observing the criminal and extra-criminal aspects (BELEZA; COSTA PINTO, 1999, p. 45).

One last question, which is the central issue of this paper, refers to the compatibility or not of the blank criminal rule with the theory of objective imputation. Before envisaging this problem, it is essential to discuss the crime of violation of a preventive health measure, provided for in article 268 of the Criminal Code, mainly

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because it is a crime that adopts the technique of the blank criminal rule and has been widely invoked throughout the COVID-19 pandemic.

4 THE CRIME OF VIOLATON OF PREVENTIVE HEALTH MEASURE

The scenario caused by the pandemic of the new Coronavirus (COVID-19) gave great prominence to the crime of violation of preventive sanitary measure, foreseen in article 268 of the Criminal Code, which provides that:

> Art. 268 – Violating the determination of the public authorities, aimed at preventing the introduction or spread of a contagious disease: Penalty - detention, from one month to one year, and fine. Sole paragraph - The penalty is increased by one third, if the agent is a public health worker or exercises the profession of physician, pharmacist, dentist or nurse.

The aforementioned offense is in a chapter of the Criminal Code for crimes against public health, being a criminal offense that seeks to protect the legal good called public security, especially with regard to the public health.

In addition, the criminal type in question does not require any special quality from the active subject; the crime of violation of a preventive health measure can be practiced by anyone. The caveat pointed out by Cézar Roberto Bitencourt (2020, p. 376) refers to the agent that accomplishes the conduct:

> […] if the conduct described in the type is carried out by any of the persons specified in the sole paragraph (public health worker, physician, pharmacist, dentist or nurse), the penalty is increased by one third, as in this case there would also be a breach of functional duty.

On the other hand, the passive subject is the collectivity, who has its health put in check due to a real threat resulting from the breach of the preventive health measure.

At the objective level, the core verb of the type is to violate, which is a synonym to breach, disobey and offend, among others. In order to configure the crime in

question, it is necessary to violate the determination of the public authorities, aimed at preventing the introduction or spread of a contagious disease.

At this point, one notes that the crime provided for in article 268 of the Criminal Code is a blank criminal rule, since "the configuration of the type therefore depends on what the government determines, which is certainly another rule" (BUSATO, 2016, p. 193).

It should be noted that the blank complementary rule may be, for example, a law, decree, ordinance, regulation or other normative act originating from the government that aims to prevent the introduction or spread of contagious disease.

In terms of the subjective type, the crime of infraction of a preventive health measure is not provided for in the negligence modality, as a matter of fact the subjective element of the type is only the intent.

The consummation of the crime occurs due to the disobedience of the determination of the public power (complementary rule); it is irrelevant for the consummation that there is the effective introduction or spread of contagious disease. It is a crime of abstract danger, and it is worth remembering that on the distinction between harm and danger crimes, Cézar Roberto Bitencourt (2009, p. 224) clarifies that:

> Crime of damage relates to the consummation of which the supervenience of the effective injury of the legal good is necessary. [...] Crime of danger is consummated with the simple creation of danger for the legal good, without producing effective damage. In these crimes, the subjective element is the willfulness of danger, which is limited to the creation of the dangerous situation, not wanting the damage, not even eventually.

The criminal offense of article 268 of the Criminal Code allows the attempted form, which can be better elucidated by the example of Magalhães Noronha (1988, p. 11) relating to the passenger of a ship in quarantine who, when trying to leave the vessel, is prevented from doing while executing the plan.

Finally, considering that the maximum penalty does not exceed two years, it is a criminal offense with less offensive potential, which jurisdiction for judgment and execution is the Special Criminal Court.

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4.1 DETERMINATION OF PUBLIC POWER INTENDED TO PREVENT THE INTRODUCTION OR PROPAGATION OF CONTAGIOUS DISEASE

In the foreground, it should be remembered that through the judgment of Direct Action of Unconstitutionality No. 6,341, the Supreme Federal Court recognized that the competence to fight Covid-19 is competing between the Union, the Federal District, states and municipalities.

In view of this decision, for the purpose of complementing the blank provided for in article 268 of the Criminal Code, the determination of the public power aimed at preventing the introduction or propagation of Covid-19 may come from any of the federal entities. This precedent is important because it allows the determination of the public power to prevent the introduction or spread of Covid-19 to be adapted to the local reality.

However, this autonomy among the federative entities to edit rules aimed at combating the pandemic can cause unusual situations, which can raise countless issues in the scope of Criminal Law. This can happen because it is possible that contiguous municipalities may be subject to completely different rules. As an example, a case occurred in June 2020 in a mall located between the municipalities of Sorocaba and Votorantim, in the interior of the State of São Paulo (g1.GLOBO, 2020).

It was observed that, as of June 22, 2020, the stores in the mall that were located in Sorocaba were unable to open their doors, as the aforementioned municipality only allowed the opening of essential stores. On the other hand, the stores that were located in the Municipality of Votorantim operated normally, insofar as the opening of malls was fully permitted in that town.

In the town of Sorocaba, a shopkeeper could incur the sanctions provided for in article 268 of the Criminal Code, if he failed to comply with the determination of the municipality and opened the doors of his establishment. On the contrary, the tenant of the same mall, but which establishment is located in the Municipality of Votorantim and kept operating, in theory would be acting in regular exercise of law and would not be committing any criminal violation.

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In terms of the offense of a preventive health measure, there is also the possibility that the complementary rule (determination of the public authority) refers to a third rule. “There is, then, a blank criminal rule of successive or second degree reference” (GUARAGNI, 2014, p. 31).

To better elucidate this issue, Decree No. 180, dated January 27, 2021, issued by the Municipality of Curitiba is cited, which is a rule designed to prevent the introduction or spread of contagious disease (COVID-19) or, in other words, it is a rule that can complement the blank provided for in the offense of article 268 of the Criminal Code. When dealing with churches and temples of any cult, the sole paragraph of article 15 of the aforementioned decree determines that, in relation to churches and temples, Resolution No. 1,434, dated December 3, 2020, issued by the Secretary of State for Health of Paraná.

In this example of a blank criminal law of the second degree, it is clear that the configuration of the crime of violation of a preventive health measure depends on the violation of the aforementioned Resolution of the Secretary of State for Health of Paraná.

5 BLANK CRIMINAL RULE VERSUS OBJECTIVE IMPUTATION

Before analyzing the harmonization between the blank criminal rule and the theory of objective imputation, it is necessary to remember and establish some premises. First, as mentioned in the previous chapter, the blank criminal rule is one of the mechanisms used to protect public health. In this regard, it is worth mentioning the double political-criminal utility of blank criminal rules, which are extremely important especially in the context of a pandemic. The first one is the constant updating of the incriminating type due to the reference to add-ons which editing requires less formality (GUARAGNI, 2014, p. 33). The second political-criminal utility, and the major reason for using blank criminal rules, is “the need to evoke vertical technical knowledge, within the framework of a post-industrial society, dependent on trust in expert systems, synthesis of advanced technologies that flood the market ”(GUARAGNI, 2014, p. 47).

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As this verticalized technical knowledge, as a rule, is not in the Legislative Power, but in the Executive Power, “the staff specialists of the executive power produce regulations that complete the blank criminal rules, nourishing them with sophisticated technical data that the legislator is not aware of ”(GUARAGNI, 2014, p. 34).

Upon analyzing specifically article 268 of the Criminal Code, the legislator did not specify what determination of the government would be, nor did it provide a concept of contagious disease. If the legislator had delimited the criminal type, the criminal type would be “plastered” and the protection of public health would be impaired, especially because in every moment it is possible to arise a new contagious disease, as well as several determinations of the public power aimed at preventing its introduction or spread.

When establishing that the necessary elements for the configuration of the crime of violation of preventive sanitary measure should be sought in determinations of the government, it is possible to keep the criminal type constantly updated, as it is simpler to update a decree, ordinance, resolution or regulation than a criminal type.

This role of the blank criminal rule as a State risk manager (GUARAGNI, 2014, p. 47) is of fundamental importance when it comes to a pandemic scenario, such as the one caused by COVID-19, since the increase or the reduction in the spread of the contagious disease is extremely variable.

In spite of the positive aspects of the blank criminal rule contained in the offense of a preventive health measure, it can be argued that the referred criminal rule does not include sufficient elements to identify the creation of a risk not allowed to the legal good, the accomplishment of the risk in the result and that the result is included in the scope of the type (objective imputation criteria). Due to these reasons, the question arises whether or not there is harmony between the blank criminal rule and the objective imputation theory.

The supposed lack of harmony can be immediately ruled out, because after the blank criminal rule is filled in by the complementary rule, the type now has the necessary elements for the analysis of the objective imputation. It is important to keep in mind that complementation is an essential part of the type; according to MEZGER

(1949, p. 196 *apud* BACIGALUPO, 2005, p. 140) the complemented type fulfills the same function as any other type.

In the same vein, Juarez Cirino dos Santos (2007, p. 51) asserts that "the complement of the blank criminal rule is part of the criminal law, insofar as it is an objective type element". Even if the complementary rule is a regulation, decree, resolution or ordinance, it is a fundamental element of the type and, as such, able to be submitted to the criteria of objective imputation.

Anyway, even if the complementary rule was not considered an integral element of the objective type of the incriminating criminal rule, there would be no lack of harmony between the blank criminal rule and the objective imputation theory. Even in the criminal rules that have the complete primary precept, the analysis of the objective imputation escapes from the elements contained only in the incriminating rule.

When addressing the crime analysis system, one must remember that

> […] the adoption of theories of objective imputation in the system of analysis of the crime ends up imposing a reference to legal and infra-legal rules in each and every criminal case judged, for fixing the allowed or prohibited character of the levels of risks generated by the conduct (GUARAGNI, 2014 , p. 47/48).

If the reference to legal and infra-legal extra-criminal rules was not enough, the analysis of exceeding the limits of the risk allowed in originally complete criminal rules may be related, for example, to the idea of a prudent man, the principle of trust and technical safety standard rules (GRECO, 2006, p. 169).

Finally, it should be noted that the use of the blank criminal law technique in the crime of violation of a preventive health measure is in accordance with the function of criminal law, namely the subsidiary protection of legal assets.

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6 FINAL CONSIDERATIONS

The present paper aimed to analyze the harmonization between the blank criminal rule and the objective imputation from the analysis of the crime of violation of preventive sanitary measure.

In order to build the theoretical framework necessary to answer that question, at first, it was necessary to analyze the theory of the objective imputation of Roxinian functionalism. It started with the overcoming of the causal and finalist models of the action based on the changes promoted in the objective type, due to the insertion of the objective imputation criteria. Upon the analysis of the creation of an unallowed risk, the accomplishment of the risk in the result and the result included in the scope in the type, it was possible to overcome several limits found in the previous imputation models.

Subsequently, it was observed that the technique of the blank criminal rule is used in the offense of article 268 of the Criminal Code. However, given the incompleteness of the primary precept, doubts arise about the compatibility with the objective imputation theory.

In this aspect, two theses can be invoked to justify the harmony between a blank criminal rule and the objective imputation. The first one based on the idea that the complementary rule is an essential part of the type, being a true element of the objective type. Thus, the complementary rule cannot only, but must be used for the accomplishment of the objective imputation judgment. In the background, even though the complementary rule is not seen as an integral part of the objective type, the lack of harmony between the blank criminal rule and the objective imputation could not be invoked.

This conclusion is reached because, even in the full incriminating criminal rules it is common to analyze the exceeding of the limits of the permitted risk, the accomplishment of the risk in the result and the result included in the scope of the type through the analysis of extra-criminal legal and infra-legal rules, such as: the principle of trust, the notion of a prudent man and the technical safety standard rules.

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Even in the criminal rules which primary precept is complete, the analysis of the objective imputation needs reference to external elements; it can be concluded that there is no problem of objective imputation in the blank criminal rules.

Finally, it should be noted that the blank criminal rule, due to its dual political-criminal utility, is an effective instrument for the protection of public health in the scenario caused by the pandemic of COVID-19.

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