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DESIGN UNITY AND CONTINUED CRIME: A CRITICAL APPROACH REGARDING THE BRAZILIAN LEGAL SYSTEM

UNIDADE DE DESÍGNIOS E CRIME CONTINUADO: CONSIDERAÇÕES CRÍTICAS À LUZ DO ORDENAMENTO JURÍDICO BRASILEIRO

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ABSTRACT

Objectives: This paper seeks to investigate the legitimacy of adopting the objective-subjective theory as a foundation for continued crime in the Brazilian legal system. Although the doctrine mostly recognizes the adoption of the objective theory and the article 71 discards the requirement for a unity of purpose, Brazilian courts insist on

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making the application of article 71 conditional on the proof of this requirement. Therefore, the objective of the work is to investigate the causes that led to the current decision-making context on the issue and its conformity with the criminal principle and the Social and Democratic State of Law instituted after 1988.

Methodology: The methodology used is deductive, by comparing court decisions with the Brazilian constitutional principles, and bibliographical, from the review of national and foreign literature on the subject, with the aim of promoting a logical articulation between dogmatics and jurisprudence on the subject.

Results: The work demonstrates that the adoption of the objective-subjective theory directly violates the Constitutional Principle of Legality and should be considered illegitimate. This is because the paradigmatic understanding that supports its adoption absolutely lacks substance in a contemporary principiological logic and represents an interpretation in malam partem, which is prohibited in criminal matters.

Contributions: The work highlights the importance of reviewing consolidated jurisprudential precedents, especially on issues related to the ultima ratio of the Legal System.

Keywords: Multiple crimes; Continued crime; Legality; Unitary plan.

RESUMO

Objetivos: O presente trabalho procura investigar a legitimidade da adoção da teoria objetivo-subjetiva como fundamento do crime continuado no ordenamento jurídico brasileiro. Apesar da doutrina majoritariamente reconhecer a adoção da teoria objetiva e a redação do artigo 71 descartar a exigência a uma unidade de desígnios, os tribunais brasileiros insistem em condicionar a aplicação do artigo 71 à comprovação desse requisito. Diante disso, o objetivo do trabalho é investigar as causas que levaram ao atual contexto decisório sobre a questão e a sua conformidade com a principiologia penal e o Estado Social e Democrático de Direito instituído pós 1988.

Metodologia: A metodologia utilizada é dedutiva, através do cotejamento das decisões judiciais com a principiologia constitucional brasileira, e bibliográfica, a partir da revisão da literatura nacional e estrangeira sobre o assunto, com o objetivo de promover uma articulação lógica entre a dogmática e o respaldo jurisprudencial sobre o tema.

Resultados: O trabalho demonstra que a adoção da teoria objetivo-subjetiva viola diretamente o Princípio Constitucional da Legalidade e deve ser considerada ilegítima. Isso porque o entendimento paradigmático que sustenta sua adoção carece absolutamente de substância em uma lógica principiológica contemporânea e representa uma interpretação in malam partem, o que é vedado em sede penal.

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Contribuições: O trabalho evidencia a importância da revisão de precedentes jurisprudenciais consolidados, sobretudo em temas correlacionados à ultima ratio do Ordenamento Jurídico.

Palavras-Chave: Concurso de crimes; Crime Continuado; Legalidade; Unidade de desígnio

1 INTRODUCTION

The delictual practice is a social complex phenomenon. It is not rare for the offender to have many legal tipes imputed to himself due to a single conduct or to divide the delictual activity in different acts. Aiming to give a coherent and systematic answer in such situations, the Civil Law countries within their Criminal Law systems have predicted specific legal institutes, being the continued crime a concept tailored to reach such goals.

The continued crime is a legal construction, and therefore, a normative figure, created with political-criminal goals under the influence of *favor rei* determinants. The main idea of the institute is to attribute a lighter penalty in comparison to the one given to a material bind for an offender who committed several delictual crimes. As in many elements which compose the contemporary criminal dogmatic, the continued crime is not an exclusive Brazilian criminal law concept, being its creation and constitution connected to antiquity.

Specifically regarding the Brazilian Criminal Law, this concept is subject to many controversies, either in regard to its constitution, or the legal nature of itself or even its legal viability.

We can appoint as a major current obstacle the jurisprudential negotiation of superior courts about the subject, which reproduces a rationale which is almost unanimous in regarding the verification criteria for the continued crime, but mainly in disregard of the legal scriptures and the current legal reasoning which reasserts the scripture of 1940. Despite the clear legislation about the objectivity of the elements

composing this concept, it is common the denial of claims asking for the recognition of the continuity of crimes by the lack of an additional subjective element, in the form of the unity of design of the offender. The "imposition" of such a requisite goes back to the jurisprudence of 1970's, and is still being reproduced currently in an automatic and mistaken way.

Therefore, this paper proposition is to revamp the dogmatic debate about the legitimacy of the objective-subjective theory debate as a ground for the Continued Crime. In other words, we seek to investigate the legitimacy of the demand for a subjective bind for the recognition of continuity, adopted despite the legal script, its original interpretation and almost the legal doctrine as a whole.

2 BRAZILIAN LAW'S CONTINUED CRIME OVERVIEW

There are mainly 4 theories that determine the content of continued crime. The so called purely subjective theory, which detaches as a central element the unicity of design for the commitment of offences; the objective theory, which, in contrast, demands the investigation of the bundle of objective conditions that defines the delictual continuity (temporal conditions, place, *modus operandi*, and others), finally, the subjective-objective theory, which basically unifies both points of view, adding the design unicity as a homogeneity of *modus operandi*. All precedes the addition of the continued crime in the Brazilian legislation and, of the three presented theories, we can identify the objective theory as the one which was clearly adopted by the literal script of article 71 of Código Penal. As it follows:

> Whenever an offender, through more than one action or omission, performs two or more crimes of the same kind and, through temporal, place, and *modus operandi* conditions as well as others, must the following be regarded as a continuation of the first, applying to them only one crime's penalty, if the same, the greater, if diverse, enlarged, in any case, from one sixth to two thirds.

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Grammatically, it can be perceived that there is no kind of interpretative gap that demands a subjective "design unity" criteria from the offender. Distinguished from other controversies on Criminal Law, the article 71 script is crystal clear about the criteria to be fulfilled in order for its incidence. The legal reasoning for the article itself from the general part of the Brazilian Criminal Code from 1984 (*Código Penal*), emphasizes the interpretative flow chosen by the legislators:

> The purely objective theory criteria has not revealed itself in practice to have major inconvenientes, despite the objections formulated by the objective-subjective theory followers. The project opted for the criteria judged more fitted which contrasts with the professional, organized and violent criminality growth, in which the offenses against different victims are repeated in similar time, place and *modus operandi,* as well as other conditions. To extend the concept of continued crime implies to benefit them, thus the professional offender becomes subject to a lighter criminal penalty by dismissing occasional criminal charges. In addition, with the extinction, in the Project, of the security measure for the imputable, comes the need for a reinforcement in the system, to seek greater penalties to ones that would be subjected to the imposition of the detentive security measure and are benefited by the measure's abolition. The Criminal Policy acts, therefore, in an inverse way, to avoid the premature liberation of determined offender category, who are subject of great periculosity.

As stated by Hungria, during his era, the discussion about the adoption of the subjective-objective theory has been overcome by the legislation. In the approval procedure of the Criminal Code proposition of 1940, Costa e Silva refuted the positivation of the objective-subjective theory and opted for the commision proposal, elaborating the script's content positivated within article 51 §2º, in which is casted out the exigence of a unity of design. Moreover, the current article 71 script is a literal reproduction of the 1940's version of the legal rule.

At that time, despite of the impugnation of Alcântara Machado - and his inquiry about the content of "same conditions of time, place and *modus operandi*, as others", within the suggestion offered by the commission prevailed the adoption of the objective theory, making clear the commision in its treplica which these conditions would be nothing different of any other circumstances which by its possible to infer the consequentialist bind between the offenses.

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Among the main critiques made by the lawyers - still current - we may highlight the inconsistency of the objective-subjective theory in explaining in what would consist the subjective element in the real world during the conduct performance (HUNGRIA, 1958, p.386), specially because the doctrine would be losing their path to distinguish what would characterize will and distinguishment.

For many, the unitary intent would manifest itself as nothing else than the reflex of objective conditions already outcasted by offender (HUNGRIA, 1958, p.330), which by it would be useless to clarify the institute.

For others, following a absolutely inverse logic, from that adopted by the current jurisprudential panorama, the institute of continued crime would pass to be a *benesse* to the individual who has a *plus* in one's intent, which is, a person for whom would be demanded a greated reproval, since he or she would have planed the delictive design before its execution:

> The incongruence of the subjective-objective theory was already appointed by Von Bar (ob.cit.,pág.596): "One has certainly no right to a benignum treatment, thereby its shown greater intensity of intent one who, according a single design (resolution) or a prior delineated design in its details, practice many crimes of the same species; but in the contrary, it does not let to ma subjected to the right of whom, given an occasion essentially identical to the last time he or she practiced the crime without any dissuasion to one's evil ways, succumbs once more to temptation. (HUNGRIA,1958, p.332-333)

Furthermore, despite of the previous article 50, §2º from the original text of 1940 and the current article 71 of the general part of 1984 state objectively the theoretical choice form the code's authors by the purely objective theory, and from their confirmation within the motives exposition, the jurisprudence has firmed a rationale absolutely contrasting to the literality of the legal statute. Current, specially regarding the Superior Courts, it is crystalised the idea that the criminal code has adopted the subjective-objective theory, either for consider a more appropriated theory, or because they reproduce ideas illustrated by this subject's precedents:

> REGIMENTAL APPEAL IN DECLARATION APPEAL TO ORDINARY APPEAL REGARDING HABEAS CORPUS. CRIMINAL LAW. RAPING OF VULNERABLE. DOSIMETRY. LEGAL CIRCUMSTANCES. LACK OF

> MANIFEST ILLEGALITY. FACTUAL AND PROOF REEXAMINATION. IMPOSSIBILITY WITHIN THE STRICT PROCEDURE OF HABEAS CORPUS. DELICTUAL CONTINUITY. HYBRID THEORY. DESIGN UNICITY. REGIMENTAL APPEAL DENIED. 1. The revision of the penalty dosimetry is not possible if it's necessary for the factual and proof reexamination, which is not possible through habeas corpus, being void of any illegality inferable by the presented data about the particular incident. Supreme Federal Court Jurisprudence. 2. The unity of designs is a requisite for the characterization of delictive continuity, since it was adopted by this court the hybrid theory (subjective-objective). Precedents. 3. Regimental appeal denied. (RHC 150666 ED-AgR, Relator(a): EDSON FACHIN, Segunda Turma, julgado em 28/06/2019, PROCESSO ELETRÔNICO DJe-167 DIVULG 31-07-2019 PUBLIC 01-08-2019)

But, how the jurisprudence, through such a legal and doctrinaire clear statements, has affirmed the adoption of the objective-subjective theory? The present paper's proposition is to answer this question, and in order to accomplish it, we'll observe the event that unleashed the current schism between the legal scripts about this institute (objective theory) and the interpretation that demands proof of "design unicity" to recognize the continuity.

3 PRECEDENTS AND THE CHANGE OF JURISPRUDENTIAL UNDERSTANDING

As far as we know, the first decision of the Federal Supreme Court that mentioned the subjective link as a prerequisite for the assessment of continuity was a defeated vote by Minister Cunha Peixoto declared in the proceedings of Extraordinary Appeal No. 87,769, in 1978. It was about a case in which the offender had committed multiple robberies, between December 1972 and January 1973 and, as a result, required the recognition of the continued crime based on Article 51§2 of the Criminal Code of 1940.

The other ministers have not commented on the objective-subjective theory. The vote review, given by Minister Décio Miranda, recognized the applicability of the institute, anchored, above all, by the small time lapse between the crimes analyzed. The third minister, Soares Muñoz, also acknowledged the criminal continuity and made no allusion to a subjective link. The fourth, Minister Moreira Alves, did not

recognize the continuity, but admitted that the Brazilian Criminal Code adopted the objective Germanic theory[1], excluding, therefore, the requirement of a subjective link and the fifth, minister Cordeiro Guerra, based his decision on the need to "disincentive to criminality" and dismissed the hypothesis of continued crime, expressing his disdain to all the aforementioned theories[2]. The remainder of the votes did not establish affiliation to any of the strands and the final result of the judgment was unfavorable to the recognition of continuity.

In this case, the defeated vote was the responsibility of the rapporteur, Minister Cunha Peixoto, who rejected the recognition of criminal continuity, on the grounds that the theory adopted by the Criminal Code would not be appropriate, since the measurement of continuity could not remove the subjective element of the offender:

> Although the Brazilian Criminal Code has, with regard to continued crime, adopted the German theory of objective tendency, thus dispensing with the unity of purpose, it is not possible for the judge to remove the offender's subjective element from all.

In sum: the defeated Minister exposed his legislative "desire" in his vote. I would like the adopted theory to be the objective-subjective one, but aware that the legal wording did not meet it.

After the publication of this decision and, as seen, despite the fact that two of the Judging Ministers rejected the demand for unity of purpose and all the others did not even raise it, the vote of the Rapporteur Minister Cunha Peixoto started to be considered as a paradigm for subsequent decisions. From then on, the Supreme Court's understanding was considered altered without any in-depth discussion on the

[1] "So, Mr. President, I follow the eminent Rapporteur, first because I support the thesis that *Código Penal* follows the objective Germanic theory, which does not admit continued crime in such cases; second because, even if I did not understand it, in the specific case, I find that there are no objective circumstances that characterize that the crimes in question do not form a chain such that the subsequent ones are considered to be continued by the consequents." STF. Rext. 87.769, Rapporteur(a): Cunha Peixoto, judged on 03/09/1978.

[2] "For me, little objective or subjective theory is given to me; for me, it is unacceptable that this man is encouraged to crime, he and all the others who specialize in the use of the machine gun, in the so-called "campana" on the door of the building, in surveying supermarkets, banks, etc.". STF. Income 87,769, Rapporteur: Cunha Peixoto, judged on 03/09/1978.

matter, with the "unity of purposes" having acquired the character of an implicit requirement for the recognition of continued crime[3].

Eleven years after this decision, the discussion resurfaced in 1989, this time before the Superior Court of Justice, when Special Appeal No. 507 was judged. In the vote of Justice Rapporteur Assis Toledo, new arguments were mentioned to substantiate the requirement of unity of purpose or "complete intent", the Judgment not abstaining from anchoring itself in the judgment of the Extraordinary Appeal "paradigm", that is, the Resp. No. 87,769, analyzed above.

In addition to the mention of the “understanding” of the STF, the Rapporteur's vote provided a reasoning aimed at legitimizing the requirement of the subjective requirement, bringing, as a contribution, teachings from German and Italian doctrine. As he stated, the unity of the purpose of Italian law (partisan of subjective theory) would find some parallelism in the praxis of German law, cradle of objective theory, since the jurisprudence of this country would be demanding the presence of a "total intent" to extol the result of the fact perpetrated by the offender.[4]

In illustrating his vote, the minister equated the institute's instrumentalization by our legislation with the approach taken by foreign legislation, adding that "the law in Brazil, as in other countries, does not offer us infallible criteria for identifying the criminal unit or continuity, in the presence of multiple actions”.

Based on this premise, he built a reasoning to validate the insertion of subjective criteria in the absence of our legal wording. The logic of admitting a subjective element in the scope of, now already Article 71 of the Criminal Code,

[3] For example: Menu - Criminal Law and Criminal Procedure. Unification of sentences: continued crime. Usual crime. Art. 71 of *Código Penal*. "Habeas Corpus". Since the judgments demonstrated that the patient did not fulfill the requirements regarding the conditions of place and the unit of purposes, being, moreover, a habitual offender, they rightly concluded by the rejection of the unification of sentences, based on criminal continuity (art. 71 of the *Código Penal*). "H.C." against these judgments, dismissed (HC 72024, Rapporteur: Justice Sydney Sanches, First Panel, judged on 03/28/95, DJ 05-26-1995 PP-15157 EMENT VOL-01788-02 PP-00339).

[4] “In Germany, for example, cradle of the so-called objective theory, courts have demanded the presence of a "total intent" (*gesamtvorsatz*) that links the total result of the fact in its essential aspects, with regard to place, time, person of the victim and mode of execution, so that the isolated acts represent the successive realization of the desired set. (Jescheck, Lehrbuch des Strafrechts, Allg. Teil, 4. Auflage, 1988, p. 649). On the other hand, unrelated acts that affect very personal legal assets (*höchstpersönliche Rechtsgüter*) do not constitute continued crime, according to this jurisprudence, when each act is directed against different holders of these assets (murder, sexual attacks, etc.).” STJ. Special Appeal No. 507. Rapporteur (a) Minister Assis Toledo. Judged on 11/20/1989.

would basically result from the flexibilization of the interpretative guidelines carried out by German jurisprudence, which, until then, also dispensed with any intentional element on the part of the acting offender:

> The purely objective theory, of certain authors of past times, gives way today to a mixed theory that combines objective and subjective elements for a more restricted characterization of continued crime.", justifying the interpretative amplitude used to demand the subjective link by the use of such called "fundamental principle of fair retribution.[5]

In complete disregard for the legal text, the exposition of reasons and the massive doctrine, and ignoring the rule-principle of legality arising from the entry into force of the Constitution or even the total difference between alien predictions and our own order, the decision was unanimously accepted by the other ministers, which facilitated the pacification of the understanding on the adoption of the objective-subjective theory in the current wording of article 71 of the Criminal Code.

4 (UN)BUILDING CONCEPTS: THE ILLEGITIMACY OF CURRENT JURISPRUDENTIAL UNDERSTANDING

In our opinion, the above narrative illustrates the illegitimacy of demanding a subjective requirement for the recognition of continued crime, at least under two justifications: first, as elucidated at the beginning of the presentation, the literal interpretation of article 71 of the Criminal Code it absolutely prohibits the measurement of such an element and, in doing so, the constitutional principle of

[5] "Thus, for criminal continuity, it is essential, in my view, that the various criminal acts are linked, the subsequent ones linked to the first (Article 71 of *Código Penal*), either because they are part of the execution of the same criminal project, or because they result from an opportunity, albeit fortuitous, provided by the execution of this project (taking advantage of the same situation). This, of course, once the objective requirements of article 71 are verified. Apart from that, I think that criminal continuity should not be accepted, as a result, as is well known, of practical requirements of criminal policy. The conveniences or greater conveniences of a procedural nature should not weigh in against the substantial requirements of substantive law, with regard to the fundamental principle of fair retribution. And the possible excess of penalty, caused by the application of the material competition, finds a solution by the mandatory application of the general limiting rule of article 75 of *Código Penal*."

legality, established by the Federal Constitution of 1988, is directly violated. Second, the justifications used by the Excellent Praetorium, as well as by the Superior Court of Justice, are absolutely inadequate to justify the insertion of this additional criterion - and, consequently, rule out the violation of legality - fundamentally due to the dissonance between our legal provision and the extraterrestrial constructions, which will be further developed next.

4.1 A VIOLATION OF LEGALITY'S PRINCIPLE

Concerning the legality principle, we initially highlight the complete principle-logical and contextual incompatibility between the historical panorama from 1978 and the current one. At the time of the first decision handed down by the STF on the subject, the country was subject to an intense restriction with regard to individual rights, even because Institutional Act number 5 was in full force. Despite the legislation at the time, that is, the 1940 Criminal Code, also adopting the objective theory for the purposes of applying the article 51, in that historical period, there would be no constitutional impediment for the scope of legality to be exceeded. In fact, there would be no more favorable time for that. The allegation of "fighting crime" was the most raised plea and the basic constitutional guarantees were, as a rule, relaxed in favor of a supposed "common good".

The provisions are also proven by the perfunctory reading of the grounds contained in the votes of Extraordinary Appeal No. 87,769. Several times, we come across expressions such as "it is no longer safe to walk in the street" or "the looseness of repression is what generates a stimulus to criminality" as grounds for an extension of the interpretation of the criminal law in harming the defendant. On the other hand, the principle of legality was never mentioned. Obviously, such assertions reflect the way of thinking and the historical context of the time. It so happens that such statements no longer find shelter in our current legal system, whose individual constitutional guarantees must serve as an obstacle to the interpretation of criminal law and the pursuit of any political-criminal purpose.

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Currently, the principle of legality, considered a canon of Criminal Law, finds its legal provision both in the constitutional body (Art. 5, II of the Federal Constitution - *Constituição Federal*) and in the *Código Penal* (Art. 1 *CP*). Precisely because of its importance in providing prior knowledge of what is the object of protection under Criminal Law, and, consequently, legitimizing legal certainty, the respective principle guides the prohibition of analogy in malam partem, under any circumstances. Basically, we can point out 2 main functions performed by the Constitutional Principle of Legality: the first, limiting the state power, and the second, maintaining legal security, essential in any legal system that claims to be contemporary.

Although article 71 of the Brazilian Criminal Code is not characterized as a prohibitive precept and, by nature, is defined as a normative construction, it is a provision in which strict requirements are determined for obtaining a right. Therefore, any limit to obtaining this right must be only and only included by the legislator, who is the one who has the constitutionally granted power to establish penalties and flexibilities to these same penalties. The disregard of the will of the legislator on the argument that "society calls for justice" or any related expression, is nothing more than an inadmissible violation of legality, since unforeseen limits are being imposed and, more precisely, it is to impose a more serious penalty than provided for by law. The same can be said of the maintenance of conflicting understanding with the constitutional principle or the construction of jurisprudential understanding without any kind of dogmatic support.

This is because dogmatism has a fundamental role to play in guaranteeing respect for the principle of legality, especially as a tool for preparing and complementing the positive law (MIR PUIG, 1994, p.13), as it holds its limit and foundation of constitution, with the objective of nothing more than complementing it (MIR PUIG, 1994, p.22). Therefore, primarily, no type of conclusion reached through jurisprudence should disregard the paradigms and interpretative frameworks arising from doctrine and law, especially because Criminal Science, as it is systematically arranged, undergoes an autopoietic complementation and, furthermore, it seeks give content to the legislation, where it finds its linde.

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After the advent and dissemination of the importance of the functionalist perspective as a tool for bringing Law and society closer together, it is unreasonable to apply any institute not associated with the criminal policy established by law. In this case, as already pointed out, the explanatory statements of 1940 and 1984 are expressed in the sense of pointing out the objective theory as the predetermined option by the legislator and, although one does not want to recognize the functionalist line, we recall that the authors cited in the judgment 87,769 are admittedly causal. Out of historical curiosity, among the participants in the elaboration of the 1940 text, only Roberto Lira dissented from the others, and his suggestion was defeated by that of Nélson Hungria, a supporter of objective theory.

It is also worth pointing out that the intense reasoning laid down in judgment 87.769, reproduced up to the present day, boils down to the differentiation between the continued crime and the habitual criminal, that is, the person who takes crime as a life project. It is evident that the intention of the legislator could never have been to apply a lower penalty to a person whose social conduct is more reprehensible, which makes it even clearer that the differentiation between these two species is independent of the subjective element.

4.2 ILLEGITIMACY OF A FOREIGN DOCTRINE COMPARISON

In addition to what was developed in the above item, the interpretation reproduced by the current jurisprudence also disseminates an inadmissible stain on legality. The main argument made by the judgments of the Superior Court of Justice to support the adoption of the objective-subjective theory is a parallel with foreign legislation, mainly the German legislation, which, via case law, admitted a significant change of understanding about the constitution of the institute. Therefore, the reflection on the legitimacy of the reasoning adopted by our courts requires an analytical study of the alien prediction of continued crime so that, from there, we can be able to do a systemic comparison between our reality and the international context.

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But the central point of the improperness of the arguments quoted by the Superior Court of Justice is the lack of legal provision of the continued crime in German Law.

We immediately noticed the improperness of the foundations that underscore the adoption of the objective-subjective theory, either at the time of the decision or today. The vote of the Rapporteur Minister Assis Toledo uses as the main argument the requirement of the unity of purpose of German doctrine, construction without any expected legal protection. German law never had any legal provision for the continuing action offense (*Fortgesezten Handlung*) (ROXIN, 2003, p.873) and the jurisprudence definitively refused its use in a BGH ruling in 1994 (BHTSt 40, 138-168) (ROXIN, 2003, p.872). The institute was derived absolutely from a doctrinal and jurisprudential construction, a figure that sometimes was based on substantive law and sometimes on procedural law, so that the trial of individual facts that should be tried in the same process, when there was a similarity between them, avoiding lis pendens and privileging the res judicata when the court had not included in the conviction a few cases that were parties of a whole. (JAKOBS, 1993, p.901).

Contrasting to the Brazilian case, in which the continued crime has its wording in law and does not require any subjective element, the absence of legal provision allowed total flexibility in the creation and modification of its constituent elements, which is why part of the doctrine and jurisprudence began to require an additional element, embodied in the so-called full intent (*Gesamtvorsazt*) as an imperative to the recognition of the delitive continuity.

Even within the German doctrine, there has always been disagreement about what would be the subjective element required by some authors. Many argue that continued crime represents a unit of action and not, as our legal script provides, a range of actions that make up various offenses.

Probably the strength of the subjectivity thesis and the "general intent" is due to Welzel, for obvious reasons of linking his system to the intent and will of the offender. In his conception, the continued offense can present itself in two distinct ways: as a unit of action consists in a successive realization of a "full intent"; or as a punishable driving unit of life (*Einheit strafbarer Lebensführung*), in this second case,

as culpability of conducting life (*Lebensführungsschuld*). And in its conception, only in the first case – the realization of a full intent – could be talked about in continued crime along the lines of what in its time recognized the BGH. (WELZEL, p.198).

But it is in the doctrine of Jescheck – which apparently choruses the doctrine that preaches the end of the institute[6] – that Minister Assis Toledo will seek its foundation. He expressly cites "full intent", and makes it clear that it is the courts that demand it. However, Assis Toledo closes his citation arbitrarily without Jescheck's conclusion in his work. The Minister cites that the full intent should link "the total result of the fact in its essential aspects, with regard to place, time, person of the victim and mode of execution, so that the isolated acts represent the consecutive realization of the desired set". But to support his own predilection for subjectivity, he strategically does not mention that the German author recognizes that a global intent very rarely can be verified in reality, and so the courts are forced to artificial grounds so that the continued crime can have some practical importance. (JESCHECK, 1996, p.716).

Indeed, authors later recognize that "complete offense" is but a rhetorical argument. Jakobs clearly argues that the subjective element named "full intent" or " continuity simulation" (*Fortsetzungsvosatzes*) is empty of content and could be filled at the will of the interpreter (JAKOBS, 1993, p.903), and – even if it is contrary to the institute – recognizes that reason lies with the part of the doctrine that excludes him from the analysis of the continued crime because thus the figure can be applied with greater perfection and achieve its purpose, that is nothing more than avoiding a penalty that punishes in isolation stereotyped conducts that are nothing more than repetitions of the same series (JAKOBS, 1993, p.905).

At the end of his vote, he lacked technical precision – or interest – to the Minister when he literally states: "as we have seen, the purely objective theory, accepted by the judgment, is not accepted today in the land of origin itself with such large scope, or without limitations, as is elicit to the lessons of Jescheck, in the aforementioned work". In fact, as we must, because it is an institute absent from legal

[6] JESCHECK, 1996, p. 715. In the original: "*Es ist deshalb kein Wunder, dass sich die Stimmen für di Preisgabe der fortgesetzten Handlung gemehrt haben*".

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forecasting, one can always apply it objectively or subjectively, to the applicator's taste and such insecurity has reached such a critical point that the institute has been formally abandoned by the system.

It should also be noted that the Minister uses Italian doctrine for the same purpose, and curiously expressly citing that the legal text provides for the subjective aspect[7]. It is at least curious that you make this express reference since you recognize that the legal provisions are different, and their conclusion should be exactly the opposite: if Italian law requires it, it must be present; if Brazilian law does not require it, one cannot want it to be present. Interpretation such as that made by the Minister is the application of analogy in "*malam partem*", which as we know, is inadmissible in criminal matters.

With regard to similarities, it should be noted that Spanish legislation has a forecast similar to that contained in Article 71 of our Criminal Code, but there are some peculiarities that differentiate the species predicted there from that which belongs to us. Firstly, with regard to the terminology adopted on the multiple offense we have in both countries a division between "real competition", which would be equivalent to our idea of material tender, and "ideal contest" which would correspond to what we mean by formal tender.

Although both laws converge in this respect, the "Continued Crime", so-called by both systems, is constituted differently in each of them. Spanish law, for example, did not have any kind of legal determination to impose the recognition of a continuing offense until 1983. The institute was entirely the result of a jurisprudential construction, and its positiveness occurred only after this date, through a specific legislative change and the doctrine and jurisprudence recognized objective and subjective aspects (MIR PUIG, 2011, p.653). However, also in Spain, part of the doctrine argued that the criterion for continued crime should be the objective:

> The most coherent configuration of continued crime is that based on objective data. Among these, it is essential to highlight as essential the identity of the legal good injured or endangered and the identity or, at least,

[7] Nas palavras do Ministro: “In Italy, as is known, by express legal provision of the Penal Code, Art. 81, it is required that the various actions characterize the execution of the same criminal intent”.

> the homogeneity of the penal precept violated. (ROSAL; ANTÓN,1999, p.782)

And also there, as here, the jurisprudence apparently corrupted the institute, as Muñoz Conde reports:

> Originally, the continued crime was an institute that arose with the aim of benefiting the defendant by excluding his various criminal actions from the rules of material tender, assessing them as one, or at least, as a single offense. Nevertheless, the jurisprudence also used the figure of the continued crime when there were difficulties to prove the various isolated actions, and for other procedural reasons that did not always benefit the defendant. (CONDE, 1996, p.487).

Currently, the Spanish forecast of the institute expressly requires the presence of a "preconceived plan", in other words, a unit of will of the offender, which officially validates the adoption of subjective theory and reason why the jurisprudence of that country have full legitimacy to demand its presence[8].

Thus, the phenomenon that occurs in Brazil configures the reproduction of an absolutely unconstitutional understanding, which violates basic precepts of the Legal System, which disorients the limitation of punitive power, which, in turn, is the foundation of the existence of criminal law. The continued crime provided in Brazil is expressly provided for by law, very different from the continued crime derived from the German system that was the result of a doctrinal and jurisprudential construction resulting from the legislative gap, and the Italian system that has express provision for the presence of a subjective element. What is amazement is that Francisco de Assis Toledo participated in the committee for the preparation of the general part of 1984, in which in his explanatory statement expressly declares that the criterion adopted by our code would be the objective.

[8] Artículo 74. 1. *No obstante lo dispuesto en el artículo anterior, el que, en ejecución de* ***un plan preconcebido*** *o aprovechando idéntica ocasión, realice una pluralidad de acciones u omisiones que ofendan a uno o varios sujetos e infrinjan el mismo precepto penal o preceptos de igual o semejante naturaleza, será castigado como autor de un delito o falta continuados con la pena señalada para la infracción más grave, que se impondrá en su mitad superior, pudiendo llegar hasta la mitad inferior de la pena superior en grado* (**highlighted**).

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5 FINAL CONSIDERATIONS

Based on the considerations developed above, we can conclude that the adoption of the objective-subjective theory, as practiced by a great part of the jurisprudence, directly violates the Constitutional Principle of Legality and should be considered illegitimate.

The precedent currently quoted as a basis for this argumentation absolutely lacks substance in a contemporary axiological logic, in such fashion that its reproduction represents a taint in the legal security itself, since this perspective legitimizes the interpretation in malam depart conceived by the jurisprudential route.

Although our codification presents similarities with other continental rooted systems, a circumstantial parallelism must be done accordingly and respecting the particularities of each country, which, as demonstrated, escapes the understanding expressed by the precedent under analysis.

The prediction of the continued crime in the Brazilian legal system is expressly due to a law script which, in turn, exhaustively lists the requirements for the recognition of the institute, all of an objective nature. The conceptual maneuver currently, reproduced by our jurisprudence, represents an illegitimate equivalent of the rule contained in Article 71 of *Código Penal* with alien predictions that do not fulfill the characteristics that would allow such comparison.

Unlike what occurs in our legal system, the continued crime is not representative in German legislation, and, being a doctrinaire construction, it entails substantial changes in its content, whether perpetrated by the doctrine itself, whether they are arising from the jurisprudential route. Hence, in that locality, the theory adopted for the interpretation of the institute can vary between the objective and the objective-subjective, which requires the unity of design from the offender.

By using the concept of a continued crime brought by the German or Italian legal systems to legitimize the demand of a requirement not provided by Law to recognize this institute, the higher courts are at the time clearly infringing the constitutional principle of legality, a breach which, consequently, delegitimizes the reproduction of that understanding in the present day. The immediate alteration of

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this dictatorial remnant in our jurisprudence is absolutely inevitable, under penalty of allowing the corruption of the separation of powers and, in addition to that, limiting the function of the punitive power, a mandatory goal of contemporary criminal law, therefore it should be dissolved.

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