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ABSTRACT

Multitudinary crimes are those committed by several people, however, without a subjective link. Such crimes are committed in collective turmoil. For this reason, considering the principle of individualization of the penalty, in the procedural phase, it becomes relevant to verify the need (or not) to identify the participation of each agent during the commission of the crime in order to establish the criminal responsibility of each one since the initial accusation, in compliance with the constitutional principles of culpability and the personality of the penalty. The absence of factual elements, collected in the investigation, may not allow the identification of the conduct of each agent in the commission of the crime. Therefore, it is necessary to analyze if the concept of collective criminal procedure can be applied in the scope of multitudinary crimes in order to relativize the content of the initial, described in article 41, of the Code of Criminal Procedure, to the point of describing the facts in a generic way, that is, refraining from individualizing the conduct of each agent. Therefore, the hypothetical-deductive method will be used in relation to the doctrinal source. It is expected that the results of the research can contribute, in the procedural sphere, with grounds for criminal proceedings in multitudinary crimes.

Keywords: multitudinaria crimes. individualization of the penalty. collective criminal process. responsibility.

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Multitudinary crimes are those committed by several people, however, without a subjective link. Such crimes are committed in collective turmoil. For this reason, considering the principle of individualization of the penalty, in the procedural phase, it becomes relevant to verify the need (or not) to identify the participation of each agent during the commission of the crime in order to establish the criminal responsibility of each one since the initial accusation, in compliance with the constitutional principles of culpability and the personality of the penalty. The absence of factual elements, collected in the investigation, may not allow the identification of the conduct of each agent in the commission of the crime. Therefore, it is necessary to analyze if the concept of collective criminal procedure can be applied in the scope of multitudinary crimes in order to relativize the content of the initial, described in article 41, of the Code of Criminal Procedure, to the point of describing the facts in a generic way, that is, refraining from individualizing the conduct of each agent. Therefore, the hypothetical-deductive method will be used in relation to the doctrinal source. It is expected that the results of the research can contribute, in the procedural sphere, with grounds for criminal proceedings in multitudinary crimes.

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I. INTRODUCTION

First of all, it is important to point out that multitudinous crimes are those committed by several people, without a subjective link, in a collective turmoil and the biggest problem, in these kinds of crimes, lies in the difficulty in identifying the participation of each agent during the commission of the crime.

So, this article intends to focus on the discussion about multitudinary crimes and the need (or not) to individualize the facts committed by agents, since in such crimes there is no subjective link between the participants. The unit of the process occurs, therefore, by the occasional intersubjective connection or by simultaneity, understood as that in which two or more crimes have been committed, at the same time, by several people together (art. 76, I, 1st part, CPP).

Considering the difficulty in knowing how each person acted in the commission of the crime, in order to individualize their conduct, it is important to analyze the possibility of mitigating this individualization in the initial accusation, from a procedural point of view. Therefore, it is necessary to verify if the concept of collective

criminal procedure can be applied in the scope of multitudinary crimes, in order to relativize the content of the initial accusation, described in article 41 of the Criminal Procedure Code.

For this, the hypothetical-deductive method was used in relation to the doctrinal source, and, in the sequence, were indicated the hypotheses that were tested through the bibliographical research technique.

II. THE PROBLEM OF MULTITUDINARY CRIMES IN THE PROCEDURAL SCOPE

In the study of multitudinary crimes, there is a certain misinterpretation of its concept. This is because, as already mentioned, they are those practiced by several people, without a subjective link, in collective turmoil.

In this context, the great difficulty is to identifying the participation of each agent during the commission of the crime in order to establish the criminal responsibility of each one, in compliance with the constitutional principles of culpability and personality of the penalty.

Here lies precisely one of the main discussions on this matter - the possibility of a concurrence of agents in crimes committed by people in a crowd: on the one hand, there are those who believe the existence of a concurrence of people *sui generis*, because,

the collective commission of the crime, in these circumstances, despite occurring in a normally traumatic situation, does not rule out the existence of psychological links between the members of the crowd, that characterize the concurrence of people. In crimes committed by a delinquent crowd, it is unnecessary to describe in detail the participation of each of the actors, otherwise it will make the application of the law infeasible. The greater or lesser participation of each one will be object of the criminal instruction (BITENCOURT, 2021, p. 276 - our translation).

On the other hand, there are those who claim that "the psychological link between the agents cannot

be presumed and must be demonstrated in the concrete case, so that all can be held for the result arising from the sum of the conducts" (GRECO, 2019, p. 125; our translation).

It is worth noting that those who commit the crime under the influence of a crowd in turmoil will have their penalties mitigated, as determined by article 65, III, *e*, of the Penal Code. This because,

The mitigating factor thus recognizes the lesser culpability of the individual who is influenced by the crowd in turmoil, if he has not provoked it. It is not necessary that the subject has participated in the turmoil, but that it has influenced his criminal resolution. The turmoil of the crowd must exert a decisive influence on the configuration of the criminal will, therefore, the lesser exigibility of different conduct that will be directed to the subject (GALVÃO, 2017. p. 883; our translation).

In this sense, there are decisions that do not recognize the mitigating factor provided for in article 65, III, *e*, of the Penal Code, when the crimes of homicide were not committed under the influence of a crowd in turmoil, but rather, for a pre-existing reason, consisting of the victims' refusal to pay to prison leaders and to continue to their hunger strike:

[...] 8. The recognition of the mitigating circumstance of having the agent 'committed the crime under the influence of a crowd in turmoil, if he did not provoke it', provided for in article 65, item III, item 'e', of the Penal Code, if the appellant did not commit the crimes under that circumstance (TJDFT, APR 20141210025335, 2^a T., Rel. Roberval Casemiro Belinati, DJe 31/03/2016, p. 10-148; our translation).

There are also judicial decisions in the sense of the inapplicability of this mitigating factor when the appellant was the cause of the disturbance:

[...] 3. The influence of a crowd, in the midst of turmoil (art. 65, item III, item 'e', of the Penal Code. (...), the accused cannot take

advantage of the turmoil which he caused, not proceeding, on the point, even to speak of a crowd, a mass dominated by the collective spirit of aggression, since the appellant was responsible for the beginning of the melee, opting, after the physical fight with the victim has ceased, to attempt three times against her life, using his vehicle for that purpose (TJDFT, APR 20110710026799, 1^a T., Rel. Mário Machado, DJe 18/08/2011, p. 294; our translation).

In addition, those who promote, organize or lead the criminal practice or direct the activity of others will have the aggravated penality, according to the intelligence of article 62, I, of the Penal Code.

It is also important to emphasize that "in cases where the turmoil provoked by the crowd is a condition for the very configuration of a crime, such as a feud, obviously the mitigating factor will not be considered, as it is an element of the crime" (BOSCHI, 2014, p. 238-239; our translation).

So, another point that we have to analyze is the need (or not) to individualize the acts committed by the agents, since in such crimes there is no subjective link between the participants. The unity of the process and the judgment is therefore given by the occasional intersubjective connection.

The possibility of mitigating the individualization of conducts, in the initial accusation, becomes relevant from the procedural point of view, because of the difficulty in knowing how each agent acted during the commission of the crime, since the observance of individualization can lead to impunity. Therefore, it is necessary to verify if the concept of collective criminal procedure can be applied in the scope of multitudinary crimes, in order to relativize the content of the initial accusation, described in article 41, of the Code of Criminal Procedure, to the point of describing the facts in a generic way, that is, refraining from individualizing the conduct of each agent.

2.1 In Search of Collective Criminal Procedure

The collective process does not exist separately from the codified system, because its institutes are informed by traditional precepts and by concepts already elaborated, which must be reviewed from the perspective of collective legal relations. In the collective process, it is necessary to re-read the classic dogmatics, considering the peculiarities of collective interests (LEONEL, 2002, p. 89).

The collective process gained ground in Brazil, with the advent of the Consumer Protection Code. For Ada Pelegrini Grinover (2018, p. 480),

Finally, with the 1990 Consumer Protection Code, Brazil was able to count on a true microsystem of collective processes, composed of the Code that also created the category of homogeneous individual interests or rights - and Law n. 7.347/85, interacting through the reciprocal application of the provisions of the two laws.

In Brazil, there are several microsystems that deal with collective interests and, therefore, collective protection, such as the Public Civil Action Law, the Consumer Protection Code, the Child and Adolescent Statute, the Law for the Defense of Investors in the Securities Market, the Law for the Defense of Persons with Disabilities, the Antitrust Law, the Law of Administrative Impropriety and the Organic Legislation of the Public Prosecutor's Office.

The legitimacy of the Public Prosecutor's Office to act in collective proceedings is not discussed, because it must always operate in the defense of collective interests and, in this kind of process, the legal possibility of the request will be viable, as long as there is no express legal prohibition. In this sense, for Ricardo de Barros Leonel (2002, p. 435),

In examining issues of collective process, the starting point should always be the premise that the legal operator must 'think collectively', examining procedural problems based on the idea that he is not dealing with an individual controversy. Although the

observation seems obvious, most of the mistakes that are made, in this matter, result from reasoning based on valid premises for individual demands, but insubstantial to solve doubts related to collective protection. It will be unfeasible to grant adequate dimension and operability to the collective process without changing mentality (our translation).

The collective process must fulfill an ethical and moral role, because of the possibility of several people being part of the passive pole of the procedural relationship, although there is no subjective link between them, in order to comply with the principle of procedural economy.

Its essence is always based when there are meta-individual or collective interests, as occurs, for example, in the areas of security, tax, consumer, traffic and environment, that is, interests that are linked to community relations and not to the individual in isolation.

In this area, the study about the possibility of applying the provisions of the collective procedure in the scope of criminal procedural, especially in the so-called multitudinary crimes, becomes prominent, in view of the difficulty founded, in the preliminary phase of the criminal procedure, in the identification and individualization of the cooperation of each agent in relation to the various crimes committed.

It must not be forgotten that, for the occurrence of a multitudinary crime, there must be a collective action and imputation. In this kind of crime, all the agents' conducts are in the same direction, however, without a subjective link between them for this purpose. In other words, this kind of crime has its origin through a turmoil in which there is the participation of several agents who, in an accidental unity of purpose, can offend a plurality of legal interests. Its most relevant feature lies, as stated above, in the lack of prior agreement between the contenders, a fact that makes it difficult the personal identification of each participant or co-author in the commission of the crime.

In the criminal scope, when analyzing the "Carandiru Massacre", which took place on

October 2, 1992, as a result of a confrontation between prisoners at the São Paulo House of Detention (called Carandiru) and military police officers, to contain a rebellion that took place there and which resulted in the death of more than 111 prisoners and many others wounded, due to the excessive violence used in this action, it is a true example of a multitudinary crime.

A police investigation was started and the fact was notified to the Military Justice, and then it was sent to the common justice system, "as well as an international complaint to the Inter-American Commission on Human Rights, in order to hold the State responsible for the crimes committed by public agents who acted in contempt of the Democratic State of Law" (OLIVEIRA, 2022; our translation), however, it was not possible to identify and individualize the conduct that each defendant practiced, that is, it was not possible to describe and, therefore, delimit the contribution of each criminal agent, in the initial accusation, in relation to all those deaths.

The same occurs in the criminal practice against economic order, more specifically, the "cartel formation", provided for in article 4, II, of Law 8.137/90, in which the identification of the conduct of each agent is difficult to be accomplished, a fact that currently, under the existing criminal procedural basis, can lead of impunity.

Indeed, in crimes of this nature, it is not possible to clearly describe, in the initial accusation, the action committed by each of the agents. Therefore, generic complaints, which face the requirements of article 41 of the Code of Criminal Procedure and, consequently, the individualization of criminal behavior, that involves the typical description of multitudinary crimes, needs to be debated in order to verify the need to reject the denunciation, for being inept, in the form of article 395, I, of the Code of Criminal Procedure or receive it, considering the impossibility of describing the individual conduct, but rather the collective conduct and the result.

Moreover, perhaps the best moment to identify the individual conduct of the defendant is at the

criminal instruction stage. However, if it is not possible to identify it during the criminal proceedings, as it is a crime of a multitudinary nature, it becomes necessary for the judge to reevaluate its contents in order to proceed the individualization, due to its relevance when he recognizes the validity of the punitive intention and starts to the dosimetry of the penalty.

In this sense, the jurisprudence of the Federal Supreme Court has been oriented towards admitting the generic narration of the facts, without discrimination of the specific conduct of each defendant (CPP, art. 41), when it is a multitudinary crime, behold, only the instruction can clarify who, participated or remained unrelated to the illicit action or the result obtained with it. In this case law, the denunciation indicates the fact attributed to the patient and allows the exercise of the right of defense:

HABEAS-CORPUS. CRIMES, IN MATERIAL CONCURRENCE, OF EXCHANGE RATE FRAUD AND FRAUD, IN CRIMINAL CONTINUITY, AND GANG FORMATION. ALLEGATION OF INEPTITUDE OF THE DENUNCIATION AND LACK OF JUST CAUSE FOR THE CRIMINAL ACTION: MULTITUDINARY CRIME OR JOINT OR COLLECTIVE AUTHORSHIP. 1. It is not ineligible to denounce any omissions regarding the requirements of art. 41 of the CPP - which can be replaced at any time, before the final sentence (art. 569 of the CPP) -, as long as it allows the exercise of the right of defense. The defendant must defend himself against the facts alleged against him and not against the kind of criminal offense invoked in the denunciation. 2. In crimes of collective authorship, the complaint may generically narrate the participation of each agent, whose specific conduct is determined in the course of the criminal action. Precedent. 3. The Penal Code, when dealing with the concurrence of people, provides for the figures of author, co-author and participant, who, in any way, may be a legitimate passive pole in the action (art. 29), even if he has not practiced the conduct

foreseen in the core of the criminal type. 4. The special and summary rite of habeas corpus is not compatible with the reexamination of facts and evidence. 5. Known but dismissed habeas corpus (STF. HC 75868/RJ, 2^a. T, Rel. Min. Mauricio Correa, j. 10/02/1998, DJe 06/06/2003; our translation).

However, despite this individualized description of the conduct of each agent being dispensable, it is necessary for the *Parquet* to establish the subjective link between the accused and the criminal practice, as the Superior Court of Justice has already decided:

REQUEST FOR EXTENSION OF HABEAS CORPUS. CRIMINAL PROCEDURE. CRIME AGAINST THE ECONOMIC ORDER, EXTORTION, MISAPPROPRIATION AND GANG FORMATION. THESIS OF INEPTITUDE OF THE DENUNCIATION. ABSENCE OF MINIMUM INDIVIDUALIZATION OF THE CONDUCT ASSIGNED TO THE DEFENDANTS. ILLEGAL CONSTRAINT EVIDENCED. REQUEST GRANTED. 1. Although it is indispensable, in crimes of collective authorship, the detailed and individualized description of the conduct of each accused person, it cannot be conceived that the public prosecutor fails to establish any link between the accused person and the crimes imputed to him. 2. The absolute absence of individualized elements that point to the relationship between the criminal facts and the authorship offends the constitutional principle of full defense, thus rendering the denunciation inept. 3. Request for extension granted to determine the suspension of the criminal action in favor of the Accused [...], without prejudice to the offering of a new accusatory document, in compliance with the provisions of art. 41 of the Criminal Procedure Code (STJ. PExtDe no HC 214.861/SC, 5^a. T, Rel. Min. Laurita Vaz, j. 19/04/2012, DJe 30/04/2012; our translation).

In summary, it is important the subsidiary application of the rules of collective procedure to collective criminal procedure, due to the

inexistence of a law that deals with this matter in the criminal sphere. Therefore, recognizing the application of the norms that provide for popular action as a basis for collective criminal proceedings, is a coherent and important measure to avoid impunity.

III. FINAL CONSIDERATIONS

As can be seen, this is an extremely important discussion, since the mobilizations of people in favor of a certain purpose, whether legal or not, can generate consequences that are often harmful. It happens because people have expectations and desires and, depending on how this is stimulated, especially when crowds are organized, it makes them end up behaving in a certain way that they were alone they would not do, and in the crowd, responsibility can be diluted among its members and many can take advantage of this "anonymity" to avoid punishment, since the way in which the criminal process is structured today, generic denunciations are not allowed.

Thus, it is necessary for the law to adapt to these new demands, either by the subsidiary use of the norms of collective process, or by the creation of rules that discipline the collective criminal process.

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