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CRIMES UNDERSTANDING BY THE NOTION OF OBSTRUCTION OF JUSTICE: AN APPROACH BASED ON THE VITAL LEGAL GOOD

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Abstract: This article aims to investigate the crimes included in the notion of "obstruction of justice", notably in the Brazilian Penal Code and in the Criminal Organizations Law, in response to movements on a global scale, such as the United Nations Convention against Transnational Organized Crime. Considering the necessary definition of clear and strict limits to the incriminating criminal rules relevant to the matter, it is asked: "How to remove from other crimes against the administration of justice the prohibition of 'obstruction of justice' provided for in Law 12.850/13, in view of the vagueness and breadth of your writing? It is assumed that an interpretation of the criminal law oriented towards the protection of legal interests based on ethical-social values and, therefore, vital, can offer the conditions to delimit the content of the prohibition of conducts aimed at the obstruction of justice. In this sense, the identification of the vital legal asset is carried out from the evaluation of the normative elements present in the legal types of crimes against the administration of justice of the Penal Code. In another turn, the study seeks to investigate the conduct that contradicts the scale of values that underlie the prohibition described in the legal type provided for in Law 12.850/13, focusing on the recognition of criminal protection for the purpose of guaranteeing the criminal investigation. Finally, the methodology, based on the ethical-social values of penal normativity, will be able to present the particularities of each offensive conduct to the administration of justice.

Keywords: Obstruction of justice. Vital legal asset. Law 12,850/2013. Guardianship of investigations.

INTRODUCTION

This article aims to investigate, from the idea of a vital legal asset, the legal types comprised by the notion of "obstruction of justice" which are found in the Brazilian Penal Code and in the Criminal Organizations Law that, prima facie, may have similarities with each other., making it difficult to apply properly by national courts. It is urgent, therefore, to emphasize the analysis of the criminal normativity responsible for protecting the administration of the judicial system from the perspective of the vital legal asset.

In the legal-criminal scenario, the criminal organization is one of the most intriguing and tormenting topics for public security agencies worldwide, because it consists of the capacity of association of criminal agents to practice illicit activities. In view of the state fragility in the fight against organized criminal groups, in 2013 Law 12,850/13 was published in Brazil, which presents articles of a criminal and criminal procedural nature and brings, in an unprecedented way, the legal definition of the crime of embarrassment to investigation that involves organization criminal.[1]

Given the lack of definition of any specific forms of conduct reached by the incriminating norm, it can be said that the type of § 1 of article 2 of the aforementioned law is vague and too abstract, giving the interpreter a wide range of hypotheses and few objective parameters in order to delimit the scope of the prohibited and the permitted.

Previously non-existent in national legislation, the legal provision stems from a commitment assumed by the signatory countries of the United Nations Convention against Transnational Organized Crime - Palermo Convention.[2] And, in addition

1 Paragraph 1 of art. 2 of Law 12,850/13 - which defines a criminal organization and deals with legal measures and criminal offenses related to it - provides that the same penalties will apply to the crime of integrating a criminal organization (article 2, caput) "whoever prevents or, in any way, hinders the investigation of a criminal offense involving a criminal organization."

2 Pursuant to Article 23 of the Convention: (...) a) The use of physical force, threats or intimidation, or the promise, offer or grant of an undue benefit in order to obtain a false witness or to prevent a testimony or the presentation evidence in a

to the use of the legal type as a control and punishment mechanism, the jurisprudence is faced with a range of practical challenges, among them the possible conflict with other legal types provided for in the Penal Code.

In this sense, taking into account the necessary setting of clear and strict limits to incriminating criminal norms, it is incumbent upon us to detail the important aspects related to crimes included in the notion of "obstruction of justice", which are dispersed in Brazilian criminal legislation. With this, it becomes possible to identify which behaviors can be framed in the legal type and which will consist of licit behaviors of individuals who defend themselves from the apparatus of criminal prosecution.

Well, the type of "obstruction of justice" provided for in Law 12,850/13 does not contain all the typical elements of those other crimes provided for in the Penal Code. As a result, the origin of the problem revolves around the vagueness and amplitude of the criminal type of embarrassment to the investigation, which give rise to problems of interpretation and application regarding the possible incidence of other incriminating devices that have more detailed descriptions.

In view of this finding, it is asked: "How can the crime of 'obstruction of justice' provided for in Law 12.850/13 be excluded from other crimes against the administration of justice, in view of the vagueness and breadth of its wording? Thus, a solution to the problem formulated with the following preliminary answer is offered: "An interpretation of the criminal norm oriented to the protection of legal interests based on ethical-social values can offer the conditions for the investigation of the legal types comprised by the notion of 'obstruction of justice.'"

Divided into two stages, the present study uses bibliographic and jurisprudential research to interpret the criminal normativity understood by the notion of "obstruction of justice". In the first stage, with the aim of identifying the vital legal asset of each legal type, the normative elements that integrate the conduct described in articles 341, 343, 344 and 347, all provided for in the Chapter of crimes against the administration of justice of the Brazilian Penal Code.

The second stage, focused on the examination of criminal judgments, seeks to investigate the conduct that contradicts the scale of values that underlie the prohibition described in the legal type provided for in Law 12,850/13. This decision-making will define unworthy actions or omissions and, thus, may present the particularities of each offensive conduct to the administration of justice.

VITAL LEGAL ASSET IN LEGAL TYPES THAT GUARD THE ADMINISTRATION OF JUSTICE

This article assumes that the criminal norm protects a vital legal asset. Criminal Law, according to Welzel (2003, p. 30-31), has the ethical-social function exercised through the protection of the fundamental values of social life, which must be configured with the protection of legal assets, which are vital values of society and the individual, which deserve legal protection precisely because of their social significance.

In this bias, the United Nations Convention against Transnational Organized Crime, the main instrument in the fight against organized crime on a global scale, must serve as a vector of interpretation so that the objective criminal

proceeding relating to the commission of offenses covered by this Convention;

b) The use of physical force, threats or intimidation to prevent a judicial or police officer from exercising the duties inherent to his/her function in relation to the commission of offenses provided for in this Convention. The provisions of this subparagraph are without prejudice to the right of States Parties to have legislation designed to protect other categories of public officials.

norm can ensure the validity of positive ethical and social values. and, at the same time, its protection. It means recognition by the Member States of the seriousness of the problem, as well as the need to promote and strengthen close international cooperation. By ratifying the protocol, the States committed themselves to adopting a series of measures to control crime and also to apply normative provisions related to obstruction of justice in their domestic legal system. It is therefore urged to verify how the aforementioned process took shape on Brazilian soil, based on the analysis of the types incorporated by the Penal Code.

First, the search for the true scope of the vital legal asset protected in article 341 of the Penal Code, for example, requires an interpretation that cannot, under any circumstances, detach from the typical conduct of falsely accusing oneself of committing a non-existent or committed crime. by someone else. In this sense, the guarantee of the regularity of the administration of justice compromised by the false self-accusation is the foundation of the norm.

The above prohibition is precisely in the provocation of police, judicial or administrative activity through false denunciation or false self-imputation, because the deception brought to the authority refers to a fact, physically and legally possible. Therefore, it is enough for the false self-accusation to reach the authorities, regardless of the further consequences of the communication.

However, if the false imputation refers to an act of administrative improbity, the crime is described in article 19 of Law Number 8,492/92, with wording maintained by Law 14,230/21. The legal type refers generically to representation against a public agent or third party beneficiary, containing a false imputation of an act of improbity, the legislator saying nothing about any legal consequences of the original whistleblower or delimiting the nature of this act of improbity. In addition, at no time did the legislator intend to reduce the protective sphere of the Public Administration to limit criminal sanctions only to slanderous whistleblowers who give rise to the effective investigation of acts of improbity, leaving out of criminal punishment.

In the slanderous denunciation of article 339 of the Penal Code, the unlawful act is falsely imputed to any person and must necessarily be a crime, with the addition of the condition that this false imputation effectively results in some investigative or judicial procedure against the victim.

As for the crime provided for in article 343 of the Penal Code, the type establishes two alternative possibilities of offering or promising: money or any other advantage to the witness, expert, accountant, translator or interpreter to make a false statement, deny or silence the truth, even if the offer or promise is not accepted. In this case, the normative prohibition consists of avoiding the enticement in relation to the one who displays any of the qualities described in the type.

This normative guarantee, therefore, makes it impossible to commit the crime of article 343 of the CP, when the person the agent bribes holds the status of victim. This is because, even if the victim falsifies the truth, even at the request of the agent, neither does he commit the crime of perjury in article 342 of the Penal Code, since in any of these cases the vital legal asset that the norm protects will remain unharmed.

The crime of coercion in the course of the process of article 344 of the Penal Code is a special type of illegal constraint in which the coerced person is not required to submit to the agent. Typical conduct requires, in its structure, that the agent uses violence or serious threats in order to favor his own or someone else's interest against authority, party

or any person who functions or is called to intervene, for example, in the judicial process.

The rule seeks to ensure that the agent, using coercion, does not aim for the specific purpose of obtaining his own or someone else's favor in the face of the coexistence of a judicial, police, administrative or simply arbitration event. That is, the prohibition of conduct is in the agent's purpose to avoid the progress of the action proposed by vis compulsiva. In this case, in the case of a witness, the typicality consists of forcing him to testify falsely. If the latter had already completed the deposition, when the threat was made, there is no need to speak, therefore, of the crime of article 344.

In the procedural fraud of article 347, the typical conduct consists of altering, through artifice or trickery, the state of place, thing or person, in order to mislead the judge or expert. In this case, the criminal and administrative proceedings are pending. However, the legislator was more severe in the artificial innovation to produce effect in criminal proceedings, since it is not necessary that the process has started, and its characterization is still possible in the investigation phase, regardless of even the initiation of the police investigation.

Artifically innovating the state of the person, for example, means changing the physical state, that is, the external aspect or internal anatomical conditions. Thus, the simple lie about one's own identity does not constitute the crime of article 347. However, procedural fraud makes it difficult to recognize the victim of homicide because the intention to artificially innovate the person's state in order to destroy evidence in criminal matters will remain evident., irrespective of whether the agent succeeds in his undertaking. It is observed, therefore, that the prohibition is in the malice used in the ruse and in the artifice by the agent. Therefore, the criminal rule of article 347 seeks to ensure that justice is not misled.

PROTECTION OF RESEARCH PRODUCT IN CRIMINAL ORGANIZATION LAW

The crime typified from article 2, § 1, of Law number 12,850/2013, responds to movements that aimed to contain international crimes, which took on increasingly significant proportions from the phenomenon of globalization. Notably, the greatest incentive to protect the administration of justice with regard to the investigation of criminal organizations comes from the United Nations Convention against transnational organized crime, approved in the Brazilian legal system through Decree n. 5015 of March 15, 2004.

In this bias, contrary to what has already been observed in relation to the types contained in the Penal Code and which have a protected legal asset, in the same way, the administration of justice, specifically with regard to the literality of the provision of the Criminal Organizations Law, it is verified that this, prima facie, would have a greater amplitude, covering an extensive range of conducts, precisely because of its lower taxation.

However, precisely in order to guarantee the correct application of the Penal Code and Law n. 12.850/2013, it is imperative to deepen the studies regarding the asymmetry between the types of extravagant law and the material Codex that are based on the same legal good.

First, a first differentiation is extracted from the jurisprudence, which, objectively, however fragile, guides the distinction in the context of the occurrence of crimes and in the principle of specialty. This way, in the case of investigation of illegality in the context of investigations of criminal organizations, the conduct practiced would be that of article 2, § 1, of Law 12,850/2013. However, practiced during the investigation of a crime unrelated

to organized crime, the same conduct would be framed based on the types of the Penal Code, in compliance with the more specific character of the subsequent law (MINAS GERAIS, 2018).

Once again, the present discussion will be primarily based on the analysis of the legal interest protected in the sphere of obstruction and in the context of the Criminal Organizations Law, linking it with the values to which it is affiliated. An extensive interpretation, beyond the literality of the law, is fundamental to the adequate understanding of the raison d'être of the type in question.

As is well known, the legal interest protected by article 2, § 1, of Law number 12.850/2013 is, in a broad sense, the administration of justice, as in the case of other crimes in the Penal Code. However, the maximum search is for the correct investigation and accountability of the subjects that make up the criminal organization and carry out their illicit activities in it (BRASIL, 2021). In this sense, as stated by Minister Edson Fachin (BRASIL, 2021), the classification of the crime is justified by the legislative intention to protect the product of the investigations, which represents the elements of knowledge that will lead to the final provision of the magistrate.

From the same perspective, Bitencourt (2014, p. 169) teaches based on the observation that criminal protection is conferred, a priori, on justice, so that it is not impeded or distorted by factors unrelated to the regular development, and also, respectability and integrity of criminal investigations, in line with the speed and normality required by public security and the proper administration of justice.

In sequence, Feldens and Teixeira (2020) bring up another important and central distinction regarding the types that protect the administration of justice. For the authors, it is necessary to go further, entering the existing duality of protections. If, on the one hand, one can speak of crimes against the administration of justice in terms of the affront to the means, the instruments, and the apparatus that the State develops for the pursuit and production of justice; there are also those who achieve the ends of justice properly.

This differentiation will be able, in itself, to link the criminal type of article 2, § 1 of Law 12,850/2013 with the first alluded possibility, since the obstruction of justice, in the manner in which it is presented by law, covers the set of actions carried out by the State to investigate a certain conduct classified as a crime, that is,, the investigative process. It is inferred, therefore, that the amplitude of the obstruction in the context of criminal investigations is not as considerable as it appears, since many practices, considered criminal and classified as obstructive, in fact will sometimes be atypical, sometimes they must be covered by the types of the Penal Code, which, as demonstrated, have different incidence.

Having overcome this issue and verified the intrinsic link between the conduct of obstruction of justice in the context of criminal organizations and the protection of investigations, in particular, we move on to the discussion regarding the scope given to the term "investigation".

In this vein, in a recent pronouncement, the Superior Court of Justice established an understanding in the sense that the crime of obstruction of justice could be consummated both at the stage of the police investigation and at the moment after the outbreak of the criminal action. The justification lies in the fact that, even after the procedure has been instituted in court, investigations and other steps may still be carried out in order to determine the occurrence of the facts, as well as the criminal authorship (BRASIL, 2019).

Still, under the aegis of important doctrinal

considerations, according to the Rapporteur Justice Joel Ilan Paciornik (BRASIL, 2019), the extensive interpretation of the type, which is not to be confused with the analogy in malam partem, would be admitted, since it is not it would be reasonable, not proportionate, to punish the conduct within the scope of the police investigation and make it atypical during the procedure in the Judiciary. Thus, extensive interpretation is adequate, provided that it is exercised in compliance with the legal, constitutional and international limits of law (CUNHA; PINTO; SOUZA, 2020).

Finally, in order to corroborate the above conception, in the sense that the crime of obstruction of justice of Law n. 12,850/2013, unlike the criminal types of the Codex, focuses exclusively on criminal investigations, urges to collate relevant accusations from Operation Lava Jato, an important movement to combat organized crime in Brazil.

From the records of the aforementioned Inquiry number 4720 of the STF, the Attorney General's Office filed a complaint for obstruction of justice in the face of the conduct, on the part of certain parliamentarians, of offering pecuniary advantage, or even threatening, to individuals who would testify, possibly collaborating with the investigation (BRAZIL, 2021). In a similar context, regarding Survey number 3,980, also of the Supreme Court, the same offense had been charged to the defendant on account of the alleged sending of threatening messages to a deputy, dissuading him from providing award-winning collaboration, an institute that took on even greater proportions after the advent of the Criminal Organizations Law (BRAZIL, 2018a).

In another turn, within the scope of Inquiry n. 4,112, the Federal Public Prosecutor's Office based its accusation on the alleged request, by a congressman, for the reversal of credits referring to deposits in his personal bank account, with the objective of, allegedly, disassociating himself from the operations and avoiding the initiation of an investigation. before the STF (BRASIL, 2017).

Finally, with regard to Survey number 4,506, the offense of article 2, § 1, of Law number 12,850/2013 given the alleged attempt by a senator to influence the choice of Federal Police delegates, who would be responsible for proceeding with Lava Jato investigations, evidently aiming to guarantee impunity for those investigated at the time (BRASIL, 2018b).

In view of the theoretical considerations exposed elsewhere, as well as from the analysis of the accusations made by the Federal Public Ministry, regardless of whether they are accepted or not by the ministers of the Supreme Court, it is concluded that the crime of obstruction of justice, specifically in relation to the way in which been approved by the Criminal Organizations Law, it has investigations, in a broad sense, as its central object of protection. Therefore, the typification of the crime addressed is justified, in order to enable the regular and adequate performance of the state apparatus of punishment and social control.

CONCLUSION

We believe that the starting point of the exegesis of the vital legal asset must consider the ontological differentiation of illicit acts included in the notion of obstruction of justice. For this, focusing both under the prism of the elementary circumstances of the legal types in question and under the disparity of sanctioning treatment given to each of the situations, it is essential to draw the dividing line between the various normative provisions.

In this sense, the ethical-social value that underlies the prohibited conduct is not determined in isolation or abstractly; on the contrary, its configuration must be evaluated

in relation to the totality of the social order. It means to say that the penal norm is oriented according to the scale of values of life in society and this defines the limits of the individual's freedom in community life. And, the violation of these limits, when appropriate to the typicality and culpability of a given legal type, will lead to the criminal liability of the agent in acts of obstruction of justice.

Therefore, it is concluded that the criminal types that protect the administration of justice keep significant distinctions among themselves, identifiable especially when analyzed from the perspective of the vital legal asset to which they are intended. Understanding the legislative intention and the context of production of the norm is, therefore, once again, fundamental for the correct interpretation and application of the Law.

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