DILEMMAS OF JUSTICE ON THE LEGAL TRANSPLANTATION OF UNITED STATESANTI-CORRUPTION INSTITUTES INTO BRAZILIAN LAW

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RESUMO

Este artigo tem como objetivo analisar sob uma perspectiva diferente as Dez Medidas Contra a Corrupção, elaboradas por membros do Ministério Público Federal (MPF) que compõem a Força Tarefa da Operação Lava Jato em Curitiba. Dentre as diversas medidas propostas, serão objeto de análise três institutos jurídicos anticorrupção norte-americanos que o MPF pretende transpor para o direito brasileiro. Este artigo pretende apresentar uma análise das Dez Medidas sob a perspectiva dicotomizada da justiça e da vingança. O Direito Penal é um campo especialmente sensível às demandas de retribuição ao sofrimento causado, reparação à vítima e clamor da sociedade por justiça, que são muitas vezes associadas à ideia de vingança. Essa perspectiva pretende trazer à luz alguns elementos de justiça e vingança identificados nesses institutos e destacar os desafios inerentes ao transplante legal desses institutos para a legislação brasileira e à sua adaptação ao ordenamento jurídico e modelo de justiça brasileiro.

Palavras-chave: Transplante Legal. Institutos Anticorrupção. Proposta Legislativa.

ABSTRACT

This article aims to present a different perspective to the analysis of the Ten Measures Against Corruption drafted by members of the Federal Public Attorney's Office (MPF) that are part of the Lava Jato Operation Task Force in Curitiba. Among several measures, the object of this analysis will be three Noth American anti-corruption legal institutes that MPF intends to transplant into the Brazilian legal. This article aims to present an analysis departing from a dichotomized perspective of Justice and Vengeance. Criminal law is a field especially sensitive to demands of retribution to the suffering caused, reparation to the victim and society's outcry for Justice, which are all often associated with the idea

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of Vengeance. This perspective intends to bring to light some elements of Justice and Vengeance identified in those institutes and highlight the challenges inherent in the legal transplantation of these institutes into the Brazilian law and adaptation to the Brazilian legal system and justice model.
Keywords: Legal Transplantation. Anti-Corruption Institutes. Bill.

1 INTRODUCTION

In March 2015, the Federal Public Attorney's Office (MPF) launched the national campaign "Ten Measures Against Corruption," drafted by members of the Lava Jato Operation Task Force in Curitiba (PR). The bill was presented to add more effectiveness to the fight against corruption, illicit enrichment of public officials and impunity. It was based on the experience arising from the Lava Jato's investigation and other major criminal investigations (DEZ).

The launch by the MPF and the approval by the House of Representatives of the "Ten Measures Against Corruption" arose great discussion in Brazil. It mobilized different types of critics but especially concerning what has been called a "legal transplant" of institutes of other legal systems, mainly the North American one.

The Ten Measures Against Corruption is related to the current Brazilian scenario of a series of corruption scandals related to the Lava Jato Operation. Its motto of combating corruption and impunity represents the desire of every Brazilian citizen for an efficient and effective criminal procedure. However, for some critics of the measures, MPF's proposal holds a paradox: it fights corruption by corrupting the justice system, the criminal procedure, and even democratic bases (CASARA, 2015).

This paradox represents the inherent conflict between MPF and society's desire for efficiency and effectiveness of the criminal procedure in one side and on the other hand the concern of some jurists about the risks that uncritical legal transplantation of legal institutes will result in a violation of Brazilian constitutional rights.

The Brazilian and American legal systems are organized differently in socio and juridical terms. They depart from different philosophic and juridical doctrines, which creates difficulties in the legal transplantation of legal institutes. In this sense, Tércio Sampaio Ferraz Jr. points out that historically and spatially, communities tend to distinguish themselves regarding social organization and conception of Justice. That helps explain "the difficulties that arise when one nation imports from another and exports to another its forms of organization" (FERRAZ JR., 2002). Moreover, he continues:

> The so-called modernization of the law comes across specific problems which, among nations, generate barriers of mutual understanding in the face of the use of different codes to decipher the same message.

However, these factors do not prevent this legal transplantation tendency from happening, and it is not recent. The reform of the Criminal Procedure Code in 2008 (Law No. 11,690/08) had already imported some exclusionary rules of illegal evidence outlined by the Supreme Court of the United States (SCOTUS). Furthermore, elements of negotiated justice in the Brazilian legal system go back to the Heinous Crimes Act (Law No. 8.072/90), which in article 8º provided for the reduction of the prison sentence to the participant who denounces members of his criminal organization to the authorities.

This scenario instigates to adopt new lenses to look at the problem. It is necessary to discuss the limits of legal transplants and the possibilities of adapting these institutes to the Brazilian criminal justice system. This article proposes to problematize the matter from the dual perspective of Justice and Vengeance.

This article intends to discuss the adaptability of the US anti-corruption institutes that inspired some of the Ten Measures Against Corruption to the Brazilian legal system. It is designed to problematize the justification ("*juris facere*") of these measures, to discuss whether they are justified[2], or rather, whether they bring J.

The questioning of these measures' justification will take place through the study of various notions of justice, seeking to identify the Justice/Vengeance dichotomy present in each institute that highlights and explains the contradictions inherent to the legal transplantation of these institutes.

The identification of elements of Justice and Vengeance might help provide a holistic understanding of the two criminal systems and may help bring out the deeper motives for the existing criticisms and enrich the discussion about the (in)compatibility between the US anti-corruption institutes and the Brazilian legal system.

The objective of this article is to subject to peer evaluation this Justice/Vengeance approach to the legal transplant of US anti-corruption institutes into Brazilian law.

To this end, these articles chose to analyse three anti-corruption measures proposed by MPF, which have equivalents in the US legal system: corruption as a heinous crime according to the value of the

[2] Interesting to take notice of the fact that one of the meanings attributed to the Greek verb δικαιόω (dikaióo – to justify) is to bring justice.

damages it caused (Measure 3) the leniency agreement (Measure 5.3); and adjustments in the exclusionary rules (Measure 7).

The next section introduces the three measures and the US anti-corruption institutes MPF used as source of inspiration, and the Third Section presents the leading critics to these measures. The Fourth Section addresses the difficulties regarding legal transplantation between legal systems based on different premises. The Firth section demonstrates how different notions of Justice can contribute to the understanding of the challenges involved in the legal transplants.

2 The transplanted institutes of North American law

This article analyses three United States anti-corruption institutes that MPF suggested being introduced into the Brazilian legal system through the Ten Measures Against Corruption. The Third Measure establishes that, in the case of economic crimes, the prison sentence be proportionally increased according to the advantage received or the amount of damage caused to the Public Administration, reproducing US parameters. The bill's justification makes direct reference to the 2014 US Sentencing Commission's Guidance Manual (DEZ MEDIDAS CONTRA A CORRUPÇÃO).

The Fifth Measure, leniency agreement, has already been incorporated to the Brazilian legal system by the Brazilian Anti-Corruption Law, through the Provisional Measure No. 703/2015, issued by the Federal Executive Branch. This measure intends to amend the Administrative Improbity's Law (AIL) and set forth the leniency agreement. Likewise, in the United States, the Department of Justice publishes guidelines on its anti-corruption and cartels policies, stipulating the conditions that grant advantages to those who collaborate with the investigations (EUA).

The Seventh Measure seeks the legal transplantation of SCOTUS' exclusionary rules. SCOTUS jurisprudence stipulates under which circumstances evidence will be considered unlawful and not be accepted in the criminal procedure. However, SCOTUS has provided for cases in which illicit evidence will be admitted, excluding its illegality. Those are the Exclusionary Rules. According to the bill's justification for the Seventh Measure, "there are several other causes excluding the illegality of the evidence, already admitted by SCOTUS, that the Brazilian law has not yet introduced, and the project intends to correct that" (DEZ MEDIDAS CONTRA A CORRUPÇÃO).

The next section presents the leading critics these three Measures received, concerning their impact on the criminal procedure fairness, the Brazilian constitutional rights and even the democratic bases.

3 The Criticisms of Legal Transplantation

The legal transplantation of United States anti-corruption institutes foreseen in the Ten Measures Against Corruption is not exempt from criticism. Critics centralize in the violation of constitutional guarantees such as the presumption of innocence, due process of law, the lawfulness of the evidence in the criminal procedure and the distribution of the burden of proof (TARDELLI, 2015).

From the perspective of the Boletim IBCCrim No. 277, the Ten Measures Against Corruption represent a punitive setback due to the "thoughtless legal transplantation of foreign legal institutes," the unprecedented increase in penalties and the legal changes threatening constitutional guarantees (EDITORIAL, 2015).

The Third Measure establishes a model of "mobile frame of punishment" that increases the applicable years of prison sentence according to the amounts of advantage obtained or damage caused. This increase leads to disproportionality: for second-degree murder (*homicídio simples*) the prison sentence would range from 6 to 20 years, and for embezzlement (*peculato*) the sentence would range from 10 to 18 years (PRADO, 2015). Adopting this proportion, killing and stealing would be equally serious crimes.

The Fifth Measure is about leniency agreements. It receives severe critics for expanding the margins for consensus in the criminal procedure based on utilitarian, pragmatic, and efficiency factors. The innovation of negotiated justice implies a procedural utilitarianism and seizes maximum efficiency.

As a consequence, there is a reduction of the judge's role to a mere ratifier and "the repressive violence of the sanction no longer goes through the judicial control nor the sanction is submitted to limits of legality" (LOPES JR., 2016).

In this context, the superiority attributed to the Public Attorney's Office is criticized. Negotiated justice's sanctions are voluntarily agreed upon in the solving of the criminal conflict (CAVALI, 2017). The Public Attorney's Office has powers to settle an agreement. Prosecutors also can determine the truth of the facts, since they choose who to settle with and who to investigate and prosecute. Therefore, they tend to settle with those whose terms confirm the hypothetical narrative of the facts that they have previously mentally formulated (BADARÓ, 2017). Some believe this power may be used as a means of psychological pressure and coercion of the defendant (LOPES JR., 2016).

Critics of the Seventh Measure arises from the bill's justification. It states that the current concept of illegal evidence is "too broad" and allows the evidence to be declared illegal due to "non-compliance with a simple formality, however insignificant it may be." For Badaró, criminal procedure formalism is not useless but a safeguard to the due process of law.

The author also points out that the exceptions to evidence's illegality, which takes into account the good faith of the police officer, or of whoever presents illegal evidence along with information of a crime occurrence, give to these individuals immense leverage and discretion. Badaró argues that the agent's intention cannot determine the legal nature of the evidence. He reinforces his critic by pointing out the difference between the Brazilian an North American systems of justice.

In the US, the Supreme Court has, in several cases, admitted unlawfully obtained evidence because it understood that the damage caused by the violation of the due process was appreciably smaller than the gain brought by the illegal evidence (MOREIRA, 2000). Moreover, the Supreme Court claims that the indiscriminate application of the rule of law would allow guilty defendants to walk free from a trial (LEGAL INFORMATION INSTITUTE). Furthermore, the purpose of the US Exclusionary Rules is to set standards for Police officers and prevent police misconduct and not to protect citizen's rights (GLOECKNER, 2015). The final critic is that the Seventh Measure Article 564 sets forth that no action shall be declared null and void if the illegality does not damage the Prosecutor or the Defendant, in explicit consideration of costs and benefits.

The critics above demonstrate the legal and constitutional obstacles encountered in the legal transplantation of anti-corruption institutes from a model of constitutional democracy that considers fundamental rights and principles differently. The next section provides the context necessary to understand a possible common origin of these critics: the different legal and philosophical premises each legal systems adopts.

4 The context of the legal transplantation critics

The context of the critics mentioned above is the difference between the philosophical and legal schools of thought, in criminal and procedural matters, that support the Brazilian and North American legal systems.

The institutes to be transplanted from the North American system have liberal and utilitarian/contractual principles typically attributed to that country. These principles reflect on the significance of the parties' autonomy and will in the North American criminal procedure, which designs a model of negotiated criminal justice. Regarding the Fifth

Measure, for example, the North American consensual or contractual view of the criminal procedure makes the negotiation of leniency agreements possible.

These principles also reflect on the preponderance of the prosecutor and defendants' role in producing evidence, in detriment of the judge's, which influences the burden of proof's distribution and the procedural dynamics. Moreover, it reflects on the sense of the criminal procedure as more private and less public, conceiving the punitive ability of the Public Attorney's Office as a personal right, which could be negotiated despite the criminal procedure.

The influence of those principles has impacts on the sanction's general preventive function. According to the general preventive function, the criminal sentence has the power to influence the free will or fear of the individual, his rational thinking, in a society. According to that, the individual compares the advantages and disadvantages of committing the crime all the time and, therefore, is concerned with the sanction's proportionality and its intimidating effect (BITENCOURT, 2011).

On the other hand, other legal systems have a stronger ethical concern about retribution, related to a philosophical background closely associated with Christian morality (BITENCOURT, 2011), that prefer not to negotiate the non-application of punishment. The sanction is conceived as an evil that must be imposed for the perpetrator to expiate his guilt (BITENCOURT, 2011). In this context, the sole function attributed to the sentence is to carry out Justice. The sanction should be applied because there was an infringement of the law, and it must observe the type and extent of the violation (*ius talionis*) (BITENCOURT, 2011).

Regarding the Seventh Measure, for Ricardo Gloeckner, the change in what is considered illegal evidence creates a "new order of principles" that intends to use all procedural acts, reflecting a utilitarian view (GLOECKNER, 2015). This change would transform the procedure into a tool for sentencing punishment, and the due process would be concerned about granting efficiency and not the due process of law. The criminal procedure would become obstacles, and the goal would be to abolish any adverse consequences arising from the disregard of the due process, such as the illegality of the evidence.

On the other hand, the Brazilian legal system is based on a view of the criminal procedure that does not grant to the Public Attorney's Office the power to decide how to use the State's punitive ability. This power is part only of the judge's potestative right and, therefore, there are no repressive powers outside a criminal procedure.

Consequently, the criminal procedure is the only way to punish an individual, making it especially important to guarantee the full right of defense. The criminal procedure is where the defendant will argue his innocence, counting on the judge to grant the due process of law.

The different principles that influenced the construction of the Brazilian and North American legal systems demonstrate the difficulties involved in the legal transplantation of anti-corruption institutes.

The philosophical premises presented above offer another perspective to face the problem. This perspective takes into account, in one side, the yearnings of society for the sentencing of punishment and the end of impunity and, on the other hand, the fears of the defenders of threats to constitutional guarantees, such as the due process of law and the full right of defense.

In the next section, this new problematizing perspective looks at the Ten Measures Against Corruption in a raw and straightforward manner, in terms of Jand Vengeance.

5 Theories of Justice and the dilemma Justice vs. Vengeance

The last sections introduced some of the critics regarding the legal transplantation of United States anti-corruption institutes into the Brazilian legal system and how it is rooted in the different philosophical premises the two legal systems adopt. The next section provides a problematizing perspective to the Ten Measures Against Corruption departing from the analysis of different notions of Justice, which can help understand the challenges involved in the legal transplantation.

5.1 Corruption as a heinous crime according to the extent of damages caused (3rd Measure)

A possible approach to understanding the Third Measure may be to differentiate vertical and horizontal retributive Justice models. The vertical Justice model presupposes a hierarchy to be protected and maintained, and the Justice system aggressively strikes back on a threat made to this hierarchy. The sanction acts as the restoration of the State's wounded sovereignty.

It makes perfect sense to apply this model when dealing with the proportional increase of the sentence according to the amount of damage caused to the Treasury. The sanction would play the role of reaffirming the Public Administration's supremacy over its citizens, lecturing them on the consequences of the crime (FERRAZ JR., 2002).

The sanction also assumes the role of purification, cleaning stains on the morality and credibility of the Public Administration. To frame

the conduct that caused extensive damages to the Treasury as a heinous crime would mean the elimination of evil, the final solution to a "*polis* illness" similar to the meaning Plato gave to the death penalty (FERRAZ JR., 2002).

After all, a heinous crime is imprescriptible and, at its origin, did not even allow the prison regime's progression. The imprisonment excludes the individual for long years, and clears the person from Society, denying the right to life almost as much as the death penalty does.

This model also elucidates the critics on the inclusion of corruption in the list of heinous crimes. Alberto Silva Franco points out this legislative proposal violates the constitutional principle of proportionality, which requires a weighing judgment between the seriousness of the fact and the severity of the sanction (PRADO, 2015). It violates that principle because it punishes offenses against property with harsh prison sentences and "fantastic severity" in comparison to crimes against life and physical integrity. A homicide sentence would range from 6 to 20 years and an embezzlement sentence from 10 to 18 years (PRADO, 2015).

There is a difference in sentencing punishment by weighing acts and sanctions according to a proportionate ratio, and by giving in to emotions and vendetta sentiments. The first is attributed to horizontal Justice and the second to vertical Justice, more associated with Vengeance. Vertical Justice is more linked to intense emotions and the application of severe sanctions that aim at restoring honor and morality and not to compensate and reconcile.

5.2 The Leniency Agreement (5.3 Measure)

Hobbes's view of Justice as a virtue linked to contracts offers provides a useful concept to understand Leniency Agreements. The nature of Justice would consist of keeping an agreement. The respect to the agreement, in turn, would arise from the fear of returning to the status of chaos and violence reigning before the contract signing: only after the conclusion of an agreement, there is a place to discuss the just and the unjust.

Before the negotiation and settlement of any given leniency agreements, a company involved in wrongdoings is concerned about the consequences of the Public Attorney's Office prosecution and possible punishment. That tends to lead it to choose to be bound by a contract with the Public Attorney's Office.

Tércio Sampaio points out that "the value of the contract's object is measured first by the appetite of the contractors and the fair value depends on what the parties are willing to give" (FERRAZ JR., 2002, p.

224). The Prosecutor's appetite for the evidence to be obtained, the facts to be clarified and the individuals to be indicted based on the agreement will determine the benefits he is willing to offer.

On the other hand, substantial evidence and new information concerning potential wrongdoings will give the company an advantage to negotiate. To balance the agreement, the Prosecutor tends to offer a proportionally better reward.

5.3 Adjustments in criminal nullities against impunity and corruption (7th Measure)

Another valuable perspective to analyse the Seventh Measure is the concept of Justice as a code of legal and political messages that can be divided into two typological possibilities: formal Justice, associated with a code provider of a robust meaning, and material Justice, associated with a code provider of a weak meaning (FERRAZ JR., 2002).

In the communication game, the robust and weak meanings establish changing dynamics in the composition of a legal system. One or another meaning can predominate, and thus play a role in the vagueness and ambiguity (weak code) or the univocal sense of orientation (robust code) of the legal system (FERRAZ JR., 2002).

Material Justice, dominated by formal codification, emphasizes accuracy, consistency, and obedience to ritualisms given the collective interest. It means "the burdens of planning, directing, and governing are considered to be instrumental for attaining the ends of material Justice" (FERRAZ JR., 2002, p. 240).

On the other hand, "the prevalence of the weak code over the robust code transforms the proportionate equality criteria into an imprecise and broad form of Justice." Justice's most relevant criteria are "proportionate equality in terms of concrete and casuistic Justice" (FERRAZ JR., 2002, p.243).

Applying this perspective to Seventh Measure, the Brazilian criminal procedure law is a legal system where the robust code (formal Justice) prevails, favoring the observance of rituals and rules of procedure, with little room for ambiguity and vagueness.

The prevalence of material Justice allows cost-benefit judgments, opening space to vendetta sentiments to pour out. Judges might casuistically apply flexible principles in the analysis of the illegality of evidence and the weight of the damages caused to the parties due to the disregard of the evidence's illegality. The use of the weak code (material Justice) also gives rise to broader principles, such as the good faith of the

police officer who obtained the evidence or the citizen who instructed news of a crime with evidence illegally obtained.

6 CONCLUSION

This article aimed at adopting a different perspective to analyze United States anti-corruption legal institutes that MPF intends to transplant into the Brazilian legal system. This perspective designed to bring to light some elements of Justice and Vengeance identified in those institutes.

This Justice vs. Vengeance approach is relevant because criminal law is especially sensitive to demands for retribution to the suffering caused and repair to the victims, often associated with the idea of Vengeance. On the other hand, criminal law, and especially anti-corruption measures are very concerned about mitigating impunity and providing an adequate response to the society's outcry for Justice. A representation of this concern is the nearly two million signatures collected for supporting the Ten Measures Against Corruption submission to the Congress as people's initiative bill.

The article presented the richness of this debate. The next step is to develop a robust methodology and test the possible approaches regarding the legal transplantation of United States anti-corruption institutes into Brazilian law. This article intended to that end, to examine the Justice vs. Vengeance perspective.

In projecting the future of this research, the plan is to study Justice by systematizing what different senses of Justice could be used and investigate what could be considered right and just in a criminal justice system. The purpose of this study is to seek the reasons, just or revengeful, behind the distribution of goods (bargains and agreements) and evils (sanctions and fines) according to different senses of Justice and its values, duties, and goals.

The study of various models and conceptions of Justice will help identify and explain the Justice vs.Vengeance dichotomy that this article claimed to have found in each anti-corruption institute presented above. The study will also be useful to highlight the challenges inherent in the legal transplantation of these institutes into the Brazilian law and the necessary adaptation to the Brazilian legal system and justice model.

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