FREEDOM OF WILL AND CULPABILITY

PhD. SEBASTIÃO PINTO
Academic Department of Legal Sciences, Federal University of Rondônia, Brazil – Research Group: AMAZONIAN STUDY AND RESEARCH CENTER (CEJAM)
ORCID: https://orcid.org/ 0000-0002-5209-8666
E-mail: sebastiao.pinto@unir.br

Msc. ROSALINA ALVES NANTES
Academic Department of Legal Sciences, Federal University of Rondônia, Brazil – Research Group: Law and Public Policies in the Western Amazon
ORCID: https://orcid.org/ 0000-0001-8347-7856
E-mail: rnantes@unir.br

Abstract

Unlike animals (which are programmed by nature), the human being, at birth, brings with him an innate characteristic: freedom of action. In our legal-criminal system, after completing 18 years, the individual acquires the fullness of that freedom and, consequently, the capacity for culpability. This is because, from this age, it is assumed that the person achieves so-called self-determination, that is, the ability to direct alone to his own actions according to the formation of his independent will. In other words: legally it no longer requires the guidance of parents or guardians to direct their conduct. You have complete freedom of action.

Keywords: criminal law; Brazilian juridic order; freedom of will; culpability.

Initial Considerations

In our legal-criminal system, after completing 18 years, the individual acquires the fullness of that freedom and, consequently, the capacity for culpability. This is because, from this age, it is assumed that the person achieves so-called self-determination, that is, the ability to direct alone to his own actions according to the formation of his independent will.

In other words: legally it no longer requires the guidance of parents or guardians to direct their conduct. You have complete freedom of action.

In the decision-making process that involves this freedom of action, according to the theoretical model of the finalist theory of action (represented by Welzel, Maurach and Kaufmann), two elements compete: one linked to the cognitive process that leads to the knowledge of the object, the (formation of consciousness in relation to the observed object) and the other, related to the volition process that gives rise to the formation of the will that, in the next moment, can become an action directed to a certain purpose.

On this final direction of the action welzel[1] stated:

> *"Human action is the exercise of a final activity... The purpose, the final character of the action, is based on the fact that man, thanks to his causal knowledge, can predict, within certain limits, the possible consequences of his conduct, designate different ends and direct his activity according to a plan, to the achievement of these ends."*

It is precisely in this freedom of will or freedom of action of the individual, to direct his conduct to certain purposes, that lies the essence of guilt, because the subject, having freedom, can structure his will according to the criminal norm. If he does not, he will be found guilty, because "he could act differently and he did not act." In this sense Welzel[2] conceptualizes culpability as "distasteability of the configuration of will."
This means that if the subject, for some reason (mental illness, irresistible moral coerce, involuntary complete drunkenness or even by mistake about the prohibition), at the time of action or omission, could not configure his will according to the law, he could not have his conduct disproved.

Theoretical Framework

Tavares[3] recognizes the imprescindibility of this freedom by stating: "The assumption, thus, of the whole process of responsibility has always been anchored in the concept of freedom of will. In this sequence, the concepts of guilt have always taken into account, both in psychological theory and in normative, that the agent can only be found guilty when he has acted with freedom of will".
The psychological theory of culpability developed by the classical school, especially by Von Liszt, considers deceit and guilt (strict sense) as the guilt itself. It is for this reason that doctrine considers deed and guilt as species of culpability.
Nevertheless, considering guilt as a form of culpability (which drew severe criticism from him), in relation to the recognition of the existence of the deed, freedom of will was indispensable, not least because it had imputability as an assumption, without denying, evidently, that there is no will in the culpable conduct, but in this, the will is restricted to action, not reaching the result.
In relation to the psychological-normative theory developed by the Neokantian school (Frank, Goldschmidt and Freudenthal) which, despite situating the deceit (with knowledge of the prohibition) and guilt (strict sense) in guilt, considered these, alongside imputability, as their elements and not as species.
Like the previous school, it suffered from the error of placing guilt as an element of culpability, which brought it the same criticisms of the psychological school. He also considered freedom of will as an essential element to characterize the censorship of action.

Jescheck, although adept at the social theory of action, also states that " culpability is the distasteability of the formation of the will." This implies that, at the time of formation, this will must be free, under penalty of excluding the distaste ability to the author.
Jiménez of Asia, quoted by Bittencourt, recognizes that the concrete psychological fact upon which the judgment of culpability begins is the author's and is, as Rosenfeld said, in his head, but the appreciation for

disapproval who makes it is a judge"

Conclusion

With these considerations it is clear that for the existence of criminal culpability, the presence of freedom of will and, consequently, that of conduct is indispensable. Without the presence of this freedom, one cannot disprove the conduct to the author.

Thus, within the paradigm of welzel's action finalist theory[6], to attribute culpability (distasteability) are necessary on the one hand, the presence of the assumptions existences of the distaste that corresponds to imputability (ability to be culpable) and, on the other, the essential elements of the distasteability that corresponds to the potential awareness of antijuricity (possibility of knowledge of the prohibition).

In the course of these two elements, culpability would be materially constituted. However, even if, materially constituted the culpability with these two elements, which underlie the "act otherwise", it would not be enough to disprove the conduct to the author.

It will still be necessary to verify whether or not extraordinary situations known as exculping causes (non-enforceability of conduct according to law) would be present, only then to establish the judgment of distaste of the typical and anti-legal conduct.

These exculpants are denominations of German doctrine that differentiate between elements of culpability and causes of exculpation. Thus, in German criminal law, if a cause of exculpation is present, the magistrate must renounce the disapproval of the conduct to the author, since, materially, the culpability would already be formed with the imputability and potential awareness of the prohibition.

Brazilian criminal law considers the cause of exculpation as an element of culpability and, consequently, if there is the presence of such a cause (non-enforceability of various conduct), in the specific case, the judge must exclude guilt and not renounce the distaste as occurs in German law.

Finally, it is concluded that: whatever element stumours the exclusion of criminal culpability, there will always be, as a basis, the absence of freedom of will.

Likewise, if the elements of the culpability leading to a conviction are present, there will always be as a background the presence of the freedom of the agent's will. Freedom of will, in the end, takes up two important positions. The first because it becomes the center of the criminal unjust, to the extent that the deed is shifted from guilt and goes to the type in its natural form (without animic-psychological components) and, secondly, because it becomes the essential object on which the judgment of censorship of conduct falls.

The concept of freedom of will is so relevant to give the application of the distaste that Zaffaroni and Pierangeli[7] developed the legal category called co-culpability, in which the authors defend the thesis that, if society did not provide the subject with the conditions for the development of its potentialities, it must have diminished distaste.

This could be applied in exclusionary society, where the process of economic development, provoked wealth on one side and, on the other, an exacerbated degree of marginalization. In these cases, judges could use, under Brazilian law, Articles 59 and 66 of the Penal Code to promote this mitigation of the penalty. This mitigation of the penalty would result from the fact that the subject has not adequately developed his freedom of will and, therefore, must have his guilt diminished.

References

1 - WELZEL, Hans. O Novo Sistema Jurídico-Penal. Revista dos Tribunais, São Paulo. p. 27

2 – WELZEL, Hans. O Novo Sistema Jurídico-Penal. cit. p. 88

3 - TAVARES, Juarez. Fundamentos da Teoria do Delito. Editora Tirant lo Blanch, São Paulo. p. 460

4 - JESCHECK, Hans Heinrich. Tratado de Direcho Penal, Ed. Espanhola, p. 559

5 - BITENCOURT, Cezar Roberto, Tratado de Direito Penal, Ed. Saraiva, p, 614

6 - WELZEL, Hans. O Novo Sistema Jurídico-Penal. cit. p. 88

7 – ZAFFARONI, Raul Eugênio; PIRANGELI, José Henrique. Manual de Direito Penal Brasileiro: Parte Geral. Revista do Tribunais, 2ª edição, São Paulo, p.610