DRUNK DRIVING, MANSLAUGHTER AND BODILY INJURY IN THE BRAZILIAN TRAFFIC CODE: CRITICAL CONSIDERATIONS ON LAW NO. 13,546 / 2017

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Abstract: The purpose of this study is to present critical considerations about Law No. 13546 / 2017, regarding Manslaughter and bodily injury crimes foreseen in the Brazilian Traffic Code and the relationship between these crimes and drunk driving. Although seen as a more severe legislative innovation, in practice the law in question does not prevent the application of criminal law institutes, such as the substitution of the deprivation of liberty for a restriction of rights, and it also does not authorize the preventive detention decree in view of the fact that crimes remain involuntary in nature. In addition, the technical improprieties of this law will be pointed out, including justifications of the presidential veto to the approved project.

Keywords: Criminal Law; Manslaughter; Bodily Injury; Drunkenness; Preventive Detention.

1 Introduction

On December 20, 2017, an amendment to the Brazilian Traffic Code (Portuguese acronym: CBT) was published, captained by Law No. 13,546, stating in its prologue that the new legislation aimed to deal with crimes committed in the motor vehicles driving.

This legislative innovation was centered on the creation of qualifiers in the crimes of manslaughter and bodily injury practiced driving a motor vehicle, in the specific circumstance in which the author is driving the vehicle under the influence of alcohol or any other psychoactive substance that determines dependence, also stating that the type of deprivation of liberty for alluded crimes of a first-degree modality would be imprisonment.

In view of the repercussion of the theme, a detailed analysis of the law in question was carried out, contextualizing it to the legal-penal and penal procedural systems to allow a gauging of its effectiveness as well as the possibility of applying penal institutes, in this case the conversion of the penalty of deprivation of liberty in a restrictive penalty of rights, as well as procedural institutes, in particular preventive detention.

Thus, comments on the new legislation will be limited not only to changes in the amount and type of penalties for the crimes in question, but also a critical assessment of the scope of the

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law produced will be made, as well as its practical ineffectiveness in view of the scarce possibility of imposition of preventive detention due to the legal assumptions authorizing the exceptional measure.

Furthermore, the expression ‘drunk driving’ will be used in the article indistinctly in relation to drunkenness itself, due to alcohol, and in relation to any psychoactive substance that determines dependence and that alters the psychomotor capacity of the agent. It should be noted, however, that there are distinctions that will be pointed out throughout the text and that refer to the qualifying circumstance of the Manslaughter, where the agent is required to be “under the influence of alcohol or any other psychoactive substance that determines dependence” and the qualifying circumstance of bodily injury, in which the agent is required to be driving the vehicle “with altered psychomotor capacity due to the influence of alcohol or other psychoactive substance that determines dependence”.

It should be warned, now, that the text does not intend to exhaust the discussion on the topic, as it is a way of collaborating in the reflection on the subject.

2 Of modifications and inclusions promoted by law no. 13.546 / 2017

The law in question is the result of a project originating from the House of Representatives (Bill No. 5,568, 2013), authored by federal deputy Iolanda Keiko Miashiro Ota (PSB / SP), whose wording was approved in the form of the adopted substitute by the Constitution and Justice and Citizenship Commission, which was subsequently approved in a revised form and amended by the Federal Senate through Bill No. 144/2015, with the final wording approved by the House of Representatives after the rejection of two amendments from the Senate.

After the bill was sent to the presidential sanction, there was a partial veto to the proposal on the grounds that the intended inclusion of Paragraph 3 in art. 291 of the Brazilian Traffic Code[1], which dealt with the possibility of replacing the penalty of deprivation of liberty by restricting rights for the cases provided for in arts. 302, Paragraph 3, 303, Paragraph 2 and 308, when the sentence did not exceed four years, it would be legal incongruence, thus providing for reasons of veto:

> The provision presents legal incongruence, being partially inapplicable, since, of the three cases listed, two of them provide for minimum penalties of imprisonment of 5 years, thus not falling within the substitution mechanism regulated by the Criminal Code. Thus, to avoid legal uncertainty, a veto on the device is required (BRASIL, 2013).

[1] The wording of art. Paragraph 3 **[Paragraph 3]** of art. 291 of the CTB, vetoed by the President of the Republic, was worded as follows: “Art. 291 (...) Paragraph 3. In the cases provided for in Paragraph 3 of art. 302, in Paragraph 2 of art. 303 and in Paragraphs 1 and 2 of art. 308 of this Code, the substitution provided for in item I of the *caput* of art. 44 of Decree-Law No. 2,848, of December 7, 1940 (Criminal Code), when a penalty of deprivation of not more than four years is applied, in compliance with the other conditions provided for in items II and III of the *caput* of the referred article.” (BRASIL, 1997).

Therefore, the following were sanctioned:

The addition of Paragraph 4 to art. 291, which deals with fixing the base penalty in cases of crimes provided for in the CTB;

The addition of Paragraph 3 to art. 302, which created a qualifier in the crime of manslaughter practiced when driving a motor vehicle by an agent under the influence of alcohol or psychoactive substance that determines dependence, providing for a penalty of imprisonment of five to eight years, and suspension or prohibition of the right to obtain permission or the license to drive a motor vehicle;

The addition of Paragraph 2 to art. 303, which created a qualifier for the crime of bodily injury practiced when driving a motor vehicle by an agent under the influence of alcohol or psychoactive substance that determines dependence, if the crime results in a serious or extremely serious injury, providing for a penalty of imprisonment of two to five years, without prejudice to the other penalties provided for in article 302;

Changing the wording of art. 308 of the Traffic Code, which deals with race, dispute, automobile competition or demonstration of expertise in a motor vehicle, on public roads, without authorization from the competent authority.

The additions and changes promoted by the law in question had *vacatio legis* of one hundred and twenty days, counted from the official publication.

In this brief analysis to come, the intended scope will permeate the additions handled by the law on Articles 302 (Manslaughter) and 303 (Bodily Injury) of the Brazilian Traffic Code.

3 Historical evolution of the Brazilian traffic code with regard to involuntary manslaughter and drunk driving motor vehicles

Since the genesis of the Brazilian Traffic Code, dated 11/23/1997, there has been an express provision for the crimes of involuntary manslaughter and drunk driving, with both crimes remaining in articles 302 and 306 respectively. At this time, if there was a manslaughter in the circumstance that the agent was under the influence of the alcohol, the hypothesis of the material contest of crimes is under surveillance.

In the origin, the crime of manslaughter had a penalty of two to four years, in addition to four major factors present in the sole paragraph that raised the penalty from one third to half if the driver did not have a Driving Permit (DP) or National Driver's License (Portuguese acronym: CNH); committing crime on a crosswalk or on the sidewalk; failed to provide assistance to the victim when possible, without personal risk; or committed the offense in the exercise of his profession or driving a passenger vehicle.

Through Law No. 11.275 of 02/07/2006, item V was added to the sole paragraph of art. 302 of the CTB, including as a major factor in manslaughter the fact that the driver is "under the influence of alcohol or toxic substance or narcotic with similar effects" (BRASIL, 2006).

Two years later, Law No. 11,705 of 06/19/2008, in its art. 9th, expressly revoked the major factor of art. 302, sole paragraph, item V, formerly added by Law No. 11.275 / 2006, resuming the original situation of the CTB and allowing material contest between the crimes of manslaughter (art. 302) and drunk driving (art. 306).

Law No. 12,971 of 05/09/2014 changed from sole Paragraph to Paragraph 1 the major factors of art. 302 and, still, added paragraph 2, with the following wording:

> Art. 302 (...)
> Paragraph 2. If the agent drives a motor vehicle with a psychomotor capacity altered due to the influence of alcohol or other psychoactive substance that determines dependence or participates, on track, in a car race or competition, or in the exhibition or demonstration of skill in maneuvering motor vehicle, not authorized by the competent authority:
> Penalties - imprisonment, from 2 (two) to 4 (four) years, and suspension or prohibition to obtain permission or authorization to drive a motor vehicle" (NR) (BRASIL, 2014).

It appears, therefore, that drunk driving that resulted in manslaughter ceased to appear as a material contest of crimes (art. 302 and 306 of the CTB) and became a material contest between art. 302, *caput* and art. 302, Paragraph 2 of the CTB, also occurring if the driver finds himself participating, on a public road, in a race, dispute, automobile competition or display or demonstration of skill.

Thus, for example, with the original wording of the CTB, someone who was accused of the crime of drunkenness and manslaughter while driving a motor vehicle, would incur material contest of the crimes of arts. 302 and 306 of the CTB. With Law No. 11.275 / 2006, in the same situation, the accused would incur the crime of manslaughter with the penalty increased by up to half. With the advent of Law No. 11,705 / 2008, the original situation is resumed with the revocation of item V of the sole paragraph of art. 302 of the CTB, with, in the proposed example, a contest of crimes of art. 302 and 306 of the CTB. With Law No. 12,971 / 2014, the drunk driving that results in manslaughter remains in contest material, however between the *caput* of art. 302 and Paragraph 2 of art. 302 of the CTB.

In yet another legislative creation, the provision of Paragraph 2 of art. 302 was revoked by art. 6 of Law No. 13,281 of May 4, 2016, which in practice ended the material contest between the caput of art. 302 and Paragraph 2 of art. 302 of the CTB and resumed the previous situation, that is, for the crime of manslaughter when driving a motor vehicle in cases where the agent was under the influence of alcohol or other psychoactive substance that determines dependence, the material contest is again between the art. 302 and 306 of the CTB. Faced with this legislative panacea, it remains to be seen what the legislator's real intention was with these successive amendments to the law.

Even with this succession of laws in such a short time, Law No. 13,546 of 12/19/2017 was published, the central object of this work, and the Paragraph 3 of art. 302 of the CTB, which started to predict, as a crime of first-degree manslaughter, the fact that the driver is under the influence of alcohol or other psychoactive substance that determines dependence, imposing a penalty of imprisonment of five to eight years, in addition to the suspension or prohibition of the right to obtain permission or authorization to drive a motor vehicle, with a 120-day *vacatio legis* period after official publication (BRASIL, 2017).

It appears that until the entry into force of the rule in question, if the agent were accused of committing manslaughter while driving a motor vehicle, being under the influence of alcohol or psychoactive substance, he would be responsible for the crime of art. 302, *caput*, in material contest with the crime of art. 306, both from CTB. On the other hand, after the entry into force of Law No. 13,546 / 2017, the driver, in the same circumstance, started to answer only for the crime of art. 302, paragraph 3. It should be noted that before this change in the CTB, the material contest between the crimes could generate a minimum penalty of two years and six months and a maximum of seven years of detention, since the penalty for involuntary manslaughter (art. 302, caput, CTB) is detention for two to four years and drunk driving (art. 306, CTB) the penalty is from six months to three years After the entry into force of the aforementioned law, the penalty of involuntary first-degree manslaughter due to drunkenness became imprisonment for five to eight years.

4 Bodily injury and drunk driving

The crime of bodily injury practiced when driving a motor vehicle is provided for in art. 303 of the CTB, which provided from its original wording that the offense be configured in the case of the practice of involuntary bodily injury driving a motor vehicle. The same hypotheses[2] of penalty increase originally foreseen in the sole paragraph of the crime of manslaughter of the CTB were also applicable in the crime of bodily injury, with a penalty increase of one third to half, the forecast of penalty increase being maintained when the modification of the sole paragraph of art. 302 to paragraph 1.

It should be noted that the changes promoted in the sole paragraph of art. 302, later modified to paragraph 1, directly reflected in the crime of involuntary bodily injuries of art. 303 of the CTB. At the origin of the code, there was talk of material contest between bodily injury

[2] Original wording of the sole paragraph of Art **[art.]** 302 of the CTB:
Sole paragraph. 302 of the CTB:
Sole paragraph. In involuntary manslaughter committed driving a motor vehicle, the penalty is increased from one third to one half, if the agent:
I - does not have a Driving Permit or Driver's License;
II - practice it in a crosswalk or on the sidewalk;
III - fail to provide assistance, when possible, without personal risk, to the accident victim;
IV - in the exercise of his profession or activity, he is driving a passenger transport vehicle (BRASIL, 1997).

and drunk driving. With Law No. 11,275 / 2006, the major factor of one-third to one-half has been forecasted. With Law No. 11,705 / 2008, it returns to the previous situation, with material contest of crimes between art. 303 and 306 of the CTB, situation maintained with Law No. 12,971 / 2014.

Only with Law No. 13,546 / 2017, the object of this essay, is the involuntary bodily injury, practiced when driving a motor vehicle in which the agent is drunk, becomes a first-degree crime, with the provision in paragraph 2 of art. 303 that:

> Paragraph 2. The penalty of deprivation of liberty is imprisonment for two to five years, without prejudice to the other penalties provided for in this article, if the agent drives the vehicle with psychomotor capacity altered due to the influence of alcohol or other psychoactive substance that determines dependence, and if the crime results in bodily injury of a serious or very serious nature. (NR) (BRASIL, 2017).

The application of art. 306 of the CTB, which deals with drunk driving whose protected legal asset is road safety and the crime is dangerous, it is reserved for cases in which there has been no involuntary manslaughter or involuntary bodily injury driving a motor vehicle.

It should also be noted that there is an important difference between the wording of the crimes of manslaughter practiced when driving a motor vehicle in which the agent is drunk (art. 302, paragraph 3 of the CTB); the description of the crime of bodily injury committed in the same circumstances (art. 303, paragraph 2 of the CTB); and the autonomous crime of drunk driving (art. 306, CTB). This is because the legislator uses the expression "If the agent **drives a motor vehicle under the influence** of alcohol or any other psychoactive substance that determines dependence" (emphasis added) in the case of manslaughter. In the case of the injury, the crime is imputed "If the agent **drives the vehicle with psychomotor capacity altered due to the influence** of alcohol or other psychoactive substance that determines dependence" (emphasis added); and in the case of drunkenness, states that "**driving a motor vehicle with altered psychomotor capacity due to the influence** of alcohol or other psychoactive substance that determines dependence" (emphasis added).

It is clear that in the case of manslaughter, driving under the influence of alcohol or psychoactive substance is enough to determine dependence. In cases of bodily injury and drunk driving (this as an autonomous crime), the agent must have his psychomotor capacity altered due to the influence, referring, therefore, to the loss of reflexes[3].

[3] Gabriel Habib, in his book Special Criminal Laws, states that "From this distinction between paragraph 3 and art. 306 two viable interpretations may arise: one in the sense that the legislator effectively wanted to give a more rigorous treatment to paragraph 3 of art. 302 than the treatment given to art. 306, in which case for the incidence of the qualifier of paragraph 3 of art. 302 the mere influence of alcohol or other psychoactive substance is sufficient; another in the sense that the legislator said less than he wanted, in which case extensive interpretation could be used to require that the qualifier only apply if the driver's psychomotor capacity is altered due to alcohol or other psychoactive substance, not being enough the mere influence". The indoctrinator states that the first interpretation would be the most appropriate, given the rigor sought by the legislator with the legislative change. (HABIB, 2018, p. 109).

5 Manslaughter and bodily injury practiced driving motor vehicles - crimes of involuntary nature and possibility of conversion to restrictive rights penalty

By legal definition expressed in law, the crimes of manslaughter and bodily injury committed driving a motor vehicle are considered to be of an involuntary nature, thus providing the *caput* of both types of traffic penalties:

> Art. 302. Committing manslaughter driving a motor vehicle:
> (...)
> Art. 303. Practicing involuntary bodily injury driving a motor vehicle:
> (...) (BRASIL, 2017).

Under the terms of art. 18, II of the Criminal Code, is considered an involuntary crime "when the agent caused the result due to imprudence, negligence or malpractice" (BRASIL, 1940).

Cláudio Brandão, when dealing with the involuntary crime, states that:

> This damage caused by a procedural defect of the agent represents a violation of an objective duty of care, since it assumes that the means that the agent has chosen to determine his action are linked to the production of the criminally relevant result. Therefore, such means will be penalized in the legal concepts of recklessness, negligence or malpractice. (BRANDÃO, 2019, p. 142)

This time, due to the provision expressed in the Traffic Code and, furthermore, due to the definition of involuntary crime outlined by the Criminal Code, there is no doubt that both the crime provided for in art. 302 (manslaughter) as the crime of art. 303 (bodily injury) of the CTB are hermetically limited to the scope of involuntary offense.

The legislative amendment outlined by Law No. 13,546 / 2017, specifically in the scope of manslaughter and bodily injury, started to provide for the first-degree modalities of crimes in cases where the agent is driving the motor vehicle under the influence of alcohol or any other psychoactive substance that determine dependence, in the case of manslaughter, and with altered psychomotor capacity, in the case of bodily injury, as follows:

> Art. 302. (...)
> Paragraph 3. If the agent drives a motor vehicle under the influence of alcohol or any other psychoactive substance that determines dependence:
> Penalties – imprisonment, five to eight years, and suspension or prohibition of the right to obtain permission or authorization to drive a motor vehicle."
> Art. 303. (...)
> Paragraph 2. The penalty of deprivation of liberty is imprisonment for two to five years, without prejudice to the other penalties provided for in this article, if the agent drives the vehicle with psychomotor capacity altered due to the influence of alcohol or other psychoactive substance that determines dependence, and if the crime results in bodily injury of a serious or very serious nature (BRASIL, 2017).

It appears, therefore, that the legal nature of involuntary crime in both crimes has remained unchanged, adding, however, provisions that qualify the crimes of manslaughter and bodily injury and, consequently, increase the respective penalties.

In the bill sent to the presidential sanction, a provision was forbidden that provided for the possibility of converting the penalty of deprivation of liberty into a restrictive penalty of rights,

in the cases of manslaughter and bodily injury practiced under the terms outlined by the new legislation. In the forecast vetoed by the President, the conversion would be possible provided that the other requirements of art. 44, items II and III of the Criminal Code. Thus provided for the vetoed text that would be inserted in the Traffic Code as Paragraph 3 of art. 291:

> Paragraph 3. In the cases provided for in Paragraph 3 of art. 302, in Paragraph 2 of art. 303 and in Paragraphs 1 and 2 of art. 308 of this Code, the substitution provided for in item I of the *caput* of art. 44 of Decree-Law No. 2,848, of December 7, 1940 (Criminal Code), when a penalty of deprivation of liberty of not more than four years is applied, in compliance with the other conditions provided for in items II and III of the caput of that article (BRASIL, 1940).

As reasons for the veto of said provision, the President of the Republic added:

> The provision presents legal incongruence, being partially inapplicable, since, of the three cases listed, two of them provide for minimum sentences of imprisonment of 5 years, thus not falling within the substitution mechanism regulated by the Criminal Code. Thus, to avoid legal uncertainty, the veto on the provision is imposed.

The technicality and absence of a systemic look at the legislation hovered over the argument of the presidential veto, since the President of the Republic stated that the provision that would add paragraph 3 to art. 291 of the Traffic Code would be inapplicable, given that two of the crimes would already have a minimum sentence of arrest of 5 years, **"thus not falling under the substitution mechanism regulated by the Criminal Code"** (emphasis added).

Now, despite even the alleged existence of the referred paragraph 3 of art. 291 is justified, considering that the matter is already regulated in the Criminal Code and the Traffic Code itself and provides for the application of the general rules of the repressive statute in cases of crimes committed driving motor vehicles (art. 29, *caput*)[4], the veto can even be considered reasonable, but its reasons only demonstrate the smallness of the systemic and critical view around Brazilian legislation, with a large production of legal and criminal norms and lacking the verification of any existing complex of laws and the reflexes arising from any change.

This is because the first requirement of substitution of the penalty of deprivation of liberty to a restriction of rights, provided for in item I of art. 44 of the Criminal Code[5], applicable to CTB by provision of art. 291, *caput*, is that "a penalty of deprivation of liberty of no more than four years is applied and the crime is not committed with violence or serious threat to the person **or, whatever the penalty applied, if the crime is involuntary**" (emphases added), therefore, of alternative and not additive conjunction.

Thus, even though the veto is fully justified, mainly due to the discretion of the President of the Republic in his decision, the reasons invoked, these yes, carry legal incongruity, since he

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[4] Brazilian Traffic Code: Art. 291. To the crimes committed driving motor vehicles, provided for in this Code, the general rules of the Criminal Code and the Criminal Procedure Code apply, if this Chapter does not provide otherwise, as well as the Law No. 9,099, of September 26, 1995, as appropriate (BRASIL, 1997).

[5] Brazilian Criminal Code: Art. 44. Restrictive penalties are autonomous and replace deprivation of liberty, when: I - deprivation of liberty of not more than four years is applied and the crime is not committed with violence or serious threat to the person or, whatever the penalty applied, if the crime is involuntary (BRASIL, 1940).

considered only the *quantum* of the sentence in abstract, however, it is possible to substitute imprisonment for restrictive rights for any type of penalty when the crime is involuntary and, as is the case, both crimes under study, manslaughter and bodily injury within the scope of the CTB, although in the version qualified as a legislative addition to Law No. 13,546 / 2017, they remain with the legal nature of involuntary crimes.

Such a situation has generated misinterpretations even in the legal environment, with notes that, in cases of manslaughter and bodily injury practiced driving a motor vehicle by a driver under the influence of alcohol or psychoactive substance that determines dependence, due to the veto of the President of the Republic, they would not have the right to convert a penalty of deprivation of liberty into a restrictive penalty of rights, which in itself is already a mistake, according to notes made.

Therefore, it remains as a subjective public right of the sentenced person to substitute the penalties, in addition to the involuntary nature of the crime, the other requirements of art. 44 of the Criminal Code.[6] Cleber Masson already warns, stating that "in the event of involuntary crimes, it is understood that substitution is possible in all of them, even if it results in the production of violence against the person, as well as in manslaughter, both in the Criminal Code (art. 121, paragraph 3) and the Brazilian Traffic Code (art. 302)" (MASSON, 2017, p. 797).

However, the provisions of Law No. 13,281 / 2016, which also added articles to the Brazilian Traffic Code, are noteworthy, providing that any possible restriction of rights imposed on those convicted of traffic crimes must necessarily be the provision of services to the community or to public entities in specific activities, thus stipulating art. CTB 312-A:

> Art. 312-A. For the crimes listed in arts. 302 to 312 of this Code, in situations where the judge applies the substitution of deprivation of liberty to a restriction of rights, it must be a service rendered to the community or public entities, in one of the following activities: (Included by Law nº 13,281, of 2016)
> I - work, on weekends, in rescue teams for fire brigades and other mobile units specialized in assisting traffic victims; (Included by Law No. 13,281, 2016)
> II - work in emergency units of public hospitals that receive victims of traffic accidents and with multiple trauma injuries; (Included by Law No. 13,281, 2016)
> III - work in clinics or institutions specialized in the recovery of traffic accident victims; (Included by Law No. 13,281, 2016)
> IV - other activities related to the rescue, assistance and recovery of victims of traffic accidents. (Included by Law No. 13,281, of 2016) (BRASIL, 2016).

It should be emphasized that the reflexes will be felt when the effective application of the penalty, since the insertion of the imprisonment species in the new qualified modalities of

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[6] In this sense, STJ, RHC 30.680 / SP, rel. Min. Og Fernandes, 6th class, judged on 09.06.2011. MENU: ORDINARY RESOURCE IN HABEAS CORPUS. INVOLUNTARY MANSLAUGHTER OF TRAFFIC. APPLICATION OF RESTRICTIVE LAW MEASURES. POSSIBILITY. ART. 44 OF CRIMINAL CODE. 1. The appellant meets the requirements for the substitution of corporal punishment by restrictive measures of law, namely, he is a primary defendant, condemned of an involuntary crime, and the judicial circumstances are all favorable. 2. The substitution of a sentence constitutes the defendant's subjective right, and the judge's approval is not granted if the legal presuppositions are present. 3. Appeal granted to replace the penalty of 2 (two) years and 8 (eight) months of detention with two restrictive measures of law, namely, provision of services to the community and pecuniary provision, to be specified by the Court of Executions (BRASIL, 1940).

manslaughter and bodily injury in the CTB makes, in the case of manslaughter, if the deprivation of liberty is not replaced by a restriction of rights, the semi-open regime is imposed as the initial sentence, and in the case of bodily injury, the semi-open or open regime is imposed, depending on the specific case[7].

However, as already pointed out, in both cases the substitution of the penalty of deprivation of liberty in restrictive rights is possible, since they refer to involuntary crimes, appearing as the subjective right of the accused, provided that the other subjective nature provided for in items II and III of art. 44 of the Criminal Code[8].

6 Of the technical impropriety in the grading of serious and very serious involuntary bodily injuries

The Law under study created the type of crime provided for in art. 303 paragraph 3º consistent with the bodily injury practiced when driving a motor vehicle by a driver who has altered the psychomotor capacity due to the influence of alcohol or psychoactive substance that determines dependence.

In the legal provision itself, the said qualifier will apply a reservation to involuntary bodily injury only if the crime results in a serious or very serious injury. Interpreting the law article; however, if the injury is minor, it will not affect the qualifier in question.

It happens, however, that the legislator took advantage of a technical impropriety in predicting a gradation of the involuntary bodily injury, that is, if the injury is serious or very serious, the crime will be qualified in the form of art. 303, paragraph 3.

In the explanatory memorandum of the special part of the Criminal Code, when adducing about the crime of involuntary bodily injury, it provided in item 42 on the lack of grading in this type of crime:

> Involuntary bodily injury is treated in art. 129, paragraph 6. In accordance with the law in force, there is no distinction here between the greater or lesser importance of material damage: mild or serious injury, the penalty is the same, that is, detention for 2 (two) months to 1 (one) year (more severe sanction than the one enacted in the current law) (BRASIL, 1940).

In the words of Cleber Masson:

> the reverse of what happens in intentional bodily injuries, in involuntary injuries there is no distinction based on the severity of injuries. The involuntary injury is only and exclusively involuntary injury, that is, there is no mention of

[7] As provided in art. 33, "The prison sentence must be served in a closed, semi-open or open regime. The one of detention, in semi-open regime, or open, unless it is necessary to transfer to a closed regime". As the maximum penalty for the crime of manslaughter of the CTB is 8 (eight) years, the initial regime for enforcement of the sentence, if there is no substitution for a restrictive penalty of rights, will be the semi-open, under the terms of art. 33, paragraph 2, b) of the Criminal Code. In the case of bodily injury, it may be the semi-open or open regime.

[8] Brazilian Criminal Code: Art. 44. (...):

II – the defendant is not a repeat offender in an involuntary crime;

III – the culpability, background, social conduct and personality of the convict, as well as the reasons and circumstances indicate that this substitution is sufficient (BRASIL, 1940).

> "mild", "serious" or "very serious" involuntary injury. (...) In fact, the severity of the injury does not interfere with the typical nature of the fact, but because it is an unfavorable judicial circumstance ("consequences of the crime"), the judge in the dosimetry of the base penalty (CP, art. 59, caput) must weigh it. (MASSON, 2018, p. 133-134)

Even before the legislation in question that changed the Brazilian Traffic Code, there was no distinction of involuntary bodily injury driving a motor vehicle, and this fact can be considered, however, when applying the base penalty, since at this moment the consequences of the crime could be assessed in judicial circumstances. Such a situation, including, is subject to the law itself under analysis, by including paragraph 4 in art. 291 of the CTB and foresee the need for the judge, when setting the base penalty, to pay special attention to the culpability and the circumstances and consequences of the crime.

When providing for the distinction between culprit bodily injuries, the legislator makes use of the predicted gradation for intentional bodily injury in the Criminal Code, which distinguishes mild from serious injury, and collects elements of the doctrine that divide serious injury to a lesser or greater severity by naming them for serious and very serious. Rogério Greco warns that "although the Criminal Code does not use this terminology in art. 129, bodily injuries qualified by their paragraphs 1 and 2 can be considered, respectively, serious or very serious" (GRECO, 2015, p. 267).

Thus, in detachment from the legislative technique, the prediction of the distinction between serious and very serious involuntary bodily injury, as stated in the amendment to the aforementioned law, creates a nebulous legal figure that takes advantage of concepts of the Criminal Code, mixes them with the Traffic Code and produces a law without the precise analysis of the origin of the terms and the practical consequences in the application of the rules.

7 Of the need for the victim's representation in the case of bodily injuries practiced in driving motor vehicles

The crime of involuntary bodily injury practiced when driving a motor vehicle, even if the driver is drunk and even though he is inappropriately graduated in a serious and very serious injury, does not lose, as mentioned, the nature of involuntary crime.

For such reasons, it is not insignificant to emphasize that the involuntary bodily injury is subject to art. 88 of Law No. 9,099 / 95, which deals with Special Civil and Criminal Courts, which adds that "In addition to the hypotheses of the Criminal Code and special legislation, the criminal action related to crimes of mild bodily injuries and involuntary injuries will depend on representation" (BRASIL, 1995).

Thus, despite the involuntary bodily injury should not be graded, the amendment promoted by Law No. 13,546 / 2017 did not change the type of criminal action for the crime in question, maintaining the need to represent the victim or whoever represents him, in terms of art.

24[9] of the Criminal Procedure Code (CPC) and art. 100, paragraph 1º [10] of the Criminal Code, so that the Public Prosecution can promote the complaint. In the words of Renato Brasileiro de Lima:

> As for the legal nature of this representation, it is known that, at least as a rule, representation functions as a specific condition of criminal action. That is, in relation to some crimes, the law imposes the implementation of this condition so that the Public Prosecution can promote public criminal action. (LIMA, 2018, p. 448-449)

It should be noted that even the police investigation may not be initiated without such representation, as stated in art. 5, paragraph 4 of the CPC, which provides that "the investigation, in crimes in which public action depends on representation, cannot be initiated without it" (BRASIL, 1941).

Thus, representation is essential, a true procedural condition, in cases of involuntary bodily injury practiced driving a motor vehicle, even if the agent is drunk, as expressly provided for in art. 88 of Law No. 9,099 / 95.

8 Of the non-appropriateness of the preventive detention in manslaughter crimes and bodily injury practiced driving a motor vehicle

As much as it advocates eventual rigidity promoted by innovation in the CTB when creating qualifiers in crimes of manslaughter and bodily injury when driving a motor vehicle, in reality it is observed that preventive detention in cases of highlighted crimes remains unavoidable and, even, it is questioned even the legality of the maintenance of the arrest in flagrante delicto until the judge's decision on the provisional liberty of the accused, since given the impossibility of converting the flagrante delicto into preventive custody, the judge's options, at this stage appearing as a true judge of guarantees, it is restricted exclusively to the granting of provisional liberty.

This fact is justified because, in the event of the arrest in the act of committing a crime of manslaughter or involuntary bodily injury, in this case serious or very serious, when driving a motor vehicle, if the driver is under the influence of alcohol or other psychoactive substance that determines dependence, the police chief, in theory, should collect the agent in prison, since due to the maximum penalties imposed on the aforementioned crimes, eight years for manslaughter and five years for bodily injury, there is a limitation in the Criminal Procedure Code regarding the arbitration of bail by the police authority, thus adding art. 322 of the CPC:

[9] Art. 24. In crimes of public action, this will be promoted by denunciation of the Public Prosecution, but will depend, when the law requires it, on the request of the Minister of Justice, or on representation of the offended person or whoever has the quality to represent him. (BRASIL, 1941).

[10] Art. 100 - The criminal action is public, except when the law expressly declares it to be private to the victim. Paragraph 1º - Public action is promoted by the Public Prosecution, depending, when the law requires it, on the representation of the offended or on request from the Minister of Justice (BRASIL, 1940).

> Art. 322. The police authority may only grant bail in cases of infraction whose maximum deprivation of freedom does not exceed 4 (four) years.
> Sole paragraph. In other cases, bail will be required from the judge, who will decide within 48 (forty-eight) hours (BRASIL, 1941).

Thus, if there is no possibility of arbitration of bail by the police chief, it will be up to that authority to carry out the usual procedures that will culminate in the detention of the prisoner.

Under the terms of art. 310 of the CPC, upon receiving the arrest in flagrante delicto, the judge should relaxation the arrest, if illegal; converting the arrest in flagrante delicto into a precautionary measure different from that of the prison; convert the arrest in flagrante delicto into preventive detention or, still, grant provisional freedom, with or without bail.

Relaxation of the arrest will only be possible in the event of an illegal arrest. Conversely, the conversion of the arrest in flagrante delicto into a precautionary measure different from that of the prison or even to preventive detention, the requirements set out in the Criminal Procedure Code must be observed.

The preventive detention is a precautionary institute provided for in the Criminal Procedure Code, outlined in art. 311 et seq. of the procedural legislation, with legal assumptions and hypotheses as requirements. As assumptions, proof of the existence of the crime and sufficient evidence of authorship are required, materializing, in the words of Nestor Távora and Rosmar Rodrigues Alencar, "the ***fumus comissi delicti*** for the decree of the measure, giving the minimum of security in the decree of the precautionary, with the evidential finding of the infraction and the infringer (just cause)" (TÁVORA; ALENCAR, 2015, p. 848).

Despite the assumptions, it is still necessary to observe, for the decree of preventive detention, the legal hypotheses that, in context, justify the measure due to the danger of freedom of the agent (*periculum libertatis*). In this sense, the possibility of preventive detention for social precaution is the guarantee of public order or the guarantee of economic order; and hypotheses for procedural precaution are the convenience of criminal instruction or to ensure the application of criminal law.

It should be noted that it is also possible to enact preventive detention, either when there is a breach of any of the obligations imposed under other precautionary measures, based on art. 312, sole paragraph of the CPC in reference to art. 282, paragraph 4 of the CPC; either due to the breach of the bail, as provided for in art. 343 of the CPC.

With regard to the offenses involving preventive detention, understood as part of the exceptional measure, mention is made of the provisions of art. 313 of the CPC, which provides as follows:

> Art. 313. Under the terms of art. 312 of this Code, the decree of preventive detention will be admitted:
> I - in intentional crimes punished with a maximum deprivation of liberty greater than 4 (four) years;
> II - if the guilty party has been convicted of another intentional crime, in a final judgement, except for the provisions of item I of the caput of art. 64 of Decree-Law No. 2,848, of December 7, 1940 - Criminal Code;
> III - if the crime involves domestic and family violence against women, children, adolescents, the elderly, the sick or persons with disabilities, to ensure the implementation of emergency protective measures;
> Sole paragraph. Preventive detention will also be admitted when there is doubt about the person's civil identity or when the person does not provide sufficient information to clarify it, and the detainee should be released immediately after identification, unless another hypothesis recommends the maintenance of the measure (BRASIL, 1941).

In view of the situation indicated, in case of arrest in flagrante delicto for the crime of manslaughter or serious or very serious involuntary bodily injury practiced when driving a motor vehicle, not being the case of relaxation of the prison, the magistrate will only have to grant provisional freedom, with or without bail.

It should be noted that the decree of preventive detention is incompatible with provisional release, which is why, in the case of the crimes under analysis, the release of the accused, as a rule, is legal imposition, noting that even under the judge's decision to convert the arrest in flagrante delicto into preventive detention will be possible.

Therefore, in the case of an involuntary crime, the decree of preventive detention is unacceptable. In the words of André Nicolitt:

> Before verifying the presence of factual assumptions (assumptions and grounds), it is necessary to check whether the law provides for the possibility of imprisonment (appropriateness. There is no point in the presence of evidence of authorship and materiality (assumptions), as well as the risk for the process (ground), if the fact does not include the measure of preventive detention, as, for example, in the case of involuntary crime (art. 313, I), for which preventive detention is not applicable. (NICOLITT, 2018, p. 838)

It should be noted that even in the case of conviction, when it would be necessary to convert the deprivation of liberty into a restriction of rights, the purpose of this flagrante 'provisional arrest' is questioned, albeit for a very short time, appearing as a true preventive detention incompatible with the certainty of imposing a restrictive penalty of rights in eventual conviction.

The Court of Justice of the State of Minas Gerais, in most of its decisions on the subject, has denied *habeas corpus*, therefore maintaining preventive detention, in cases where the driver is accused of committing manslaughter while driving a motor vehicle while under influence of alcohol or psychoactive substance that determines dependence. In this sense, it is exemplified with two menus by the judges of different rapporteurs, arranged as follows:

> MENU: HABEAS CORPUS. MANSLAUGHTER AND DRUNK DRIVING. ARREST IN FLAGRANTE DELICTO CONVERTED IN PREVENTIVE. PROOF OF MATERIALITY. AUTHOR INDICATIONS. GUARANTEE OF THE PUBLIC ORDER. MAXIMUM PENALTY IMPOSED OVER FOUR YEARS. GUARANTEE OF THE PUBLIC ORDER. ILLEGAL CONSTRAINT NOT DEMONSTRATED. LEGALLY AUTHORIZED CUSTODY. DENEGED ORDER. Based on and demonstrated the need to maintain the patient's precautionary custody, there is no mention of illegal constraint. (TJMG - HC 0676084-63.2017.8.13.0000. Des. Rapporteur Adilson Lamounier, 5th Criminal Chamber. Date of publication: 09/06/2017).

> MENU: HABEAS CORPUS - SIMPLE MANSLAUGHTER ATTEMPTED – PREVENTIVE DETENTION - FOUNDED DECISION - PRESENCE OF THE AUTHORIZING REQUIREMENTS OF THE PRECAUTIONARY CUSTODY (PROVIDED FOR IN ART. 312 AND ART. 313, I, BOTH OF CPC) - SUFFICIENT INDICATIONS OF AUTHORITY AND DELITIVE MATERIALITY - GUARANTEE OF THE PUBLIC ORDER, CONVENIENCE OF THE CRIMINAL INSTRUCTION AND THE APPLICATION OF THE CRIMINAL LAW - MAXIMUM PENALTY IMPOSED OVER FOUR YEARS - ERSONAL CONDITIONS - IRRELEVANCE. There is no need to talk about illegal constraint if the decision that turned the patient’s arrest in flagrante delicto into preventive is duly grounded in the need to guarantee public order, the convenience of criminal instruction and the application of criminal law. Having the requirements provided for in art. 312, of the Criminal Procedure Code, it is possible to maintain preventive detention when dealing with a crime punishable by a maximum sentence of more than four years of imprisonment, as in the case under analysis (art. 313, I of the Criminal Procedure Code). The patient's favorable conditions are not enough to guarantee his provisional release, especially when other circumstances authorizing the injunction are present. (TJMG, Habeas Corpus Criminal 1.0000.17.054377-1/000, Des. Rapporteur. Agostinho Gomes de Azevedo. Date of publication: 08/03/2017).

The argument of guaranteeing public order, as a requirement for preventive detention, is present in decisions in view of the interpretative breadth of the expression, leaving room for questioning its dubious constitutionality. André Nicolitt points out the unconstitutionality of this ground for arrest.[11] Guilherme de Souza Nucci seeks to substantiate the guarantee of public order by pointing the binomial severity of the infraction plus social repercussion[12], presenting arguments of dubious constitutionality.

It was found the decision of the TJMG itself, judged on 11/23/2017, in which the appellate judge granted the order of *habeas corpus* to the argument of the appropriateness of preventive detention. Therefore, it appears in the menu:

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[11] “As we have repeatedly stated, precautionary detention is only compatible with the principle of the presumption of innocence, when it aims at preserving the process, otherwise it becomes an anticipation of punishment. What protects, or should protect, public order (general and specific prevention) is the penalty. Using procedural arrest to guarantee public order is to anticipate the effects of the sentence, which is unconstitutional.” (NICOLITT, 2018, p. 846).

[12] “This is the most extensive interpretation hypothesis in assessing the need for preventive detention. It is understood by the expression the need to maintain order in society, which, as a rule, is undermined by the practice of an offense. If this is serious, of particular repercussion, with negative and traumatic effects on the lives of many, providing those who become aware of its performance with a strong sense of impunity and insecurity, it is up to the Judiciary to determine the arrest of the agent. The guarantee of public order must be viewed through the binomial severity of the infraction + social repercussions”. (NUCCI, 2009, p. 626).

> MENU: HABEAS CORPUS - INVOLUNTARY MANSLAUGHTER DRIVING A MOTOR VEHICLE - BODILY INJURY DRIVING A MOTOR VEHICLE - DRIVING MOTOR VEHICLE WITH PSYCHOMOTOR CAPACITY ALTERED UNDER THE INFLUENCE OF ALCOHOL – ILLEGAL FIREARM LICENSE OF PERMITTED USE - DELAY IN CONVERSION OF THE ARREST IN FLAGRANTE DELICTO IN PREVENTIVE - MERE IRREGULARITY - MAINTENANCE OF PREVENTIVE DETENTION - IMPOSSIBILITY - ABSENCE OF APPROPRIATENESS HYPOTHESES - CHARACTERIZED ILLEGAL CONSTRAINT - APPLICATION OF PRECAUTIONARY MEASURES DIFFERENT FROM DETENTION - POSSIBILITY - PARTIALLY GRANTED ORDER.
>
> - The delay in conversion of the arrest in flagrante delicto into preventive constitutes a mere irregularity, unfit to nullify the patient's precautionary custody.
> - In view of the absence of preventive detention, provided for in art. 313, of the CPC, a necessary measure is the partial concession of the order so that the patient can respond to the process in freedom. (HC 1.0000.17.080834-9/000. Des. Rapporteur: Corrêa Camargo. 4th Criminal Chamber. Date of publication: 11/29/2017).

It is concluded, therefore, that the imposition of preventive detention on the accused of traffic crime, especially the crimes of manslaughter and bodily injury, are exceptional hypotheses in the Brazilian legal system, even if by a drunk driver, even being questionable maintaining the arrest in flagrante delicto of the accused of the crime, since its only possibility of conversion will be by the provisional freedom, with or without bail.

9 Of the non imposition of arrest in flagrante delicto and non requirement of bail in cases where the driver provides first and integral aid to the victim

An interesting situation foreseen in the Brazilian Traffic Code refers to the non-imposition of arrest in flagrante delicto and no bail requirement in cases where the driver provides first and integral aid to the accident victim. In this sense, art. 301 of the CTB:

> Art. 301. The vehicle driver, in cases of traffic accidents that result in a victim, will not be imposed in flagrante delicto, nor will bail be demanded, if he provides immediate and integral assistance to that person (BRASIL, 1997).

There is no other condition for the non-imposition of said arrest or bail requirement, nor is it required that the driver not be under the influence of alcohol or other psychoactive substance that determines dependence. In this sense, given the absence of a prohibition in the law, it is concluded that, if the driver is in the indicated condition, even if he causes serious or very serious bodily injury, or even if he causes the victim's death, it is still possible that he will not even be required to post bail or impose his arrest in flagrante delicto, since it may be the case that he provided first and integral assistance to the victim, in the case of serious or very serious bodily injury, or even justifying the impossibility of doing so in the face of the victim's death.

In this case, therefore, despite the detection of drunkenness or the effect of a psychoactive substance that determines dependence, the accused must be immediately released by the

competent police authority without any kind of imposition of conditions due to express legal requirement.

10 Conclusion

This time, along with the discussions about the need or not of greater criminal rigidity in cases of drunk driving, the inference is reached that the innovation promoted by Law No. 13,546 / 2017 is a legal norm that does not meet the proposal advocated by the supposed innovation and just shreds even more of the already so-called Brazilian legislative quilt.

The crimes of manslaughter and bodily injury practiced when driving a motor vehicle, in cases where the driver is under the influence of alcohol or psychoactive substance that determines dependence, have become first-degree crimes, had their sentences imposed at a significant level, but was not removed from the referred crimes to the involuntary nature that are immanent to them.

The consequence of such inference is the application of criminal institutes to such crimes, such as the substitution of the deprivation of liberty into a penalty restricting rights, applicable to whatever the penalty of involuntary crime. Although the arguments of the presidential veto try to substantiate the non-application conversion, being another technical impropriety as seen in the gradation of involuntary injuries in serious and very serious.

Furthermore, the necessary representation of the victim or whoever represents him in cases of involuntary bodily injury of the CTB should not be neglected, in view of the express and coercive provision provided for in art. 88 of Law No. 9,099 / 95, which deals with special courts.

Preventive detention is a rare and questionable hypothesis in cases of involuntary crimes, a situation that ends up embarrassing the magistrate to grant provisional freedom, with or without bail, to the crimes of involuntary manslaughter and bodily injury, even if committed by a drunk driver, facts that make even arrest in flagrante delicto questionable, albeit for a short time, since the situation must lead to the necessary freedom of the detainee.

In this sense, there are the critical reflections on Law No. 13,546 / 2017, a rule that already in its origin suffers from inconsistencies and brings countless considerations and several arguments about its practical effectiveness, which concludes that it refers to a law whose advertising points to the solution of the problem called 'drunk driving' does not even lead for an effective response to the problem.

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