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Miscarriage of justice: State redress and criminal review

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ABSTRACT
The miscarriage of justice is a factor present in the judicial system, affecting the lives of countless people, who suffer directly from the conviction or indirectly from its consequences. The present work aims to expose the study on judicial error, especially focusing on the error resulting from the criminal process, seeking to demonstrate the responsibility of the State to make reparation for the error in the provision of criminal jurisdiction. Using an interdisciplinary study of the various areas of law and concrete cases, we seek to deepen the reasons that may be decisive in the erroneous outcome of the process. The work is based on data research that allows a deeper understanding of the problem, as well as on the analysis of the historical case of the Naves brothers and other cases of error. It also presents the *Innocence Project program*, in the USA and now in Brazil, whose role is to investigate and file revisional actions in cases where there was an error in the judgment of the criminal action. Also in the present research, an in-depth study is carried out on the autonomous action of criminal review, which is presented as one of the tools to repair the error and provide the due compensation. The use of mechanisms such as adversarial are ways to reduce error in actions; In addition, the possibility of the procedural and constitutional system providing for reparation and indemnity is a positive factor, and its application should be favorable to the detriment of res judicata.

Keywords: Miscarriage of justice, Criminal review, Civil liability of the State, Res judicata, Damage repair, Indemnity.

INTRODUCTION

The present work aims to present a study on the miscarriage of justice, its reparation by the State and criminal review as a tool that enables the factual reanalysis. The research is conducted in the light of the Federal Constitution of 1988, which established a new paradigm for the interpretation of substantive and criminal procedural rules.

Using an interdisciplinary study that covers several areas of law — especially the constitutional, criminal, administrative and civil branches — and resorting to concrete cases, we seek to identify some of the determining factors for erroneous results in criminal proceedings. The accountability of the State for such errors is one of the main measures sought with the declaration of miscarriage of justice. Initially, a historical study of the civil liability of the State is necessary in order to understand its liability today.

To understand the State's duty to make reparation for miscarriage of justice, it is essential to understand the three stages through which the institution of State civil liability was developed. This study also highlights the lack of official data on convictions based on miscarriage of justice and the absence of

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information on cases modified through criminal review processes. The available research was carried out by autonomous institutes, often without the proper focus on the subject.

A significant advance in reviewing cases and finding miscarriages of justice was the advent of DNA testing. The production of evidence carried out previously often did not allow the comparison of genetic data found in the investigations with the data of the accused. We also highlight the Innocence Project program, which in the United States has already reversed 349 convictions. In Brazil, the U.S. project is promoting the implementation of the Innocence Project Brazil, with the first cases already initiated.

A miscarriage of justice can occur at various times during the judicial process. The main procedural means to correct an error resulting from a criminal conviction is, as a rule, criminal review. However, other instruments, such as habeas corpus and appeals, can also be used to stop the error.

Finally, we highlight that the legislator was concerned with creating mechanisms to correct errors of unjust convictions. The main basis of criminal review is to do justice and repair the miscarriage of justice by making res judicata more flexible in favor of justice.).

OBJECTIVE

The objective of this paper is to carry out a study on the study of the miscarriage of justice, its reparation by the State and criminal review as a tool that enables the factual reanalysis. We intend to identify and analyze the factors that lead to erroneous outcomes in judicial proceedings, as well as the existing mechanisms to correct such errors, highlighting state accountability and criminal review procedures. Aiming to:

1. Understanding Miscarriage of Justice:
    1.1. Investigate the different types of miscarriages of justice and the circumstances in which they occur, with an emphasis on the criminal context;
    1.2. Analyze as a basis the Federal Constitution of 1988, which changed the interpretation of criminal and procedural rules, influencing the occurrence and correction of judicial errors.
2. Accountability of the State:
    2.1. To study the historical evolution of the civil liability of the State;
    2.2. To assess the duty of the State to repair the damage caused by erroneous convictions, comprising the three stages of the development of the State's civil liability.
3. Miscarriage of Justice and Criminal Review:
    3.1. Understand what is meant by miscarriage of justice;
    3.2. Examine procedural instruments for correcting miscarriages of justice, with a focus on criminal review.

4. Analysis of Concrete Cases:
    4.1. Use case studies to illustrate situations in which miscarriages of justice have occurred;
    4.2. Highlight the impact of technological advances, such as DNA testing, on reviewing cases and identifying miscarriages of justice.
5. Data and Research:
    5.1. Assess the lack of official data on wrongful convictions and criminal review cases;
    5.2. Analyze independent information and initiatives such as the Innocence Project, both in the United States and in Brazil, that have contributed to the correction of miscarriages of justice.
6. Justice and Redress:
    6.1. Discuss the importance of criminal review in redressing miscarriages of justice;
    6.2. Address the flexibilization of res judicata in favor of justice, with a view to correcting unjust convictions and ensuring equity in the judicial system.

In summary, the present study aims to provide an understanding of miscarriages of justice and redress mechanisms.

METHODOLOGY

The present research is based on the Federal Constitution of 1988, which instituted a new paradigm for the interpretation of substantive and criminal procedural rules. We adopted a qualitative methodological approach, centered on case studies, and conducted an in-depth analysis through literature review and research.

The choice of this methodology is justified by the exploratory and descriptive nature of the study, which seeks to understand the phenomenon studied and its implications, thus allowing a detailed analysis that, combined with the case study, is an important tool to examine the chosen cases.

THE RESPONSIBILITY OF THE STATE

JURISDICTIONAL PROVISION

The Constitution of the Federative Republic of Brazil of 1988, enshrined in its article 5, item LXXV, the responsibility of the State and the right to reparation resulting from the miscarriage of justice: "*The State shall compensate the person convicted of a miscarriage of justice, as well as the one who is imprisoned beyond the time fixed in the sentence*", as can be seen in the stated article.

We must also consider the text of Article 630 of the Code of Criminal Procedure of 1941: "*The court, if the interested party so requests, may recognize the right to just compensation for the losses* suffered."

It is known that one of the fundamental duties of the State is the jurisdictional provision, Article 1 of the Magna Carta, which emphasizes the Federative Republic of Brazil constitutes a Democratic State of Law and constitutes the Judiciary with a power of the Union, with the Power holding the jurisdictional function, and its typical activity is to resolve the most diverse disputes.

In criminal cases, it is expected that the jurisdictional provision occurs with maximum assertiveness, since the assets protected from the good of life to property are considered important by the legal system that has affirmed their protection in the law.

Let us observe, the duty of a criminal sentence to bring, after the investigative and instructive acts of the process, a reparation to the legal good, so that the jurisdictional provision sought in criminal proceedings is effective, being this a legitimate claim, which can be sought sometimes by the victim himself in the private criminal action or by the holder of the public criminal action. On the opposite side is one or more agents, who are being investigated and prosecuted as possible perpetrators of a certain fact typified as a crime.

It is necessary that, in the same criminal sentence, the magistrate, the State judge, pay attention to the due process of law, the right of defense, the constitutional principles, the general principles of law, analyzing and evaluating the evidence produced in the process, respecting the presumption of innocence and the other principles and assumptions of the criminal procedure.

However, if a criminal sentence results in the conviction of an innocent person, thus believing that this decision repairs an asset, such an act does not give rise to reparation and will cause an even greater offense to other legal assets.

The conviction of an agent, often on the basis of flimsy evidence, in a process in which there has not been due production of evidence, due adversarial or even in contradiction to the terms of the law, and this individual is innocent or the norm on which the decision is based is inapplicable, despite the fact that initially a sense of justice is celebrated, Solidified in a condemnatory decision, justice was not achieved.

Because, let's imagine that in a case, when the criminal review occurs, it is proven that the agent was innocent, in addition to the legal assets offended by the crime, but were torn apart by the miscarriage of justice, exhausted by the sentence.

Therefore, the accountability of the State is certainly one of the measures that is sought with the declaration of a miscarriage of justice, and it is important to make a brief study of the history of the civil liability of the State, so that we can understand the responsibility of the State for the miscarriage of justice today, and how this institute has been developed over the years.

The error committed in the state provision of jurisdiction, and the State must be held responsible for the act and make the due reparation, in order for us to understand the duty to indemnify it is necessary to enter into a study on state responsibility.

HISTORICAL EVOLUTION OF THE THEORY OF STATE RESPONSIBILITY

In the historical context, we find three major phases on the civil liability of the State, as highlighted by Alexandre Mazza: "*Until reaching the current stage, the theory of civil responsibility of the State has gone through three main phases: 1) theory of state irresponsibility; 2) theory of subjective liability and 3) theory of strict liability*.

It should also be noted that scholars such as Maria Sylvia Zanella Di Pietro use a differentiated classification for the phases of the State's civil liability, as follows:

> The rule adopted, for a long time, was that of irresponsibility; We then moved towards subjective responsibility, linked to guilt, which is still accepted today in various hypotheses; Later, the theory of strict liability evolved. [...] Theories on the subject include: 1. Theory of irresponsibility; 2. Civilist theories; 2.1. Theory of acts of empire and management; and 2.2. theory of civil fault or subjective liability; 3. Publicist theories; 3.1 Theory of administrative fault or fault of the public service; and 3.2 Theory of Integral or Administrative Risk or Theory of Strict Liability.

In order to understand the State's duty to make reparation for a miscarriage of justice, we must understand these three stages by which the institution of the State's civil liability has been modeled, thus initiating a legal and historical study.

The responsibility of the State is considered by Celso Antônio Bandeira de Mello as one of the pillars of Constitutional Law, so that the subjection of all people to the duty to repair damage to the right to legally protected and protected goods, so that not only the individual can be held civilly liable for the damages he causes, but that public persons of law are also responsible:

> One of the pillars of modern Constitutional Law is, precisely, the subjection of all persons, public or private, to the framework of the legal order, in such a way that the injury to the legal assets of third parties engenders for the author of the damage the obligation to repair it.

In the historical view, the civil liability of the State, in the beginning, was based on a theory of total absence of responsibility, excluding the State agent from its responsibility for any acts, that is, an irresponsible conduct, in which the State's duty to repair or recognize illegal acts was not recognized, creating a jargon of "King never errs". The present theory was predominant in the absolutist states, at a time when a political-theological conception prevailed, that the power of royalty emanated from God.

In this context, in which the responsibility of the State for its acts was not conceived, it would not be possible to claim the right to receive some kind of compensation for a miscarriage of justice, or for any other act that diminished some good of the individual, whether that good was material or subjective.

For the State could not err, since its leader, the monarch, was not liable to commit any illegal act, and, therefore, all the deeds performed by the king's agents were also protected against criminal passivity, not generating the duty of reparation.

The lack of state responsibility brought not only a lack of legal certainty, both for society and for the public servant himself, since it was admitted that in very few cases the personal liability of the employee occurred, which was not in any way decisive, because the resources of government employees were derisory.

It was only in 1800 that a legal and social change began to occur regarding the responsibility of the State, more precisely on February 17, 1800 with the enactment of a French law that regulated the right to compensation for damages arising from works carried out by the government.

The great change occurred in fact with the so-called *Arésto Blancô,* the case of the child Agnés Blanco, who while playing in the streets of Bordeaux in France, was run over by a wagon of the National Tobacco Manufacturing Company, her father then filed a lawsuit requesting compensation, based on the idea of State responsibility for the damages caused to third parties, as Jorge Luís Pinheiro de Souza points out:

The great trigger for this theme was the case that took place in France in 1873, in the then Tribunal of Conflicts, a case in which Agnés Blanco, a girl run over by a wagon of the National Company of Tobacco Manufactures, in the city of Bordeaux, was in the active pole. His father filed an action for damages and the Court of Conflicts found that the Administrative Court was competent and that the association with civil liability governed by private law was undue.

Currently, the theory of the State's irresponsibility has been overcome, bringing greater legal certainty to individuals and State servants, Maria Sylvia Zanella Di Pietro, points out that one of the reasons for this theory to be fought was its clear injustice, because the State, being the holder of rights, therefore must also assume the burden, i.e. the obligations arising from:

> This theory soon began to be opposed, for its evident injustice; if the State must protect the right, it cannot fail to respond when, by its action or omission, it causes damage to third parties, even because, as a legal person, it is the holder of rights and obligations.

In Western countries we no longer find any state that is still based on the theory of irresponsibility, the last countries being the United States in 1946 and England in 1947, to modify their legal systems, thus admitting the responsibility of the State. Both the United States and Britain abandoned the theory of irresponsibility, through the *Federal Tort Claim Act* of 1946 and the *Crown Proceeding Act* of 1947, respectively.

In a second moment in the historical study of the civil liability of the State, we find what the doctrine calls the period of the subjective liability of the State, or still known in doctrine and jurisprudence as the theory of liability with fault, intermediate theory, civil theory and even as mixed theory.

Celso Antônio Bandeira de Mello, points out that the subjectivity of the State's responsibility stems from the obligation of compensation, since the act performed is contrary to the law:

> Subjective liability is the obligation to indemnify incumbent on someone due to a procedure contrary to the law – culpable or intentional – consisting of causing damage to another or failing to prevent it when obliged to do so.

Maria Sylvia Zanella Di Pietro, also points out that at first for the purposes of responsibility, a distinction was adopted between acts of empire and acts of management, in which the distinction was used so that there would be a softening in relation to the irresponsibility of the king, the right to reparation was recognized when the acts result from management, But compensation was ruled out when the damage originated in the acts of the Empire, a phase called the civilist theory of guilt.

In the first phase, a distinction was made between the acts of the empire and the acts of management for the purposes of liability. The former would be practiced by the Administration with all the prerogatives and privileges of authority and imposed unilaterally and coercively on the individual regardless of judicial authorization, being governed by a special law, exorbitant of the common law, because individuals cannot perform similar acts; the latter would be practiced by the Administration on an equal footing with private individuals, for the conservation and development of public property and for the management of its services; as the position of the administration and that of the individual does not differ, the ordinary law applies to both.

The subjective theory used the logic that became known as the logic of civil law, in which for there to be reparation by the state the presence of guilt would be necessary, and the presence of four requirements must also be proven by the injured agent: a) act; (b) damage; (c) causal link and (d) fault or intent.

It was seen as an advance in the relations established between the private individual and the State, but Mazza points out that in the procedural legal relationship, the private agent is hyposufficient, having great difficulty in carrying out the evidence necessary for the State to hold the State accountable, as follows:

Although it represented a great advance in relation to the previous period, the subjective theory never perfectly adjusted to the relations of public law in the face of the **hyposufficiency of the administered** vis-à-vis the State. The victim's difficulty in proving in court the occurrence of guilt or lap of the public agent impaired the applicability and practical functioning of the subjective theory. Emphasis added:

Currently, the theory of subjective liability, still known as the theory of liability without fault and publicist theory, has also been overcome in the legal system, and it is not necessary to prove guilt in

relation to the harmful event, liability is levied as a result of the unlawful facts and also on the lawful events and facts, and only the causal link must be proven, the administrated party gains in the procedural relationship greater ease in proving the State's duty to carry out the due reparation.

The discussion about guilt no longer fits in the process of reparation, of the administered before the State, however guilt remains present in the theory of strict liability, now present in another procedural relationship. In the possible action for recourse against the agent causing the damage, the State must demonstrate guilt or intent, as occurs in the employer's actions for recourse against the employee who causes the damage, according to Article 932, item III of the Civil Code and enshrined in Article 37, § 6 of the Constitution:

> Legal entities governed by public law and those governed by private law that provide public services shall be liable for the damages that their agents, in this capacity, cause to third parties, ensuring the right of recourse against the person responsible in cases of intent or fault

In Brazil, with the promulgation of the 1946 Constitution, the debate on fault is transferred to the action for restitution and not to the action for reparation filed by the agent who suffered the damage, article 194 already stated: "Legal entities under domestic public law are civilly liable for the damages that their employees, in that capacity, cause to third parties.", a text very close to that adopted by the 1988 Constituent Assembly.

Thus, we consider that the miscarriage of justice is one of the causes in which the State has the duty to make reparation to the convicted person, and the three requirements for the payment of reparation are present, as highlighted by Mazza: "*For the objective theory, the payment of compensation is made only after the victim proves three requirements: a) act; (b) damage; (c) causal link*."

Thus, currently the subject must prove three requirements in the reparation action before the state agent: a) act; b) damage and c) causal link, in the object of this study we can consider the State's duty of reparation as a result of the miscarriage of justice.

The act is the judicial sentence that wrongly condemns the agent, the damage can be verified either by the execution of the sentence, even if it occurs without the final and unappealable decision of the action, either in the form of provisional execution of the sentence, or resulting from the conviction, which makes it impossible to access public office, or to a position in which it is required that the agent does not have a criminal conviction or in the constriction of some right or even in any other act of civil life, such as the conclusion of a business that is not possible, and finally the causal link is clear, since the link between the conduct of the state agent and the result in the life of the convicted.

The State is responsible for the judgment, that is, the jurisdictional provision generating, in the event of an error in this service, the duty to indemnify arises, since the damage caused was generated by the State, Eduardo Kloss reminds us that: "Whoever says the right, therefore, has responsibility".

MISCARRIAGE OF JUSTICE

In this chapter, we will study the miscarriage of justice, from a criminal point of view, and we will not seek in this study to exhaust the concept and situations in which the error resulting from the jurisdictional provision may occur. Carrying out an in-depth analysis of the miscarriage of justice resulting from criminal conviction and we will also seek to make a brief explanation of the miscarriage of justice in criminal proceedings in general.

The jurisdictional provision in the Brazilian penal system occurs through the criminal procedural system, in which it is mainly supported by the Constitutional norms and norms established by the Code of Criminal Procedure.

The current procedural code is initially dated 1941, with several modifications over time. For most jurists, a new codification is necessary, it is argued that the Constitution establishes in its body a system of measures that aims to protect individual guarantees, and the possible change is based on the search to establish a criminal procedure that can be considered in line with the constitutional premises. In this sense, Eugenio Pacelli teaches:

> If the theoretical perspective of the Code of Criminal Procedure was clearly authoritarian, with the concern with public security always prevailing, as if Criminal Law constituted true public policy, the Constitution of the Republic of 1988 went in a diametrically opposite direction. While the codified legislation was guided by the principle of culpability and dangerousness of the agent, the constitutional text instituted a system of broad individual guarantees.

The Constitution established a new paradigm for the interpretation of the norms contained in the substantive and procedural criminal rules, in which the process cannot be understood as a mere instrument, and there can be no maximization of instrumentality to the detriment of exaggerated punitivism.

The criminal process is a source of guarantee of the fair application of the substantive norm, and must guarantee its effectiveness and efficacy without losing from its framework elements such as justice, legality and its social function of bringing pacification.

The criminal process is the instrument and form in which it is possible to impose a sentence that is considered just, establishing to the convicted the possibility of defense and the adversarial process and to the accuser the justification of finding justice. Thus, respect for the norms and institutions of criminal law is the factor that legitimizes the penalty, according to Aury Lopes Junior:

The criminal process is a necessary way to legitimately reach the penalty. That is why its existence is only admitted when along this path the constitutionally guaranteed rules and guarantees (the rules of due process of law) are strictly observed.

Thus, the observance of due process of law and the rules are duties of all agents involved in criminal prosecution, especially the public agent. So that there is no error in the jurisdictional provision, and it is in the interest of society to convict the guilty agent and the consequent acquittal of the innocent.

Judicial error is a natural counterpoint to the rigors of the law and guarantees, and therefore frustrates the objectives of criminal law, both substantive and procedural.

The guarantees established in the legal system and the rules contained therein are a system that seeks to bring integrity and integrality to the process, and in the same proportions complement each other and aim at justice.

It is worth remembering that the criminal process is part of a system that protects the human person and the result of the process, when it leads to error, is an offense to its own principles and to the others of the criminal and constitutional system and also to that of the protection of the human person, whether in a national or global notion. Guarantees are protective instruments created by the State to provide due protection to citizens, as Brito, Fabretti and Lima recall:

> Therefore, the guarantees must be adequate, as an instrument of protection created by the State, as a reflex way of maintaining individual rights. The judicial provision must be provided in an ethical manner, without demeaning the dignity of the human person, under the equally ethical control and dignity of man. The basis of legitimacy of the system comes with the creation of rigid norms, but which do not affront the rule of law and individual guarantees.

Therefore, a miscarriage of justice arising from a criminal sentence is certainly a formal act of the State-Judge, a typical manifestation of its function and exercise of jurisdiction, which, through the regular action of its competences, exhausted a sentence that resulted in error, in which objectively or subjectively there was a violation of both procedural and constitutional guarantees and due process of law. and this legal aberration must be recognised and subsequently remedied.

The State has the responsibility to repair the damages caused to the administered, in the case of the subject of the case, the State is certainly an entity endowed with the legal qualities necessary for its existence and in the case of the jurisdiction, it exercises its attributes through the members of the Judiciary.

The judge, when sentencing the deed, does not do so in his name, but does so in the name of the State, and therefore in the jurisdictional provision we must consider the theory of the fallibility of judges, because the State performance is performed by a being subject to failures, a fact that reinforces the State's responsibility to recognize the error and repair it.

When we recognize the fallibility of the judge, we do nothing but recognize his human nature, which is subject to error. What cannot be stated here is that every error comes from the fact that the magistrate is a human being, since there are several causes that can contribute to the implementation of the miscarriage of justice. The Latin maxim reminds us that *errare humanum est.*

We must remember that the human factor of the judge is a measure that is imposed in several cases for the miscarriage of justice to be present in the actions, even if the double level of jurisdiction is present, and in this sense Maria Sylvia Zanella Di Pietro reminds us:

> Indeed, the fact that the judge is fallible, like all human beings, cannot serve as an excuse for the recognition of the responsibility of the State, for the same reasons that it does not serve as an excuse for any person, in public or private life.

The adversarial process combined with the right to information, which enables fair participation in the criminal process, is one of the measures that favor the reduction of miscarriage of justice, which must be combined with the duty to inform, and in this sense Fábio Ramazzini Bechara:

> The adversarial process means the opportunity for participation, an essential characteristic of a democratic State, legitimizes the decisions adopted and represents the most appropriate method for the construction of a fairer solution, since it expands the universe of knowledge and reduces the risk of miscarriage of justice. [...] If the adversarial process induces the active participation of the interested parties, such participation will only occur if there is a guarantee of information, which consists of the right to be aware, a basic prerequisite for an adequate and fair participation.

Another theory that we should mention here for a better understanding of the miscarriage of justice is the theory of the risk assumed by the jurisdictional, the aforementioned theory states that the fact that it occurs in errors in the jurisdictional provision are facts of life, because the jurisdictional chose to resolve their disputes through the judiciary.

It was consolidated by the Federal Constitution, which conferred on the Judiciary this duty to provide jurisdiction, removing from the individual the condition of doing justice for his own reasons and forces.

It is worth remembering that this delegation occurs long before the Constitution, it comes from the fiction of the social contract, a theory elaborated by Thomas Hobbes, John Locke and Jean-Jacques Rousseau in which there was the delegation of part of their freedom to individuals for the sake of a greater good, the social good, in this relationship the social contract resulted and one of the freedoms granted in favor of society was that of jurisdiction. In which the particular vengeance is now protected by the State, which will carry out the trial and the imposition of the reparative measure.

The theory of risk assumed by the jurisdictional party also understands that the fact that the right of action is promoted, the parties implicitly assume the risk of an eventual error in the state provision sought.

But, in the opposite direction, the theory we find the arguments, that the jurisdictional provision and especially in the criminal sphere is not a fact that can be arbitrated by the parties, but a legal imposition established by the law and by the State to its jurisdictions.

In addition, the need to seek state protection must be made, since it is generally forbidden to make a personal effort to take justice into one's own hands, using one's reasons and forces.

It is up to the State to carry out the judicial provision and at the same time promote the enforcement measure imposed. It enables social life in a safer and more humanized way. Although it may appear to many as ineffective to repair the juridical goods realized by the State, it is what made possible the evolution of the *lex talionis,* which was based on a penalty that mirrored the act. The current model of jurisdiction makes it possible for society to believe in reparation and rehabilitation of the offender.

An argument that is presented in the opposite way to the theory of risk assumed by the jurisdictional party is the fact that it cannot be argued that the parties sought the jurisdictional provision, since the plaintiff was the one who requested the relief and the defendant was forced to defend himself, and it is not possible for the defendant to excuse himself from the state protection and the plaintiff is also not legally allowed to seek it by other means.

Another argument that we must highlight about the miscarriage of justice is the fact that the State can be held responsible for the error resulting from the provision of the judicial service, since the jurisdictional provision is included in the *broad* sense of the concept of public service, as José Cretella Júnior reminds us:

> Indeed, the judicial service is first and foremost a public service. Now, the harmful public service, in any of its modalities, is a harmful service of the State. Why exclude, by way of exception, the judicial public service, from the general public service genre? Whereas in the public service, in general, the principle of public responsibility applies.

We must also remember that once the miscarriage of justice is recognized, the reparation must be pleaded as a rule against the State, because the civil liability is directed to the State, and it will be appropriate to proceed in cases where there was fault of the agent the due action of return, in this sense, Rui Stoco: "*The responsibility does not meet the Judge. It meets the State. Otherwise, it would be an obstacle to democracy. In fact, it is a price that the State pays for social peace, for the risk taken in this task*."

Since directing the responsibility to the agent, especially to the judge, could be considered as an offense to his guarantees, but this does not prevent the State from seeking compensation through the action for redress, when the action is appropriate. Thus, we cannot exclude miscarriage of justice from the perspective of the State's responsibility to make do reparation.

Judicial error is certainly, as stated in its own name, an error arising from the jurisdictional provision, an aberration that occurred in the state's activity of stating the law. And in this sense, the understanding of several authors is directed, such as Luís Antônio de Camargo, who conceptualizes the error as follows: "*it is the one that results from all harmful judicial activity, as an exercise of the function related to the Judiciary*"

The miscarriage of justice is certainly a denial of the very essential function of the State to promote justice and social peace, because, even if the conviction of an agent is celebrated, it is by appearance, if the judicial provision is considered as an effect or placed as an act of justice, a fair performance will not be rendered.

It must be considered that the jurisdictional provision was indeed rendered, but we cannot conclude that there was justice, the miscarriage of justice and the absence of justice itself, the denial of good judgment, as emphasized by José Cretella Júnior:

> The judicial activity or function is manifested, in essence, by the judgment or judicial act. The judicial act, the climax of the functioning of the judicial services, can produce the most varied damages, the most serious of which is the miscarriage of justice. A miscarriage of justice implies the denial of justice itself, unless it makes it possible in due time to make reparation for it.

The miscarriage of justice can occur due to several factors, as we have already emphasized, either by the human factor, which is inherent to all actors in the process, and situations in which there is a direct influence must also be considered so that a different version of the facts is concluded in the records, such as in cases where false testimony occurs, the production of manipulated expert evidence, even the most apparent mistakes, such as the condemnation of a twin brother in place of the other sibling or even by the homonym.

Other factors can influence the realization of the error such as ignorance about a fact, the production of evidence carried out illegally and other factors, a historical example we bring the case of the Naves brothers, in which the brothers in 1937 in the mining town of Araguari, located in the triangle of Minas Gerais, were convicted of the death of a local merchant.

The brothers Sebastião José Naves, 32 years old, and Joaquim Naves Rosa, 25 years old, were convicted of the death of their partner Benedito Pereira Caetano, as if they were sharing a truck in the transport of goods, the brothers were arrested and tortured so that they would confess to the crime, by the then newly appointed lieutenant Francisco Vieira as the officer responsible for the case.

Even with the false confession, the defendants' lawyer, João Alamy Filho, managed to obtain the acquittal of the defendants by the People's Jury, by 6 votes of the jurors, leaving only 1 juror in different opposition.

The Public Prosecutor's Office appeals requesting the annulment of the trial, which was done and held a new session of the jury court that again acquits the brothers, in a new appeal the prosecution manages based on the Constitution of 1937 to change the decision in the Court of Justice and the brothers are sentenced to 25 years and 6 months of imprisonment, sentence later reduced to 16 years.

In 1946, after more than 8 years of incarceration, the brothers were granted parole, but Brother Joaquim ended up dying in prison due to the illness he acquired in prison.

In 1952, 12 years after the conviction, then considered deceased, Benedito is found alive, and the innocence of the brothers is recognized, the case is considered one of the most famous in terms of miscarriage of justice, it became a movie, series and books.

In this way, we can see that the miscarriage of justice can be the result of several elements, which are embodied in the sentence that condemns the innocent. The miscarriage of justice brings to the convict a series of damages, both from his restriction of freedom, and from the staining of honor, an episode that may have directed the legislator to have affirmed the right to reparation, as Maria Sylvia recalls:

> When we talk about miscarriage of justice, we immediately think of criminal error, which includes, among others, error in conviction and error in preventive detention. However, miscarriage of justice may occur in the non-criminal sphere, encompassing error in civil, labor, electoral or any other area of jurisdictional action; It may be an error *in procedendo* or *in judicando*; it may result from error, intent or fault (negligence, malpractice or imprudence). Brazilian law has been concerned only with criminal error, both at the constitutional level (article 5, item LXXV of the Constitution) and at the level of ordinary legislation (article 630 of the CPP).

This concern of the legislator, although it may seem very restrictive, we can consider that its concern was in part assertive. The effects of a criminal sentence are generally very aggressive, given its role in bringing a solution to the conflict, repairing damage and promoting the rehabilitation and punishment of the guilty agent. And in this sense, José Cretella Júnior manifests:

Victims of miscarriage of justice in the criminal field can suffer custodial sentences and spend many years in prison. In some legal systems, they may even suffer capital punishment or life imprisonment, in which case the victim's family members have the right to claim compensation in court. In addition to these extreme cases, which are not hypothetical, there are other hypotheses of pre-trial detention, which are abusively prolonged; of lawsuits that end in dismissal, but that leave irreparable stains on a person's credit or reputation.

As a rule, until a judicial sentence is passed, we cannot consider a miscarriage of justice, since there is the possibility of verifying the error, and of acquittal or another measure, the criminal process precisely serves to resolve the issues that arise, in which the fact, the illegality and the authorship must be proven.

The sentence that judges the defendant innocent, or even that recognizes the legitimacy of the agent to carry out the act, even if illicit, but in which the removal of guilt or punishability occurs as occurs in cases of legitimate defense, it is not possible to verify the miscarriage of justice *a priori*.

Since the process has as its objective precisely this persecution, we do not bring here the possibility of there being a miscarriage of justice arising from a precautionary or provisional detention that proves to be abusive, in order to study the error in the aforementioned hypotheses it is necessary to study other arguments and theories, which will not be deepened here.

Thus, if there is a sentence in which there is a judicial error, the effects of the error are more clearly assessable, being even more present in cases in which there is the provisional execution of the sentence or other constrictive or restrictive measure of law.

The condemnatory sentence has the sanction of imposing a criminal sanction on the defendant, as Damásio de Jesus points out: "Condemnation is the act of the judge through which he imposes a criminal sanction on the active subject of an infraction." Thus, when exhausted, a sentence based on error, in which its effects are applied, even if they are not restrictive of freedom, and may be monetary, the damage is configured in general.

It should be noted that compliance, even if provisional, with the measures constitutes the materialization of the miscarriage of justice. The provisional execution of the sentence has been welcomed in the legal system, especially after the decisions exhausted by the Federal Supreme Court, in the judgment of the Declaratory Actions of Constitutionality (ADCs) 43 and 44, which considered possible the provisional execution of the sentence after a decision of a collegiate body of second instance.

Thus, the final and unappealable decision is not a requirement for a miscarriage of justice to be considered, since the constriction of a legal asset, even temporarily, based on a decision, brings offense and diminution to several legal assets, both those linked to personality and those linked to property.

In the case of miscarriage of justice, there is also a violation of due process of law and of the principle "*nulla poena sine juditio"*, affirmed in Article 5, item LIV of the Constitution: "no one shall be deprived of liberty or of his property without due process of law", when we imagine, for example, the confession extracted through torture or threat.

The miscarriage of justice often comes from a set that is flawed at its birth, or contaminated in the investigative phase, and even if it results in a sentence of acquittal, the damage caused can occur even before the process is formed, since sometimes the investigations become mediatic or excessive and a social judgment occurs that results in great damage to those investigated.

Although not considered as a miscarriage of justice, many cases can certainly be considered as a police error and, thus, be understood as species of the genus miscarriage of justice, which would encompass not only those exhausted by acts exclusive to the judiciary, but all those linked to its function.

Thus, the miscarriage of justice can often be linked to the criminal prosecution system, which does not keep the proper proportions, an example we must bring the case that became known as the case of the Base School.

The Base School was located in the neighborhood of Aclimação in the capital of São Paulo, when on March 26, 1994 a 4-year-old student of the school told his mother that he was taken to a house to have sexual acts performed on him, the next day two mothers of students went to the police authorities to report that their children had been abused.

On March 28 of the same year, the children are sent to the Forensic Medical Institute (IML), to be carried out for examinations and searches are carried out at the school, on the 29th, the preliminary result of the IML is positive indicating the possibility of libidinous acts having been practiced, on the same day the Jornal Nacional of the Globo Television Network broadcasts the first article about the case.

On March 30, all the major media reported that its owners, the couple Icushiro Shimada and Maria Aparecida Shimada, a teacher Paula Milhim Alvarenga and her husband, the school driver, Maurício Monteiro de Alvarenga, carried out sexual acts with the students, even using a Volkswagen Kombi car for the acts, on the same day the school is attacked by people and the police receive new accusations.

On April 5, new accusations are made and Saulo da Costa Nunes and Mara Cristiana França Nunes, parents of a student, are detained on suspicion of sexual abuse of their son and are later released, the police receive other anonymous complaints that the house of another person, that of Richard Pedicini, was used as a place for the practice of the acts. On April 17, 1994, a new police chief took over the investigations, and the investigation found no evidence or situation reported.

In the case the lives of 6 people were changed, even if the criminal sentence results in the recognition of innocence, the result in error even if not presented in a criminal conviction must be repaired, the emblematic case demonstrates that sometimes the miscarriage of justice can be the result of several factors, either by the false reporting of a crime, or by the wrong investigation and the early judgment carried out by the police authority and publicized by the media.

There is a lack of official data on convictions based on miscarriage of justice, or even on cases modified through criminal review processes, what we find are research carried out by autonomous institutes, without due focus on the subject.

An example was the research carried out by the Sou da Paz Institute in partnership with the Center for Security and Citizenship Studies (CESeC), of the Cândido Mendes University, in which it was found that in 2013 in the capital of the State of Rio de Janeiro, 772 were arrested, in flagrante delicto and later acquitted.

Another piece of data presented by the survey is the one that includes the number of people acquitted, reaching around 10% of the 7,734 flagrant acts in the city during the year 2013. It is not

possible to verify how many cases are due to an error in the investigation, or even how many cases we can understand that there was a lack of evidence and other reasons. However, the number presented is very high and the number of people impacted is very expressive. This is only in a Brazilian capital.

One fact that we must consider that contributes to the increase in cases of error is the number of prisoners awaiting trial. According to data from the Ministry of Justice, it was estimated that the prison population in June 2016 was 726,712 people and that 40% of prisoners did not have any type of conviction in the process.

Thus, the number of people imprisoned without having been tried, even by the initial jurisdiction, is a fact that contributes to the miscarriage of justice, because the delay in the trial that can result in the acquittal of the agent is an aggravating fact.

It should be noted that miscarriage of justice is not exclusive to Brazil, in the United States miscarriage of justice motivated the creation of the *Innocence Project program,* which seeks to review processes. In some cases, the officers were serving life sentences or awaiting the execution of the death penalty.

An advance that made it possible to review many cases was the DNA test, since the evidentiary production often carried out in the cases did not have the possibility of comparing the genetic data found in the investigations with the data of the accused.

The project in the United States has already managed to reverse 349 convictions, the project operates exclusively in that country, but helps in the implementation of its model in other places, such as the project that is being implemented in Brazil, such as the name *Innocence Project* Brazil, which is called a non-profit association created in December 2016, and considered as the first Brazilian organization aimed at addressing the serious issue of convictions of innocent people in the country.

Thus, the miscarriage of justice is a consequence of many causes, which must be faced by the law, always seeking to effect justice, in which the miscarriage of justice must be fought, and it is the role of the State to repair when it occurs.

It is worth remembering that the miscarriage of justice is an inevitability, that even if several mechanisms are created, it is almost impossible to extinguish it from the legal and judicial dialectic, as Vicente de Azevedo reminds us:

> This ineluctable inevitability of miscarriage of justice, which no law has ever been able to prevent, has led legislators to seek means of combating it effectively, and, once recognized, to repair it as far as possible; the miscarriage of justice that is still today, and will be for all time, the tremendous argument against the death penalty.

In this way, the criminal review is presented as one of the measures that seek to recognize and repair the error, as will be deepened in the next topic of this work.

CRIMINAL REVIEW

The miscarriage of justice, as we have already explained, can occur at various times of the jurisdictional provision, and the procedural means used to repair the judicial failure resulting from a final and unappealable criminal conviction is the criminal review, it is worth remembering that other instruments can be used so that, even if in a mediate way, the error is stopped, Such as, for example, *habeas corpus* and appeals, however, we will seek in this chapter to contemplate criminal review.

There are countless lawsuits that are judged daily in the various judicial instances in Brazil, and certainly miscarriage of justice can occur. One of the legal remedies presented to carry out the repair is the review of the process through the procedure established in Articles 621 et seq. of the Code of Criminal Procedure.

With this, the legislator was concerned with creating a mechanism that corrects the possible error of an erroneous conviction. Although in the division of the penal codification the revision is contemplated in the chapter on appeals, its legal nature is certainly considered as an autonomous action challenging a final decision.

Its competence lies with the courts for processing, I believe that perhaps for this reason there has been a mistake in the organization of the structure of the Code of Procedure.

We must consider that the criminal review should be considered as an exception and not a rule, placing it as an extraordinary means of challenge, since its purpose is to be an action independent of the one already prosecuted and in which the error persisted for various reasons. There is no deadline for its filing, since what will motivate the decision to carry out the review may be a supervening fact and is not conditioned to a deadline for its discovery.

The Federal Constitution in its article 5, item XXXV; states that the law will not prejudice the final and unappealable decision, but in the criminal review what is sought is the annulment of the process as a rule, and or the deconstitution of res judicata, a fact privileged by great doctrinaires such as Pontes Miranda, as Aury Lopes Junior recalls:

> It is an extraordinary means of challenge, not subject to time limits, which is intended to rescind a final judgment, sometimes playing a role similar to that of an action for annulment, or negative constitution in the Pontian lexicon, without being hindered by res judicata.

Another fact that we must consider in the study of criminal review is that the same article 5, in the previous paragraph, already focuses on the fact that the law cannot remove from the jurisdictional provision the injury to the right, which would occur if the criminal review were not contemplated by the legal system.

Vicente de Azevedo recalls that the function and foundation of criminal review is to repair the miscarriage of justice, which clearly brings with it the raison d'être, the foundation and the purpose of criminal review to be present in the legal system:

> The function, raison d'être, the basis of criminal review is the reparation of the miscarriage of justice. [...] Once the hypothesis has been established, and the eventuality of a miscarriage of justice is admitted, the function, the raison d'être, the foundation, the purpose of the criminal review is exposed: the recognition and reparation of the miscarriage of justice.

Thus, the basis of criminal revision is to do justice, to repair the miscarriage of justice practiced in the past, and the revision thus operates a flexibilization of res judicata in favor of justice.

We cannot claim that the relaxation of res judicata generates legal uncertainty, on the contrary, the fact that the procedural system provides for the possibility of an unjust decision being reviewed generates, in addition to legal certainty, social peace.

The rationality of creating the institute of res judicata is to protect the legal decision resulting from a process, which makes it impossible to eternally discuss a *dispute*, which thus seeks to find a deadline, even if not determined, but predictable for the resolution of the dispute.

Thus, the criminal review comes as a supplement that if an aberration occurs in the process, the wronged party may have the conviction decision reviewed. Justice is a superior right and fact to the immutable, inflexible and so-called just res judicata.

The permanence of error in the legal system also causes a social discredit in justice. Thus, the revision is a possibility of correcting an error that would be eternal, as highlighted by Brito, Fabretti and Lima:

The criminal review, therefore, allows the value of justice to override the value of legal certainty, because in fact it is a hypothesis of flexibility of the so-called res judicata, which is justified by the fact that the maintenance of an injustice sentence in the criminal sphere means the eternalization of a serious injustice, since it limits her freedom. which is a fundamental right.

We must also remember that the Brazilian system does not allow criminal review *pro societate*, since the relaxation of res judicata cannot be used as an argument for a criminal case that has become final and unappealable to be revisited.

The criminal review for the benefit of society would violate the guarantee found in the constitutional framework, since it would violate Brazil's adherence to the Pact of San José de Costa Rica, which in its article 8, item 4, provides: "The accused acquitted by a final and unappealable sentence may not be subjected to a new trial for the same facts."

Even if there is a miscarriage of justice, to the extent that it exonerates a guilty agent, it cannot be revisited, since it is argued that an unjust sentence in favor of the defendant is socially more favorable than

the lack of legal certainty, since the State would still have great accusatory force in the criminal action against the defendant in the criminal prosecution already carried out.

For Eugênio Pacelli, the prohibition of criminal review is based on the preservation of the citizen from suffering accusations of possible mistakes that occurred in criminal prosecution, as precepted:

The raison d'être of the pro *societate* prohibition is based on the need to protect the citizen from possible mistakes – excusable or not – found in criminal prosecution activity, the principle also acting as a guarantee of greater acuity and zeal of state organs in the performance of their functions (administrative, investigative, judicial and accusatory).

From a historical point of view, criminal review entered the national legal system in 1890 through Decree No. 848 of that year, an inspiration that was based on the French Code of Criminal Instruction dated 1806, the Brazilian decree allowed review before the Supreme Court of the time.

The criminal review action, as we have already highlighted, is understood as an autonomous action and, for its processing, some requirements must be proven.

Starting with the appropriateness, which is provided for in the hypotheses of article 621 of the Code of Criminal Procedure, it should be noted that for some time there has been much discussion about the legal possibility of criminal review against decisions rendered by the Jury Court, since it is presented as an argument that the review would affront the sovereignty of the verdicts.

On the other hand, it is argued that the review of the trials carried out by the Jury Court is possible because the preservation of the interests and rights of the defense is maintained, since what is presented as a prohibition is the *reformatio in pejus*, which is provided for in the sole paragraph of article 626 of the Code of Criminal Procedure, and in this sense

And so it seems to us because the principle of the sovereignty of the verdicts and even the guarantee of the Jury Court itself for the trial of intentional crimes against life were instituted in favor of the interests of the defense, and are therefore individual constitutional guarantees. [...]. It is also forbidden to *be reformatatio in pejus* (art. 626, sole paragraph, CPP), and it must be received as another guarantee made available to the citizen. The sovereignty of the verdicts is thus preserved, as the maximum penalty to be applied.

Thus, we understand that the sentences of single judges, judgments handed down by the courts, as well as the decisions of the Jury Court and other decisions of a condemnatory nature are subject to criminal review. Aury Lopes Junior, highlights the possibility of the judgment being the object and not the sentence, especially when the acquittal decision occurs, as follows:

> The revision may have as its object a conviction (or improper acquittal) or a conviction (or improper acquittal), because when the defendant is acquitted in the first degree and the Public Prosecutor's Office appeals, and the appeal is accepted, the conviction decision that is the object of

> the criminal review is the judgment rendered by the court, and not the sentence (acquittal) of the judge.

It is worth remembering that the criminal review may also be proposed in the face of an improper acquittal sentence, which is based on article 385, sole paragraph, item III.

Article 625 of the Code of Criminal Procedure, in its paragraph 1, brings as a mandatory requirement the monitoring of the certificate of res judicata and the documents necessary to prove the allegation, so it is therefore a requirement that the decision in which the review is sought can no longer be appealed.

We must remember that if the cause of the extinction is recognized before the final and unappealable decision, there is no possibility of the criminal review action, which does not remove the State's duty to repair, if there has been a miscarriage of justice, but the procedural means must be adverse to the criminal review, Brito, Fabretti and Lima highlight the impossibility of criminal review in these terms:

> However, if the cause of extinction occurs before the final and unappealable sentence of conviction, as is the case of the statute of limitations of the punitive claim in the intercurrent or retroactive modality, the forgiveness of the offended party, the peremption, the decadence, etc., the criminal review will not be applicable, as there is no criminal conviction at all.

Within the analysis of the assumptions, we must also study the identification of the *causa petendi,* which is listed in article 621. Thus, criminal review will be applicable according to item I: "When the conviction is contrary to the express text of the criminal law or to the evidence in the records".

This clause allows for criminal review under two arguments, in which the first is based on the conviction that was based on a contrary text of criminal law, and the second hypothesis is the decision that was in disagreement with the evidence in the record.

The first part of the article states that the sentence that is handed down in disagreement with the criminal law should be reviewed, and at this point we must make some explanations.

The first was due to the fact that the reading of the term of the criminal law encompasses its meaning in this article, which is broad if necessary, even if the causes of article 621 are restrictive impositions for some scholars.

In this term, the majority doctrine and jurisprudence have understood the plurality of the term criminal law, which encompasses both the substantive and procedural law and also any normative act that has been the legal basis of the conviction. In this sense, Brito, Fabretti and Lima:

> The term *criminal law* must be interpreted broadly, encompassing both substantive criminal law and criminal procedural law [...] Violation may also concern laws that are not strictly criminal, but which may have important criminal effects, as they relate to preliminary rulings, as occurs, for example, with bankruptcy law.

From this also Aury Lopes Junior that the same should be applied when the conviction decision based on a criminal type inapplicable to the agent, an example brought is that of a crime itself, for example the conviction of an agent for embezzlement and he is not a public official.

To the express text of the criminal law: which means a contradiction in relation to the criminal law, but also to criminal procedure, to the Constitution or any normative act that has been used as the basis of the conviction. [...] The same basis applies to a criminal sentence that makes an error in the subsumption of the facts to the criminal law, as can be the conviction for embezzlement of someone who was not a public official.

The second expansion refers to the fact that the legislative change, as a rule, does not generate the possibility of criminal review, a fact that, at the time of conviction, was a conduct typified in the law as illegal. And it was carried out, the conviction of the agent based on this provision and it was complied with, the measure imposed and, subsequently, the modification of the law is carried out, this fact induces the possibility of criminal review.

The third occurs in the sense that if there has been a conviction and there has been a normative or jurisprudential change, even if the criminal review is well founded, it will not be subject to compensation, because there is no error in the conviction in this sense, but a normative change.

The fourth expansion occurs in the sense that, if there is a normative change and it is still time for the sentence to be served, it is not necessary to file an autonomous action for criminal review, since it is possible to request the execution court, through a petition or even the use of the constitutional remedy of *habeas corpus* to request the application, as Eugenio Pacelli points out:

> When the amendment is legislative, it is not even necessary to file a revision; it is enough to request a simple petition to the judge of execution, or even the filing of *a writ of habeas corpus.*

The fifth and last expansion to be made here on this part of the article and which we consider pertinent is the possibility of filing a review based on the change in jurisprudential understanding that is most advantageous to the defendant.

For example, we bring the judgment in suspension in the Federal Supreme Court of the action that has as its object the declaration of the unconstitutionality of the criminal type of possession of drugs for personal use, through Ordinary Appeal 635.659, in which, hypothetically, when we imagine that the Supreme Court judges the declaration of unconstitutionality of the possession of drugs for personal use, This change in understanding is a fact that makes criminal review possible.

We understand that the jurisprudential change must be peaceful and relevant, there will not be a normative change, but a change in the applicability of the norm. However, this understanding is not easy,

as highlighted by Aury Lopes Junior, who understands that the change should be a break in paradigms, an example he brought refers to the unconstitutionality of the fully closed regime for heinous crimes:

An interesting issue is the (im)possibility of criminal review because the decision is contrary to the new, more benign jurisprudential understanding. Far from being a peaceful understanding, we agree with this possibility, as long as the change is effective and in relation to a peaceful and relevant understanding. It means an effective change of understanding, a paradigm shift, something similar to what happened, for example, in relation to the unconstitutionality of the fully closed regime for heinous crimes.

We also emphasize that it is possible to file a review if the conviction has violated the interpretation made by the Federal Supreme Court, as highlighted by Brito, Fabretti and Lima:

> However, the STF has already understood that if the conviction has violated the constitutional interpretation of the STF, even if stabilized after the attacked decision, then there will be a calm interpretation in the opposite direction to what was decided, the criminal review may be appropriate, in an expansive interpretation of the provision.

The second part of the article to be analyzed is the possibility of filing a criminal review when the criminal conviction is contrary to the evidence in the record.

The rescission of the sentence in this case is a fact that imposes the State's duty to indemnify the wrongly convicted. Criminal review is based on the evidentiary field and no longer normative.

Thus, the criminal sentence must contain, in general, a vast amount of possible evidence, allowing, in the course of the process, the adversarial process, the production of lawful evidence and also indicate in the decision the evidential ballast that brings the conclusion of the sentence, so the facts and grounds must be consistent with the evidence in the case.

The sentence itself is a complex and subjective act, formed by the evaluation of the evidence and the subjectivity of the judging agent who must form his conviction, so the jurisprudence also sought to pay attention to the erroneous way in the criminal review based on this part of item I of article 621 that, if there is evidence in the record can support the conviction decision, Although fragile, the intended termination will not be appropriate, because what is done in the review under this aspect is to carry out a new evaluation of the evidence.

For some scholars, this jurisprudential construction cannot be accepted in the light of the current Constitution, according to Aury Lopes Junior:

> Therefore, although traditionally only the conviction that is directly contrary to the evidence in the case file is subject to review, we believe that the democratic criminal process in accordance with the Constitution does not admit such reductionism.

For Brito, Fabretti and Lima, even if the revision based on the second part of item I is not accepted, the court must process the judgment of the revision based on the first part of the item, because the

judgment carried out without reliable evidence affronts reasonable doubt and may also violate the principle of favor rei, expressed in the maxim "*in dubio pro reo*":

> However, it is necessary to pay attention to the fact that if a global analysis of the evidence gathered in the case file is not sufficient to sustain the conviction, the criminal review will be appropriate, but for another reason, that is: to contradict the express text of the criminal law, under the terms of article 621, I, first part [...] when analyzing the body of evidence on which the conviction was based, To reach the conclusion that the evidence was not reliable to remove the "reasonable doubt" of innocence, would be contrary to the constitutional norm, specifically article 5, LVII, and the criminal procedural norm, specifically article 386, VII, of the Code of Criminal Procedure, since there was not enough evidence for conviction.

We must now enter the study of item II of article 621, which has the following wording: "When the conviction is based on testimonies, examinations or documents proven to be false". In this section, it seems to be clearer the function of the criminal review that is based on this legal basis, and also the fact that compensation is necessary.

If the evidence is false and has not been the basis of the judgment, there will be no interest in acting for the filing of the revision, and the proof of falsity may also be prior to the process. According to Aury Lopes Junior:

> The proof of the false may be made in the course of the criminal review itself, although the Brazilian courts, in general, do not admit a plenary cognition in the course of this action, requiring pre-constituted evidence.

In relation to this clause, to illustrate its applicability, we bring a recent case widely reported by the media, in which the salesman Atercino Ferreira de Lima Filho, 51 years old, was sentenced to 27 years for abusing his children, which was later denied by the alleged victims who stated that at the time they were threatened to make false statements. The action was promoted with the support of the *Innocence Project* Brazil.

We then move on to the study of the last item of article 621, III: "when, after the sentence, new evidence of the convicted person's innocence or of a circumstance that determines or authorizes a special reduction of the sentence is discovered."

For the Italian jurist Franco Cordero, new evidence is that which is not introduced in the process, and may be pre-existing or supervening:

> They are new pieces of evidence because they had not been introduced into the process, whether pre-existing or supervening; We also consider new evidence to be those that have been adduced, but that have been left out of the decision, as sometimes happens.

In this particular case, technological advances enable criminal review, such as the popularization of DNA testing, as occurred in the case of Adão Manoel Ramires, convicted in 1995 of rape and 2006 was acquitted, accused of having raped a mentally disabled neighbor, he was pointed out by the victim as the

perpetrator of the crime. As a result of the rape, the victim became pregnant and had twins, with the negative paternity test result the accused had the possibility of criminal review.

The statement in this section is certainly very clear, regarding the possibility of revision and the duty of reparation, Eugênio Pacelli also recalls that the evidence may have been ignored by the judge at the time of the initial judgment:

> It is also possible that this is evidence that was already in the records, but was ignored by the judge, who simply discarded it for the pronouncement of the sentence. From the point of view of "judicial cognition", it is a new document, as it has not yet been evaluated by the court.

Thus, we move on to the other requirements, in relation to the time of the process, article 622 leaves no doubt as to the deadline: "The review may be requested at any time, before the extinction of the sentence or after". Thus, there is no misunderstanding about the possibility of filing a review at any time, provided that, as previously emphasized, the criminal conviction has already become final.

In relation to who may be the proponent of the action, article 623 provides as follows: "The revision may be requested by the defendant himself or by a legally qualified attorney or, in the case of the defendant's death, by the spouse, ascendant, descendant or sibling", regarding the possibility of filing the action by the Public Prosecutor's Office, the majority understanding is that there is no legitimacy on the part of the Prosecutor's Office in promoting this action.

Article 624 regulates jurisdiction, it should be noted that the Superior Court of Justice and the Federal Supreme Court are competent to judge criminal reviews under the terms of article 102, I, J and 105, I of the Federal Constitution. In other cases, it will be the state courts of justice and the regional federal courts.

Regarding the procedure, the action begins with the filing of a request, with the structure of an initial petition, if the requirements are met and if there is no rejection of the plan, the Public Prosecutor's Office will be summoned to take cognizance of the process, there may be evidentiary production and if the process is ripe for judgment, the rapporteur will take it to the collegiate, as highlighted by Eugênio Pacelli:

If the initial complaint is not rejected outright, due to a deficiency of instructive documents (article 625, § 5, CPP), the new evidentiary material, if not the case of article 621, I, of the CPP, will be examined by the Public Prosecutor's Office and, subsequently, by the other members of the court.

Regarding the effects of the decision, the criminal review may acquit the defendant, change the classification of the offense, modify the sentence or annul the process, and the sentence of the convicted person may not be aggravated, according to article 626 of the Code of Criminal Procedure and its sole paragraph. In the event of an acquittal, the accused returns to the *status quo ante,* that is, the restoration of all rights lost as a result of the conviction, in accordance with Article 627 of the Code of Procedure.

The decision, in accordance with article 630 of the same code, may also establish, at the request of the interested party, the right to fair compensation for the losses suffered, according to the article, which is also based on article 5, item LXXV of the Constitution, which provides as follows: "The State shall compensate the person convicted of a miscarriage of justice, as well as the person who is imprisoned beyond the time fixed in the sentence", and the liquidation must be carried out before the civil court.

The responsibility for payment is described in the first paragraph of the same article: "For this indemnity, which will be settled in the civil court, the Federal Government shall be responsible, if the conviction has been handed down by the courts of the Federal District or Territory, or the State, if it has been issued by the respective courts."

It should be noted that Article 630, § 2, in its subparagraphs establishes two hypotheses in which there will be no duty to indemnify, namely:

> (a) if the error or injustice of the conviction arises from an act or fault attributable to the petitioner himself, such as a confession or concealment of evidence in his possession; (b) if the accusation was merely private.

For Brito, Fabretti and Lima and for a large part of the doctrine, the first hypothesis is an exclusion of strict liability of the State and the second in which there would be no reception by the Constitution, thus being revoked, because it is the State that carries out the condemnation and therefore should proceed with the compensation, as follows:

> In the first case, we find a hypothesis of exclusion of the strict liability of the State because the error arises, exclusively, from the fault of the convicted person himself. [...] In the second case, in which we find the hypothesis of private criminal action, the exclusion of the State's liability should no longer exist, because although the criminal action was initiated by the individual, the State is responsible for the conviction and, consequently, for the error.

Thus, it is understood that the second hypothesis in which the process is of a private action, the State must proceed to indemnify, since there was no reception by the Constitution of subparagraph b of article 630, § 2 of the Code of Criminal Procedure.

The filing of a criminal review may occur even if the convicted person has already died or, if he dies in the process, a curator will be appointed for his defense.

FINAL THOUGHTS

The present work sought to expose the study on judicial error, especially focusing on the error resulting from the criminal process, not seeking to exhaust the concept and situations in which the error resulting from the jurisdictional provision may occur.

The work was carried out in the light of the Federal Constitution of 1988, which established a new paradigm for the interpretation of the norms contained in the substantive and criminal procedural rules. Using the interdisciplinary study of the various areas of law, especially on the support of the constitutional, criminal, administrative and civil branches, also using concrete cases, we seek to illustrate reasons that can be decisive in the erroneous result of the process.

The accountability of the State is, of course, one of the measures that is sought with the declaration of the miscarriage of justice, being presented in an initial way a history of the civil liability of the State, for a greater understanding of this institute today and the three stages by which it has been modeled.

In the study, we also pointed out the lack of official data on convictions based on miscarriage of justice, and also on cases modified through criminal review processes.

We conclude that an advance that made it possible to review many cases and the finding of miscarriage of justice was the advent of DNA testing, since the evidentiary production often carried out in the cases did not have the possibility of comparing the genetic data found in the investigations with the data of the accused.

The creation of mechanisms such as the *Innocence Project* in the United States has already managed to reverse 349 convictions, and the implementation of the work such as *the Innocence Project* Brazil and are positive facts in the fight against miscarriage of justice.

The miscarriage of justice can occur at various times in the jurisdictional provision, and the procedural means used for its reparation resulting from a criminal conviction is, as a rule, the criminal review, and other instruments may be used to stop the error, such as *habeas corpus* and appeals.

We also conclude that the legislator was concerned with creating a mechanism that corrects the error of a conviction. Thus, the main basis of the criminal review, as it turns out, is to do justice and to repair the judicial error committed, the review operates the flexibility of res judicata in favor of justice and social welfare.

In addition, the work presents the conclusion that the Brazilian system does not allow the criminal review *pro societate*, since the flexibilization of res judicata cannot be used as an argument for a criminal case that has become final and unappealable to be revisited, for the benefit of society, as it would violate the guarantee found in the constitutional framework, arising from the Pact of San José of Costa Rica that in its article 8, item 4, which states: "The accused acquitted by a final and unappealable sentence may not be submitted to a new trial for the same facts."

We should also mention that theories adverse to error and indemnification are present in the law, such as the theory of risk assumed by the jurisdictional party, stating that the fact that errors occur in the jurisdictional provision are facts of life, since the jurisdictional parties chose to resolve their disputes through the judiciary. This is not to be applied in the Brazilian legal system, a fact that was consolidated

by the Federal Constitution, which conferred on the Judiciary the duty to provide jurisdiction, removing from the individual the condition of doing justice for his own reasons and forces.

We also conclude that miscarriage of justice materializes in many cases as police error, and thus should be understood as species of the genus miscarriage of justice that would encompass not only those exhausted by exclusive acts of the judiciary, but all those linked to its function. We conclude that the miscarriage of justice can often be linked to the criminal prosecution system, which does not keep the proper proportions.

We conclude, therefore, that, as mechanisms that can minimize the miscarriage of justice, the state strengthening of the Public Defender's Office and the Public Prosecutor's Office, especially with projects aimed at criminal review actions or other necessary measures, the creation of a permanent commission composed of members of the Public Prosecutor's Office, the Public Defender's Office, the OAB and members of civil society in commissions at the state level that would receive and carry out a prior analysis of requests for criminal review, in which convicts could refer their cases at no cost.

The creation of a law that regulates the criminal review process and facilitates the payment of compensation to those convicted.

The strengthening of the scientific police, the Public Prosecutor's Office and the state means of evidentiary production in order to minimize the erroneous production of evidence and better criminal prosecution.

And finally, the accountability of the procedural actors in a secondary way for the damages caused, not only the state agent, but also the public agent who intentionally influences the erroneous conviction.

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