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The Italian State, unaware of or ignoring the Brazilian Constitution, formalized a duly instructed extradition request, in the face of Mr. Robson de Souza, a well-known footballer who goes by the nickname Robinho, in view of the final conviction in the European country, whose sentence remained in nine years of imprisonment for the crime of rape [1]



This erroneous request was not followed up since,

considering that Robinho is a Brazilian by birth, he is protected by the Brazilian national Constitution (BC), which does not allow extradition, except for some circumstances that do not apply to the specific case [2].

Faced with the impossibility of extradition, the Italian State requested the transfer of Robinho's criminal execution based on article 100 of the Law 13.445/2017 [3] (Migration Law), as well as in the Extradition Treaty signed between the two aforementioned countries, enacted by Decree 863, of July 9, 1993.

As it understood, in theory, that such a request was possible, the Ministry of Justice forwarded the claim to the Distinguished Superior Court of Justice (STJ), in Brasília, which is responsible for homologating the foreign decision. Upon arriving, there was a dispatch from the Presidency with subsequent distribution to one of the Ministers of the Court [4].

It should be noted that, to date, the STJ has not yet ruled, through its Special Court, on the possibility of ratifying a condemnatory criminal sentence for the purpose of transferring the execution of the sentence in Brazil, notably in cases involving Brazilians, whose extradition is expressly prohibited by the Brazilian Constitution, pursuant to Art. 5th, LV, already mentioned.

In the present case, there are many points of discussion, of which three stand out: the possibility or not of ratifying a foreign judgment outside the hypotheses of the act. 9 of the Brazilian Penal Code (BPC); the existence or not of conventional and legal sources that

authorize the transfer of execution of the sentence between Brazil and Italy and, finally, the applicability or not of the Migration Law in the case of Robinho, a native Brazilian who committed the crime before the entry into force of the referred law.

The issue does not have a simple solution unless we ignore the basic principles of criminal rights and guarantees as a result of the proposed vile criminal case. Likewise, it is not desired that impunity be established.

Therefore, it is necessary to consider the best solution for the case under discussion.

The fact is that on the date the crime was allegedly committed by Robinho, there was no legal provision in force authorizing the homologation of a foreign conviction by the Brazilian Judiciary.

In fact, the BPC, in its article 9, I and II, only authorized, and still authorizes, the homologation of a foreign sentence in two hypotheses: "obligating the convict to repair the damage, restitution and other civil effects; and subjecting it to the safety measure".

It turns out that, in November 2017, the Migration Law came into force (Law 13.445/17), which, in its articles 100 to 102, introduced new cases of ratification of a foreign sentence, now allowing the granting of exequatur, that is, the authorization for compliance on Brazilian soil, also with the sentence of imprisonment.

Thus, from the beginning of its effectiveness, two questions with repercussions in the Robinho case arose: (a) do articles 100 to 102 of the Migration Law apply to native Brazilians? (b) can these provisions be retroactive to cover crimes committed before their entry into force?

Effectively, these questions should be resolved by the STJ and there is no simple solution to be defined.

Here are the likely hypotheses.

Firstly, it is necessary to analyze the scope of the Migration Law, so that, only then, can the possibility of it retroacting to harm the agent be analyzed.

According to its 1st article: *"the law provides for the rights and duties of migrants and visitors, regulates their entry and stay in the country and establishes principles and guidelines for public policies for emigrants"*, from which it can be concluded that their scope of incidence is restricted to the figures of the migrant and visitor, defining their rights and duties, but without reaching the native Brazilian.

The text of article 100 of the same Law reinforces this understanding by providing that the transfer of the execution of the prison sentence can only be requested or authorized in the cases of enforceable extradition [5], that is, it will only be possible to authorize the fulfillment of a prison sentence imposed abroad for persons subject to extradition, in this case, migrants and visitors, never native Brazilians.

Evidence of such non-applicability to native Brazilians, due to the prohibition of their extradition, is the provision in article 82, I, of the same diploma:

"Extradition will not be granted when: I - the individual whose extradition is requested to Brazil is a native Brazilian".

If the precondition for the ratification of a foreign conviction for the purposes of serving a prison sentence is the pertinence of extradition, and if extradition of a native Brazilian is not applicable, the conclusion is that it is not appropriate for *exequatur* to allow the execution of a private sentence in Brazil of freedom imposed abroad, when the convict has an original nationality.

Thus, it would only remain to apply the provisions of the BPC, whose article 9, as already mentioned, only authorizes the ratification of a foreign judgment for purposes of a civil nature or compliance with a security measure.

Once the stage of applying the new law to native Brazilians has been overcome, the analysis of the legal nature of the devices in question and their application in time.

This fact deserves special attention, since the content contained in articles 100 to 102 of Law no. 13.445/17 has repercussions in the procedural scope, which, in principle, could suggest the application of the *tempus regit actum* principle (Brazilian Criminal Procedural Code - BCPC, article 2), according to which the rules of a procedural nature have immediate impact and apply to ongoing or subsequent processes, regardless of being harmful or not to the situation of the agent.

Procedural law is not governed by the principle of non-retroactivity *in pejus*.

Despite their appearance as a procedural norm, the aforementioned provisions are of a criminal nature, as they are not limited to establishing procedures or ordering procedural acts, but, in addition, expand the punitive claim of the State, making the satisfaction of the punitive claim more intense.

Any norm that creates, extinguishes, increases or reduces the intensity of the right to punish has a criminal nature. If a penalty is enforced more rigorously, the nature of the rule is penal, if the penalty cannot be enforced, making it impossible to satisfy the *juspunitiois* (enforceable claim), it is also penal.

Being penal, it cannot retroact to harm the agent, in the words of Capez.^[6]

" Any norm that affects, in any way, the punitive or enforceable intention of the State, creating it, extinguishing it, increasing it or reducing it, is considered criminal. Thus, a norm that incriminates a new fact has a criminal character, as it is creating the right to punish for the state, in relation to that fact (...). Procedural is the norm that affects only the process, without splashing the punitive claim. This is the case of the rules governing pre-trial detention, prohibiting the granting of bail or provisional release for certain crimes, extending the term of temporary detention or forcing the convict to go to prison to appeal the conviction."

With regard to the application of the principle of immediacy of the procedural law, Aury Lopes Jr. resorts to the distinction between pure penal laws, pure procedural laws and mixed laws[7], asserting:

" Finally, there are mixed laws, that is, those that have criminal and procedural characteristics. In this case, the rule of Criminal Law applies, that is, the most benign law is retroactive and the most burdensome is not. Some authors call mixed norms with prevalent penal characteristics, since they govern an act carried out in the process, but which concerns the punitive power and the extinction of punishment"

When conceptualizing material criminal procedural norms, Guilherme de Souza Nucci [8] affirms:

" They are those that, despite being in the context of criminal proceedings, governing acts performed by the parties during the police investigation or during the procedural process, have a strong content of criminal law. And said content is extracted from its interrelationship with substantive law norms, that is, they are usually mixed institutes, provided for in the Criminal Procedure Code, but also in the Penal Code, as with peremption, pardon, waiver , decadence, among others (...). Once the rules are modified, as for one of them, there may be uncontested reflections in the field of criminal law. Imagine that a law creates a new cause of peremption. Although it concerns future situations, it is possible that, in a specific case, the defendant will benefit from the newly created criminal procedural rule. It must be retroactive in order to extinguish the accused's punishment, as its effect on substantive law is clear (art. 107, IV, BPC)"

Allowing the public power to satisfy its punitive intention is unequivocally criminal in nature. Thus, even if the new provisions were applicable to native Brazilians, in the event of the crime committed by Robinho — before the new rules came into force — the law could never retroact to harm the agent.

The Migration Law, which would supposedly open the possibility of serving a custodial sentence resulting from a foreign sentence on Brazilian soil, dates from 2017, much later than the date of the crime, which took place in 2013. As it is a criminal law, which interferes with the state *jus puniendis*, is subject to the constitutional principle enshrined in the BC, article 5, XL: *"The criminal law will not retroact, except to benefit the defendant"*.

For those who understand that the new devices have a hybrid nature, the consequence will be the same, always with a penal character prevailing over the merely procedural or procedural l.

Finally, it must be said that there is no bilateral treaty between Brazil and Italy that provides for the execution of criminal convictions, since the Judicial Cooperation Agreement in criminal matters between the two countries, in its article 1, paragraph 3, states that: "cooperation will not include the execution of measures restricting personal freedom or the execution of convictions".

Given the circumstances, the question is: will Robinho go unpunished? The answer is no, but he will have to be prosecuted like any other Brazilian..

The correct possibility will be the application of article 7 of the CP, which admits the extraterritoriality of Brazilian criminal law, consisting of the application of Brazilian law to crimes committed outside Brazil, since "they are subject to Brazilian law, although committed abroad."

One of the hypotheses of extraterritoriality is that of a Brazilian who commits a crime outside Brazil, applying the so-called principle of active personality, exactly Robinho's hypothesis, save for better judgment.

The process will have to be reopened in Brazil, subject to the principles of broad defense, contradictory and due process of law, resuming the criminal prosecution since its inception.

There is enough time for this, since the crime will only prescribe in 2033, considering the statute of limitations of 20 years, corresponding to the maximum penalty foreseen for the collective rape of a vulnerable person (CP, article 217-A, § 1, c.c. article 226, IV, *a*, and article 109, I).

Popular outcry or media claims for news cannot override legal certainty and constitutional principles, under penalty of the criminal process spectacle, whose harmful consequences are known throughout the world.

[1] Italian Penal Code – article 609-*octies* – commission of the crime of group sexual violence.

[2] Brazilian Constitution (BC), art. V, LI, *in verbis*: "*no Brazilian will be extradited, except for the naturalized one, in the case of a common crime, committed before naturalization, or of proven involvement in illicit trafficking in narcotics and similar drugs, as provided by law*". our translation.

[3] Law^o 13.445/17, art. 100: "*In cases where a request for enforceable extradition is applicable, the competent authority may request or authorize the transfer of execution of the sentence, provided that the principle of non bis in idem*"

[4] STF – Homologation of Foreign Decision Number 7986 – (X (2023/0050354-7)).

[5] CAPEZ, Fernando. The Robinho case and articles 100 to 102 of the Migration Law. Available at: <https://www.conjur.com.br/2023-abr-06/controversias-juridicas-caso-robinho-artigos-lei-migracao>. Accessed on: 04/13/2023

[6] CAPEZ, Fernando. *Curso de Processo Penal*, 27^a edição, São Paulo, Ed. Saraiva, 2020, p. 96/97.



[7] LOPES JR. Aury. *Direito Processual Penal*, 18ª edição, São Paulo, Ed. Saraiva, 2021, p. 124.

[8] NUCCI, Guilherme de Souza. *Curso de Direito Processual Penal*, 18ª edição, Rio de Janeiro, Ed. Forense, 2021, p. 166.

Fonte: <https://conjur.jumps.com.br/2023-jun-27/edson-vieira-abdala-probable-international-own-goal/>