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THE CONSTITUTIONAL PRINCIPLE OF PROPORTIONALITY IN CRIMINAL LAW[1]

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ABSTRACT

The present work aims to highlight the ways how the idea of proportionality of Criminal Law is capable of learning and building values and purposes of the legal order.

Keywords: Principle, Proportion, Law, Criminal System, Punishment.

[1] **Como citar este artigo científico**. SOARES, Ricardo Maurício Freire; OLIVEIRA NETO, Mario Fausto de; ALVES, Robson Cosme de Jesus. The constitutional principle of proportionality in criminal law. In: Revista Amagis Jurídica, Belo Horizonte, Ed. Associação dos Magistrados Mineiros, v. 15, n. 3, p. 309-341, set.-dez. 2023.

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1 THE OUTLINES OF A CRIMINAL LAW MADE OF PRINCIPLES

The positivist formalism is incapable of answering increasingly more complex questions from the *ius puniendi*. The legal-criminal order can not be efficient in front of a neutral and socially distant positivism that aims to reproduce the exact legal language. Recognizing the value-based and teleological character of the legal phenomenon highlights the need to identify and rationalize the principles that justify and guide the interpretation of the Criminal Law in any of its instances.

This axiological and teleological nature of Criminal Law is discussed by Jesús-Maria Silva Sanchez (1999, p. 116), who states that "the configuration of the various legal systems for imputing the fact to the subject, as well as the general guarantees of each system, have a clear dependence on its legal consequences, its configuration and its teleology"

In front of the profusion of estimates that are related to the legal order, reflecting the quirks of certain human cultures, Criminal Law must be understood as an axiological and teleological system as it enforces socially shared values and finalities. Such characteristics allow a systematic congruence, with which it is possible to obtain the security of a non-contradictory penal order, which also potentializes the material correction that allows the performance of justice in a concrete case.

Therefore, as stated by Saldanha (1988, p. 244), with the constitution of a structure in which there are values, every order carries significance. If the order exists and is followed and accomplished, it is clear that its accomplishment confirms its significance. Every interpretative activity must aim for something understandable in a concrete sense. The social meaning has evidence as it is exteriorized in a concrete plan, which allows the legal-criminal system to constitute an order that is understandable in the social-historic plan and in which the share of human values is processed.

The evolution of legal epistemology has been enforcing the diversity of styles of knowledge about real objects. Regarding cultural objects, it is possible to have the experience of reinvigorating them. To understand a phenomenon means to involve it in the totality of its goals with its meaningful connections. In contrast, the natural objects, which do not substantiate human meaning, only allow the explanation, which is obtained by referring such phenomena to a cause. To explain would be to discover in reality what in its own reality is contained, and, in natural sciences, the explanation can be seen as straightforward and neutral, refracting itself from the world of values.

This results in the situation in which, when we explain something, we describe it ontologically while, in the activity of understanding, it is important to have the existence of a positive contribution of the subject, who will perform the necessary connections and will execute a evaluative task. The social orders, including law-criminal, appear as objects of human culture, building significant realities that must be interpreted correctly.

To understand criminal order, it is important to use an adequate method of empirical-dialetical nature which dynamizes the epistemological act of understanding. As stated by Machado Neto (1975, p. 11), it is a singular merit of the argentinean law philosopher Carlos Cossio the finding of the fact that the epistemological act of understanding is performed with an empirical-dialetical method:

“It is also the work of Cossio that essential complement to the epistemology of understanding when he discovers that it occurs through an empirical-dialectical method. Empirical, because it is about facts, since cultural objects are spatiotemporal real, as we have already seen, and the way of encountering them is an empirical, perceptive way, since we perceive the substrate with sensitive intuition, seeing, hearing, smelling , tasting, feeling... And dialectical because understanding occurs in a dialectical work, something like a dialogue that the spirit undertakes between the substratum and the meaning, to understand the meaning in its substratum and the substratum through its meaning”.

As such, the meanings of the legal-criminal order are revealed in a dialectic process, in a mobile sense of materiality of its substrate in a spiritual sense as a text that is linguistically structured with reasons that inspired its creation. This dialectic movement manifests itself, metaphorically, as the transit between text and reality, between rule and ruled situation, in an open and infinite process illustrated by a spiral.

This results in a criminal rule designated to a social scope in which the value depends on the hermeneutic agents, based on concrete circumstances of each legal situation. The axiological and teleological understanding of Criminal Law tries to delimit the objective, the *ratio essendi* of the normative precept, guiding itself by the legal principles to, as a result, determine its real meaning. The delimitation of the normative meaning requires the grasp of the goals for which the legal normativity was elaborated, finding basis in the axiological consistency of the legal principiology.

By sharing such understanding, Reale (1996, p. 285) states that the interpretation of a law requires its knowledge related to its social goals to, effectively, determine the sense of each of its devices. This is the only way to make it applicable to every case related to those goals. The first measurement of the modern hermeneutic agent consists in knowing the social finality, as it is this finality that allows the law to penetrate the structures of its particular meanings.

As a consequence, the finding that the meaning of the legal law does not wait for its interpreter , as if the object is not bound to the subject - the hermeneutic agent, emerges. This happens because knowledge is a phenomenon that consists in the apprehension of the object by the subject, not of the object per se, but of the object as an object of knowledge.

As it is indicated by Maria Auxiliadora Minahim (1999, p. 48), legal rules mark the space in which the judge can thread, but it does not overtake the rights that become concrete in the moment of its application. The theory of the criminal types tried to contain the descriptive formulation of the objective circumstances of crime, but it cannot stop the insertion of evaluative elements. So, the judge has the task of decodifying the symbols contained in the rule to inseminate it with sense and clarity.

Therefore, the object of knowledge is the creation of a subject that puts or supposes certain conditions to be noticed. To think of a knowledge of things about themselves makes no sense, but the knowledge of phenomena, or things already characterized by those forms, is a condition of the possibility of knowledge. Due to the constitutive function of the subject in the field of the ontognosiological relation, it is not possible to isolate the interpreter of the hermeneutical object in the area of Criminal Law.

Such ideas dialog with the studies of Pasqualini (2002, p. 171), who states that meaning does not exist only on the side of the text nor on the side of the interpreter, but as an event that happens in a double helix: from the text (which is exteriorized and comes forward) to the interpreter; and from the interpreter (who dives in the language and reveals it) to the text. They know the distance that separates themselves and they know that, when together, they hide themselves (veiling) and show themselves (unveiling). Far from forced metaphors, the relationship between text and interpreter is similar to the one between musician and instrument: without the resonance box of a violin, its cords do not have any value, and they, without a violinist, have no utility.

The knowledge of the cultural objects do not identify with the object of the knowledge, a conclusion that is even more significant regarding the apprehension of human culture as such objects, being significant realities or objectifications of the spirit, demand more creativity of the subject to be revealed in their plenitude. As Criminal Law integrates the cultural world, the knowledge of the legal rules is submissive to the vicissitudes that singularize the gnoseological process of the human spirit.

The straightforward meaning of the normative models of Criminal Law is a construction of the subjects of legal interpretation. Every rule applies based on the interpretation attributed by its applicant. The meaning of the legal rule is not a voluntary act produced in the moment of the creation of the law, but an energy that regenerates continually as it is produced in an infinite pregnancy. The legal-criminal interpretation does not rethink what was already thought, it results in what was already being thought by the legislator to determine the real wishes of the law.

Such ideas dialog with the studies made by Bergel (2001, p. 320), who states that the question is not about the interpreter being a medium or a scientist, if they practice the legal or political actions nor that the interpretation participates in the creation of the application of legal rules. This depends on the freedom or the fidelity imposed with reference to the positive law. So, the law only has meaning with the application given to it and the power conceded to the interpreter shows the fragility of the normative order: no law commandment receives its sense from a legal essence; it becomes meaningful with its application based on its interpretation.

By combining the existence of security, resultant of the demand of strict legality, with the tireless impulse for transformation, the principle of modern Legal Law requires the overcoming of traditional subjectiveness - *voluntas legislatoris*, in favor of a new understanding of objectivism - *voluntas legis*, highlighting the role of an interpreter in the exteriorization of the meanings of the legal area, conceding value and goals to the punitive system.

Christiano Andrade (1992, p. 19) agrees with those ideas and states that Law can be seen as an intelligent combination of stability and movement without refusing social transformations. This way, Law intends to be stable and transformable. However, it is important to state that perfect security would result in the absolute immobility of social life, making human life impossible. Law must guarantee a reasonable amount of order and social organization in a way in which the order satisfies the sense of justice and other values.

So, a dimension that reveals the estimative and finalistic nature of Criminal Law must be considered. So, the role of the legal principles is important to indicate the fundamental values and goals of the legal order, indicating the basic guidelines for the interpretation, the application and the creation of the totality of the legal-criminal order.

This is what Carlos Nino (1974, p. 77-80) states when he says that the dogmatic theories of Criminal Law do not limit themselves to promote the deduction of the rules of the positive order, but allow the inference of principles not included in the express system of the legislator. As such, legal theories allow the reconstruction of a legal system by establishing guidelines that complete their gaps or by establishing criteria to solve the eventual conflicts that should be equated by different areas of positive law.

The definition of Criminal Law, therefore, must aim to congregate the normative-formal aspect (rules) with the estimative-material aspect of the legal system (principles), resulting in a set of legal principles and rules that define criminal acts, the penalties for them and the conditions to apply such penalties.

Regarding the topic, Yacobucci (2002, p. 359-360) states that "it is essential to recognize the presence of a certain framework of values made explicit through prescriptions that provide consistency and foundation to criminal reasons in terms of criminal policy, dogmatics and legal interpretation. It is, therefore, about the penal principles that, in addition to the principles of law in the general

field of legal thought, express a certain value or end and are present to allow the understanding of criminal matters, evaluate them, guide them and prescribe them. It is possible to talk about this, and in a generic sense, of a philosophy of penal law in terms of understanding it as a complete explanation of an evaluative order on the strata of meaning of criminal activity and criminal knowledge".

So, the principles present themselves as a source of justification of Criminal Law, legitimating concrete decision making. This happens because the legitimation of Criminal Law is related to its socially evaluated goals. As such, it is the task of law enforcers to abandon the mechanical and automatic vision of strict application of the criminal rules, as the principles allow the interaction between the criminal system and the group of values and assets that integrate human interaction.

The knowledge of the effective performance of the principles in the legal-criminal system is important not only to guarantee the imposition of limits to *ius puniendi*, but also to understand that the legal dogmas act not only based on pre-established rules, but also making use of the principles for the treatment of concrete situations of the human life. This statement means, in other words, that incriminatory rules that are not in consonance with the evaluate-material character of the guiding principles of the criminal system could be considered as non-consistent to the reality.

Furthermore, the criminal principles act as bonds between the legal prescriptions and the concrete decisions based on justice, legitimating the interpretative action. So, every law needs interpretation, as their legal meanings can be distinct. So, the criminal principles act as normative interpretation guides, making the possible meanings of a legal text clear with its sights on the performance of the fundamental goals and values of the legal order. As a result, they avoid excessive discretion in decision making, keeping the transparency of the teleological and of the axiological fundaments that are the basis of a hermeneutical option.

As Ricardo Andreucci (1989, p. 90) says, the interpretation of the criminal normativity is possible only with the principles related to this relevant legal area, serving as instances of the hermeneutical control that avoid the legal arbitrariness and the indetermination of the totalitarian systems of Criminal Law. So, the task of the interpreter and applier of Criminal Law is permeated by the ultimate finality of every punitive basis: the performance of the idea of justice.

2 THE LEGAL-CONSTITUTIONAL SYSTEM AND THE FUNDAMENTAL PRINCIPLES OF CRIMINAL LAW

As stated before, principles are basic sources for any field in the Law studies, with effects in the formation and in the application of laws. It would not be different regarding Criminal Law, which could be understood as an open and, therefore, permeable system with social values and finalities that embody legal rules and principles.

Cezar Roberto Bittencourt (2003, p. 9) indicate the principles of Criminal Law as "Limiting Principles of the Punitive Power of the State", or even as "Fundamental Constitutional Principles to Protect the Citizen" or simply as "Fundamental Principles of Criminal Law of a Social and Democratic State of Law", with all of those principles working as ways to protect the citizen. According to the referred author, the principles inserted in our Constitution have the prerogative of guiding the legislator, the administrator and the judge in adopting a system of criminal control focused on the function of the fundamental rights and of a criminal policy that is based on freedom and human dignity.

Such principles could be understood by reading each Constitution, which work as a congruent point of axiology and teleology of the legal order. The legitimacy of Criminal Law is bound to the strict respect for the principles as they are expressed on *lex mater* (e.g. principle of legality, principle of equality, principle of culpability), and to the principles that are not inserted in the

constitutional text (v.g. principle of insignificancy, principle of the minimal intervention, principle of proportionality), but the result from the legal-political model of the Democratic State.

As observed by Marcelo Rodrigues da Silva (2003, p. 182), Criminal Law serves society as an instrument of social pacification and of harmonization of the collective livelihood. Its function, according to modern criminal doctrine, is the preservation of legal assets. Those find their source in the State Magna Carta. The Constitution, as an expression of the wishes of the people, must irradiate its values to every human action, affecting Laws. This way, as it hits the elementary prerogatives of a community, like freedom and dignity, Criminal Law must be in perfect sintony with the guidelines of *Suma Lex*.

The legal value of *ius puniendi* is related to multiple criminal principles, as there should be the regard for multiple limits of the exercise of the right of punishment, because, in the Democratic State, characterized by the prevalence of the fundamental rights and guarantees, many criminal principles are articulated and complemented in the task of delimiting the punitive power of the state. So, there are legal principles that have ample reception in the legal order due to the political significance of its historic appearance, or due to its importance in a legal controversy. Those effects are relevant for the Democratic State, creating an axiological and teleological level, with an unlimited reflex in the understanding of positive rules.

As such, Regis Prado (1997, p. 66-68) states that, in the Democratic State, the determination of elemental values of community must be delimited by the Constitution, with the legislator taking into consideration the guidelines from the Magna Carta and the values that it upholds to define legal assets and to use *jus puniendi* in face of the limiting character of the criminal guardianship. The criminal sanction done by sacrificing a legal asset should only be administered when there is danger for another asset of, at least, identical social importance.

3 THE CONSTITUTIONAL PRINCIPLE OF PROPORTIONALITY IN CRIMINAL LAW

The content about the principle of proportionality is intrinsically associated to other principles also related to the dosage of the sanctioning instrument of the State, upholding special relevance in the legal order with the statement that the raising demand for penal guardianship by different parts of society is resulting the progressive commitment to the fundamental rights of the citizen.

Historically, the notion of proportionality in the establishment of crimes and punishments does not present itself as something new, as it was already expressed in the ancient *pena debet commensurari delicto* and it constitutes significantly the contents of the law of talion. Another reference can be found in *Magna Carta Libertatum*, 1215, that establishes that the free man cannot be punished for a minor offense without proportionality, and that this man should be punished accordingly depending on the severity of his crime. In a further moment, the idea of proportionality was influenced by the ideals of freedom of the illuminism, which defended the adoption of a criminal legislation that conformed to the criteria of social utility.

A typical example of the modern philosophy is found in the studies performed by Cesare Beccaria (1994, p. 46-48), who stated that the figures of the offenses would be determined by the essence of the punishment and classified by the severity of each offense, and that one of the major brakes of the offenses is not the cruelty of the punishment, but its infallibility, thus, the certainty that such punishment would be upheld in a moderate way. According to the referred author, among the different ways to punish and to apply them proportionally, it is important to choose the means that should cause in the public the impression of efficiency and durability while also being the least cruel possible.

As such, the constitutional principle of proportionality guides the construction of incriminating types through a strict selection of actions that deserve and that do not deserve a severe action of Criminal

Law, creating a limit to the activity performed by the legislator and other interpreters, as this establishes the borders of the legitimacy of the State in restricting the fundamental rights of citizens (v.g. life, freedom and possessions). As proportionality draws the line between legal assets stated by the Constitution, it configures a principle that could be adopted in any conflict related to values, like those related to eventual limitations of the Public Authority regarding individual rights and guarantees.

Proportionality manages the conflicts between social security and the individual interest of freedom, making it valuable, after analysis of such values, the one with the highest value. This is why it has influence over the creation and the application of the criminal law. This is possible because the legislator must respect, even if generically and hypothetically, the proportion between the proposed sanction and its real necessity, integrity and proportionality regarding the damage to the legal asset and to the punishment. This is also possible because, in the concrete cases of punishment, the Judiciary Branch, in front of a disproportional criminal type, could help to combat the material unconstitutionality resulting from the lack of proportionality in the creation of an incriminating penal type.

As stated by Juliana Cabral (2005, p. 162), the principle of proportionality must be considered not only to determine the *quantum* and the quality of the punishment through the proportion between the damages to the legal asset and the countermeasure enforced by the State, but, before that, the authorities must remember to consider the impossibility of impose punishment, acting the the indication of the incriminated conduct and respecting the proportion between its potential damages and the official authorization to harm the legal asset of titularity of the ones who practice them.

The judgment of proportionality is not, however, an absolute judgment as if there was a single constitutional truth, but there is, in fact, a constitutional logic that is susceptible to being translated into an indeterminate plurality of proportional possibilities. So, it is

possible to exist more than one hermeneutical result that is related to the principle of governability, being responsibility of the Judiciary Branch, through the material control of the constitutionality of the laws, to restrain eventual excesses performed by the authorities in the densification of the constitutional values and goals. This is due to the fact that the judges can restrain the strictness of the criminals laws, interpreting them according to the constitutional order, with the principle of proportionality presiding over the understanding of the criminal normativity, being in illegal acts, being in the sanctioning of the hierarchical superiority of the Constitution. The principle has a relevant role in finding the most appropriate solution to problems, taking into consideration the range of social values formed in the essence of the Magna Carta.

As stated by Mariângela Gomes (2003, p. 220), if it is not possible to interfere in the discretionary power of the criminal legislator, the judge must verify if the proportion between competence and discretionary power was respected. So, the judge acts on the hypothesis in which there is no balance in such choice. The reason for this is found in the criteria of abuse of power, because of the hypothesis in which there is a lack of balance.

Far from creating opportunities for a “dictatorship of the judges”, for, allegedly, giving rise to the voluntary character of the interpreter and the breach of the separation of powers, the usage of the principle of proportionality in Criminal Law presents itself as an instance of hermeneutic control, as it potentializes the realization of the fundamental values and goals of the Constitution when associated to the constitutional principle of justification of the legal decisions.

Certainly, the constitutional requirement of motivation of judicial decisions makes the judgment of proportionality visible and functional, since the reasoning of the decision-making process gives the judiciary greater objectivity, guaranteeing greater control of its decisions by the legal community, in addition to serving as a parameter for future legislative activity, when parliament is responsible for drafting new laws, by balancing the various constitutional values.

Furthermore, the constitutional principle of proportionality, within the scope of Criminal Law, can also be broken down into sub-principles: adequacy, necessity and proportionality in the strict sense. The subprinciple of suitability means that the measure must be suitable to achieve the intended purpose. The subprinciple of necessity requires that the measure be the only one necessary, with no way of choosing another equally effective measure that does not aggravate the affected rights. Lastly, the subprinciple of proportionality in the strict sense embodies the imposition that the legal system must keep a reasonable balance or proportion with the legal interests it intends to protect.

Therefore, the principle of proportionality operates in three important spheres, which seek, above all, to balance measures that may invade individual freedom, when penal intervention proves to be dishonest and disproportionate in the strict sense. The lack of proportionality in a Democratic State of Law would lead to legislative excess, aggravated by the axiological and teleological inconsistency in the orientation and creation of the penal punitive process. This is why, in the event of a conflict between fundamental rights (e.g., public security versus individual freedom), the principle of proportionality acquires paramount importance, by guiding the examination of the value that should prevail in the specific case, taking into account the subprinciples of adequacy , necessity and proportionality in the strict sense.

Henceforth, it is necessary to examine the specificities of each sub-principle in the field of Criminal Law.

4 THE SUBPRINCIPLE OF ADEQUACY

According to the principle of adequacy, Criminal Law can and should only intervene when it is minimally effective and suitable to prevent the crime, and its intervention should be ruled out when, from the perspective of criminal policy, it proves to be inoperative, inadequate or counterproductive in preventing crimes. The concept

of adequacy requires examining the instrumental quality of the means, in order to identify its aptitude to reach the proposed purpose, thus demanding an adequacy between the means and the end to be achieved by the punitive system.

According to Tereza Agudo Correa (1999, p. 151-152), the creation of the aforementioned subprinciple of adequacy in Criminal Law is associated to conceptions created by Von Liszt and de Mayer, who established, as a criteria for criminal intervention, that the legal asset gathers the following attributes: to be worthy of protection, to be in need of protection, and to be capable of penal guardianship.

In the criminal sphere, it is an indispensable assumption, for state intervention to be suitable in the protection of a given legal asset, that the purpose of the norm can be achieved by it. Thus, when criminally protecting a certain legal interest, what must be considered, in terms of criminal suitability, is the extent to which the incrimination will effectively fulfill the objective that Criminal Law proposes to achieve. In this sense, Criminal Law must prevent criminal types from producing a criminogenic effect, endangering others or the protected legal interest itself.

In line with the requirement that the penalty must be suitable, maintaining a certain proportion between the offense and the penalty, in order to achieve an end, the principle of suitability implies, in addition to the need for the penalty to be suitable for the protection of good legal, that it is qualitatively adequate to achieve its purpose.

Therefore, the effectiveness of criminal law is strongly related to the subprinciple of adequacy, because it indicates that the legitimacy of this legal branch is linked to the capacity of its prescriptions, in order to be respected by its addressees, and also to the capacity rules to protect the legal good. The judgment of suitability of the norm consists of an eminently empirical assessment, since it is from the way in which the norm is received by society, demonstrated by the conformation of the behavior of the individuals to the values explained therein, that its suitability for a given task is assessed.

The social effectiveness of penal norms comprises three distinct plans or levels: effectiveness of the norm (or of the threat); effectiveness of the penalty (or its application); and effectiveness of the bureaucratic apparatus of criminal prosecution. The effectiveness of the norm (or the threat) concerns the predisposition of the norm, verified when it was elaborated, to protect the legal interest. The effectiveness of the penalty (or its application) is related to the expectation that, in the future, the norm will be observed by those who violated it, which means that the effectiveness of the sanction considers the efficiency of the penalty based on the analysis of its cost-effectiveness, to be measured during its execution. In turn, the effectiveness of the bureaucratic apparatus translates the scope of the specific objectives of each state body (eg, Police, Public Ministry and Judiciary).

Following what Mariângela Gomes (2003, p. 132) stated, it is possible to understand that the adequacy to the scope of the penal guardianship is related to the instrument, to the integrity of the criminal type and the sanctionary device to pursue the legitimate result of guardianship. This way, it is possible to state that the judgment of suitability of criminal law is characterized in terms of instrumental rationality and not as a finalistic discretion. The proof of integrity is not enough to make use of Criminal Law, so there should be the capability of the mean (penalty) to reach the scope.

Most of the time, it is impossible for the legislator to predict all the results arising from the existence of the incriminating norm. Although the enormous difficulty posed to the legislator is not questioned, in the sense of predicting, with accuracy, all the consequences of a certain legislative act, it is necessary to evaluate, at least, the potentiality of the rule being obeyed by the majority of the community. In fact, attention to the adequacy subprinciple does not mean that in each case the result must be effectively achieved, but that there is a probability of achieving a given scope.

Even if errors occur in legislative forecasts, considering that the legislator may fail in his choice and that, eventually,

social transformations change the way the norm is received by the community, it is up to the legislator to interfere and correct the law, as well as o how it is up to the Judiciary Branch to declare the normative act unconstitutional, as it is unsuitable for the criminal protection of legal interests.

In terms of adequacy, what is evaluated is the suitability of the sanction imposed to carry out the preventive task, and not the fact that it is placed in proportion to the infraction. So, what is sought within the scope of the principle of suitability is to establish the limits within which it is possible to speak of adequate punishment to prevent the criminal practice. It is in this context that it is stated that the decisive point in this question concerns the acceptance of punishment as a reasonable means to a legitimate end. Therefore, the limits of the criminal sanction must be analyzed, since penalties that are too low or too high end up being unfit to offer the necessary protection to the legal interest.

That is why it is important to analyze the criminogenic effect of the criminal law, because there are some criminal modalities that, despite the fact that they refer to legal assets that lack criminal-legal protection, end up generating social effects that are different from the objectives that justify the typification of the conduct. Therefore, all the social consequences caused by incriminating penal norms must be appreciated. It is at this moment that the subprinciple of adequacy must be applied, as it plays an important role in guaranteeing the citizen, since it denies legitimacy to incriminations that, although presumably suitable for the purpose of public security, produce, through the penalty, significant damage to individual rights.

5 THE SUBPRINCIPLE OF NECESSITY

According to the teaching of Paulo Queiroz (2002, p. 101-102), if the imposition of the penalty is not a metaphysical success, but a bitter necessity of a society of imperfect beings, it follows that

this intervention is only justified if it results absolutely necessary, that is, to the extent that it cannot really be dispensed with, or even to the extent that better and more effective protection cannot be guaranteed by less violent instruments. And only when its uselessness as a deterrent has not been demonstrated, otherwise there will be no logical relationship between means (criminal law) and end (crime prevention).

In this sense, the subprinciple of necessity requires that the interest protected by the criminal law be relevant in order to justify the delimitation that it will inevitably cause in the sphere of individual freedom. Evidently, on the one hand there is the protection of the legal good, on the other the related threat to the freedom of the recipients of the punitive system. Therefore, Criminal Law is not necessary in the face of any attack on criminally protected legal assets, but only in the face of any serious aggression against socially relevant legal assets.

As noted by Luiz Flávio Gomes (2002, p. 45-46), based on this parameter, Criminal Law is necessary in the current stage of civilization and, according to the perspective of the Rule of Law and fundamental rights, this intervention must be the least as radical as possible, as it must act exclusively to avoid injury or the concrete danger of injury to criminal-legal interests. In other words, criminal law is not necessary for any other type of infraction that is harmful or concretely dangerous for the protected legal interest. Therefore, penal intervention is only necessary when the actual injury or concrete danger occurs.

It can also be said that the idea of necessity is projected, within the scope of Criminal Law, on the principles of offensiveness and minimal intervention, serving as axiological and teleological parameters for the delimitation of interests that justify the mantle of criminal protection.

With regard to the principle of offensiveness, it can be said that it is linked to the requirement that an offense against an essential

legal interest occur. In this way, penal intervention requires the existence of an offense, an aggression, directed at this legal interest. The principle of offensiveness responds to liberal convictions, leaving the offense as a mere violation of a duty outside the context of Criminal Law. Consequently, this principle seeks, above all, to purge from the criminal scope the incriminations that intend to protect mere ethical-moral values and that are shown to be harmless for the protected legal interest.

The principle of offensiveness in Criminal Law intends to radiate its effects in two different planes. It serves not only as a guide in the legislative activity, therefore guiding the legislator, at the exact moment of the formulation of the criminal type, with the aim of linking it to the construction of legal types endowed with a real offensive content to socially relevant legal interests, if not also as a criterion of interpretation, addressed to the judge and the interpreter, to exhort them to verify, in each concrete case, the existence of the necessary harmfulness to the protected legal interest.

In this vein, Gianpaolo Smanio (2000, p. 83) maintains that this principle directly binds the legislator and the interpreter. The legislator must configure crimes as conduct that offends a legal interest, so that only facts that cause damage or at least the danger of damage to a legal interest have criminal relevance. The interpreter, in turn, must reconstruct the types of crime with the help of the criterion of the legal good, excluding behaviors that are not offensive to the good protected by the incriminating norm.

Indeed, the principle of offensiveness in Criminal Law would play a dual role: the political-criminal function, at the moment when it is decided to criminalize the conduct; and the hermeneutic function, at the moment when Criminal Law is concretely interpreted and applied. The first function of the principle of offensiveness constitutes a limit to the State's right to punish, addressing the legislator. The second function configures a limit to the Criminal Law, destined to the applicator of the criminal law. These functions are

not incommunicable, but, on the contrary, complementary. So much so that, when the legislator does not fulfill its role of criminalizing conduct that is offensive to a legal interest, this task is transferred to the interpreter of Criminal Law.

On the other hand, with regard to the idea of minimal intervention, the principle under discussion establishes that Criminal Law only promotes interference in cases of real need, and only when other legal branches prove to be inefficient to provide protection to legal interests. This is because the State does not only use Criminal Law to protect the interests of society, but, on the contrary, has a huge range of other branches of Law that also lend themselves to protecting the interests of the human community.

As Yuri Carneiro Coelho (2003, p. 113) rightly points out, the principle of minimal intervention establishes that criminal law should only act when it is necessary to protect legal assets considered fundamental to peaceful coexistence in society and only when less burdensome forms of intervention are not sufficient to avoid damage to the legal interest. Only conduct that, effectively, obstructs the satisfactory coexistence of society can be raised to the category of crime.

In this sense, the principle of minimal intervention can mean both the abstention of Criminal Law from intervening in certain situations, either due to the legal interest achieved, or the way in which it was attacked, but it can also justify its use in terms of the last argument. . In this case, the punitive system is called upon to intervene in a way when there are no other more effective instruments of social control.

Thus, as asserted by Renato Silveira (2003, p. 28-29), the so-called principle of minimal intervention, also known as *ultima ratio*, seeks to outline the north and frontier for State action, advocating that criminalization is only legitimate if it constitutes means necessary for the protection of a given legal interest. If there are other forms of social control, capable enough to protect this good, such criminalization will prove to be inadequate and not recommendable.

Hence the finding that the principle of minimal intervention refers to the verification of the degree assumed by the binomial subsidiarity-fragmentation. Subsidiarity and fragmentation are two characteristics of Criminal Law that flow from the principle of minimal intervention and that, likewise, are also erected to the category of principles. This happens because Criminal Law should only punish injuries to legal assets and social infractions if it is indispensable for community life. Where the means of Civil Law or Public Law suffice, Criminal Law must withdraw, which demonstrates the fragmentary or subsidiary nature of criminal protection. Therefore, what is not pertinent to other branches of positive law must be of interest to the criminal legal system and, therefore, enter within the scope of its regulation.

With regard to the notion of fragmentation, Maura Roberti (2001, p. 102) points out that, as Criminal Law is the most drastic form of intervention in social life, its fragmentary character imposes the essential limit on a totalitarianism of state protection, as it is of a material limit to the exercise of the *ius puniendi*, which has a political-criminal nature and which finds its origin in the principle of minimal intervention.

With regard to criminal subsidiarity, Alice Bianchini (2002, p. 142) maintains that the criminalization of certain conduct that seriously offends goods or fundamental values or that has exposed them to suitable danger is only justified if the controversy could not be resolved. resolved by other means of social control, whether formal or informal, less costly, which configures Criminal Law as a subsidiary legal branch.

As can be seen from the above, the standards of offensiveness and minimal intervention densify and materialize the subprinciple of necessity, a corollary of the application of the constitutional principle of proportionality within the criminal system. These distinct criminal principles must be connected to each other so that the content of

each one of them can be understood and fulfill the intended limiting effectiveness of the *ius puniendi*, within the institutional framework of the Democratic State of Law.

6 THE *STRICTO SENSU* SUBPRINCIPLE OF PROPORTIONALITY

Like the other mentioned subprinciples, the *stricto sensu* subprinciple of proportionality unfolds proportionality in a broad sense, linking it to the examination of merit and necessity in the application of the criminal sanction. The subprinciple of proportionality in the strict sense implies a relationship of compatibility between the gravity of the unjust and the severity of the penalty at the legislative moment, as well as, in the jurisdictional sphere, it establishes that the application of the criminal sanction is proportional to the gravity of the concrete facts committed.

Certainly, the justice of a penalty rests on its quality of being proportional, in the abstract and concrete senses. This is the reason why the subprinciple of proportionality is intended for the legislator, imposing the proportion between the gravity of the unjust and the gravity of the sentence imposed, and for the magistrate, demanding the search for the proportion between the seriousness of the concrete social situation and the penalty applied to the offender.

According to the teaching of Tereza Correa (1999, p. 276-277), the historical development of the principle of proportionality in the strict sense can be found in the work "Of Crimes and Punishments", by Cesare Beccaria, who dedicates a chapter of his work on the proportion between crimes and penal sanctions. Also, in Article 12 of the Declaration of the Rights and Duties of Man and Citizen, the principle of proportionality in the strict sense was expressly proclaimed, stipulating that the law should only provide for penalties that are strictly necessary and proportionate to the crime. Although the principle is not usually expressly contained in current

constitutionalism, the doctrinal and jurisprudential understanding prevails that this principle has constitutional roots in the Democratic State of Law.

In this sense, the penalty indicates the importance that is given by the legal order to the protected good, and must be established based on the seriousness of the infraction, in order to fulfill the socio-educational function of Criminal Law, by demarcating the values whose protection is considered necessary. to public safety. The criminal sanction must therefore keep a link of adequacy between the offense and also between the criminally protected legal interest itself, since more serious penalties must safeguard the most important legal interests.

The problem lies, however, in determining which are the most relevant legal assets for society, creating obstacles to verifying the constitutionally due amount of penalty for each incriminating type. Despite this difficulty, the doctrine has formulated parameters to identify the constitutional bonds and limits imposed on the ordinary legislator and the judge, in order to guide the establishment of penalties proportional to the various affronts to the legal-penal rights.

Worth noting is the systematization offered by Mariângela Gomes (2003, p. 158-168), for whom the application of the subprinciple of strict proportionality can be guided by the following criteria: illegitimacy of fixed penalties; minimum penalty requirement; maximum penalty requirement; illegitimacy of excessively wide penal margin; and proportionality ratio between the minimum penalty and the maximum penalty.

By the criterion of “illegitimacy of fixed penalties”, the fixed penalty becomes illegitimate because the application of the penalty in the concrete case is not guided only by the principle of legality. On the contrary, at that moment it is up to the interpreter, as provided for in article 5 of the CF, to proceed with the individualization of the penalty based on the factual situations established, referring

to the seriousness of the fact and the culpability of the agent. The law enforcer must choose the proportional penalty for each specific concrete case.

According to the “minimum penalty requirement” criterion, the justification for the provision of a legal minimum penalty is related to the devaluation of the offensive fact to the legal interest. The setting of the legal minimum of abstract penalty fulfills the function of absolutely ratifying the hierarchical placement of the protected good, showing the degree to which the penalty can be reduced. This parameter is modulated by the aforementioned principle of offensiveness. The offense must be observed by the legislator and the judge at the time of the concrete application of the penalty, in order to verify whether the conduct effectively injured or endangered the protected legal interest. If it were not required to establish a minimum penalty corresponding to the devaluation of the fact, it could be reduced until it came to correspond to the concrete devaluation of the conduct, becoming part of Criminal Law, an immense range of behaviors, whose harmful content is axiologically repulsive.

In turn, the “maximum penalty requirement” criterion refers to the need to define a maximum penalty, since the absence of a maximum legislative limit will allow an assessment by the judging body, in order to allow the imposition of penalties. exaggeratedly high penalties, giving rise to dangerous judicial discretion.

In turn, the criterion of “illegitimacy of excessively wide criminal margin” means that the interpretative space cannot be very extensive, even if the law enforcer effectively has the power to adjust the law to the concrete case. This is because an excessively wide margin propitiates, in theory, the evaluative incongruity of the hermeneutic, since attacks on different legal interests end up being punished in a similar way. This leads to the finding that an excessive expansion of the margin between the minimum and maximum limits of the prescribed penalty makes it possible to disrespect the basic principles of equality and legal certainty.

Finally, the criterion of “proportionality between the minimum penalty and the maximum penalty” calls for a rational

quantification of the reprehensibility of conduct that offends a given legal interest. Among the aforementioned maximum and minimum limits, individualization should be sought in the establishment of the criminal sanction, in order to control the discretionary power of the criminal judiciary.

In addition to the examined criteria, other parameters can be listed to guide the application of the strict proportionality subprinciple, such as: the degree of offense to the protected legal interest; the severity of the attack; the subjective element of the devaluation of the action; the community importance of the criminal--legal interest; the social harmfulness of criminal behavior; the mode of execution of the crime; and the forms of participation of the agents in the commission of the crime.

In view of the above, it can be stated that the principle of proportionality in the strict sense emanates from the essential values of a Democratic State of Law, protecting the dignity of citizens against the arbitrariness of public authorities, by raising limits to the creation and application of criminal sanctions. The penalties must be consistent with the seriousness of the criminal behavior, in order to achieve the purpose of criminal protection with the least sacrifice to the private sphere of citizens. This is because the interference of Criminal Law is not legitimate when there is a marked imbalance between the penalty to be applied and the aggression practiced by the criminal. This proportionality appears as an essential element for the materialization of the idea of justice, since the reaction of the Criminal Law, to be legitimate, must be proportional to the human action that violates the legal interest.

7 CONCLUSION

In light of the foregoing, it can be stated that:

a) the emergence of the post-positivist movement allows overcoming the reductionism of the legal phenomenon to a set of legal rules, opening up room for the axiological treatment of law and the effective use of general principles of law as normative species;

b) the legal principles present a morphology and normative structure different from those verified in the examination of the rules of law, since the rules govern a determined legal situation, in definitive terms, while the principled norms express an evaluative option, without regulating a specific legal situation, nor refer to a particular circumstance;

c) legal principles seek to carry out the supplementary, grounding and hermeneutic functions, offering, in the latter case, the parameters for an interpretation/application of law which, by overcoming the subsumptive model, proves to be more legitimate and compatible with social facts;

d) positivist formalism proves to be incapable of answering the increasingly complex questions of the *ius puniendi*, since the legal-penal system cannot be effective in the face of a neutral and socially distant positivism, which is intended for the exact reproduction of legislative language;

e) the recognition of the evaluative and teleological nature of the legal phenomenon highlights the need to identify and rationalize the principles that justify and guide the interpretation and application of Criminal Law;

f) the definition of Criminal Law should, therefore, seek to bring together the normative-formal aspect of the rules with the evaluative-material aspect of the principles, figuring this branch as the set of legal principles and rules that define criminal conduct, the penalties for them correspondents and the conditions for which such penalties are applicable;

g) the Democratic State of Law, marked by the prevalence of fundamental rights and guarantees, contemplates several penal principles that are articulated and complement each other in the task of delimiting the state's punitive power, constituting an indeclinable axiological and teleological level, with broad reflection in the understanding of Criminal Law;

h) the principle of proportionality can be understood as a commandment to optimize maximum respect for every fundamental right in a conflict situation, to the extent legally and practically possible, translating a content that is divided into three partial principles: adequacy, enforceability and proportionality in the strict sense;

i) adequacy requires an empirical relationship between the means and the end: the means must lead to the achievement of the normative purpose, whereby the administration, the legislator and the judge have the duty to choose a means that simply promotes the end;

j) the need involves two stages of investigation: the examination of the equal adequacy of the means, to verify whether the different means equally promote the end; and the examination of the least restrictive means, to examine whether the alternative means less restrict the collaterally affected fundamental rights;

l) proportionality in the strict sense is examined in view of the comparison between the importance of achieving the purpose and the intensity of the restriction of fundamental rights;

m) the principle of proportionality works as an important parameter for balancing values, guiding the weighing of potentially conflicting legal principles, as a hermeneutic alternative for the collision between the fundamental rights of citizens;

n) Criminal Law, in the Democratic State of Law, is subject to the guarantees arising from the principle of legality, combined with the need that fundamental rights are not diminished except in view of the need to preserve other rights that are equally essential for human beings;

o) the principle of proportionality, in the Brazilian legal and criminal system, enables the construction of a criminal system consistent with constitutional values and with social reality itself, aiming to assess the adequacy and the real need for the choice of criminal regulations, in order to that the method chosen by the interpreter is the least onerous for the fundamental rights of citizens;

p) the principle of proportionality imposes limits and represents a kind of defense of the fundamental rights and guarantees of citizens, whether in the proportional choice of penalty, in the effective choice of the incriminating criminal type, in the dosage of the penalty in the concrete case or in the option between the values most important in a given historical-social moment;

q) the principle of proportionality manages conflicts between social security and the individual interest in freedom, enforcing, after comparing these values, the one with greater weight, having an impact both on the creation and application of criminal law;

r) the constitutional principle of proportionality requires the delimitation of a fair measure between the restrictive means available to the State and the ends achieved with the limitation of the private sphere of the criminal, because the restriction of the rights to freedom, dignity, life or equality is only legitimate when it proves to be indispensable for the protection of fundamental goods of social coexistence;

s) the constitutional principle of proportionality, within the scope of Criminal Law, can also be broken down into sub-principles: suitability, necessity and proportionality in the strict sense;

t) the principle of adequacy establishes that Criminal Law can only intervene when it is minimally effective and suitable to prevent the crime, and its intervention must be ruled out when, from the perspective of criminal policy, it proves to be inoperative, inadequate or counterproductive in the prevention of crimes;

u) the subprinciple of necessity requires that the interest protected by the criminal law be relevant in order to justify the restriction that it will inevitably cause in the sphere of the fundamental rights of the individual;

v) the standards of offensiveness and minimal intervention densify and materialize the subprinciple of necessity, a corollary of the application of the constitutional principle of proportionality within the criminal system;

x) the subprinciple of stricto sensu proportionality implies a compatibility relationship between the seriousness of the unjust and the seriousness of the penalty at the legislative moment, as well as, in the jurisdictional sphere, establishes that the application of the criminal sanction is proportional to the seriousness of the crimes committed, having in view of the observance of the following fundamental criteria: illegitimacy of fixed penalties; minimum penalty requirement; maximum penalty requirement; illegitimacy of excessively wide penal margin; and proportionality ratio between the minimum penalty and the maximum penalty.

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Recebido em: 12-11-2023

Aprovado em: 19-12-2023