

Is the Legislator of Sanctionatory Law Attentive to Criminal Policy?*

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In this article, a reflection is carried out on the excessive use of sanctionatory laws, such as criminal law and the administrative sanctionatory law. In this sequence, an appeal is made for the legislator, prior to the creation of crimes, or other infractions, to take into account, in particular, criminal policy, but also criminology, as disciplines of von Liszt's total criminal law science (*Gesamtsstrafrechtswissenschaft*).

Keywords: criminal policy, criminology, penal law, crime, penalty, administrative sanctionatory law, offence, fine, *Gesamtsstrafrechtswissenschaft*

Introduction

The assertion that we live in a hypercomplex society, in which the *risk—that* we must avoid at any cost—is “lurking” almost everywhere, is irrefutable. A society that is increasingly regulated, ensures to not leave anything out of what is legally relevant. Therefore, it's important to anticipate *everything* by creating rules and duties and sanctioning its violation and other conducts that violate the legal system. We live, then, immersed in administrative, criminal, and civil laws, including unlawful acts of the most diverse nature, and, even so, it seems that all of it is still not enough. At the same time, we forget that the more hypertrophied the law is in general and particularly the sanctionatory law, the less effective their sanctions are because violation and consequent application of sanctions gets trivialized.

In line with this, we persist in ignoring the assertion of Oliveira Ascensão (1980, pp. 417-419) made long ago, according to which the idea of the fullness of the legal system is a position defeated¹ a very long time ago. Finally, we insist on rejecting the idea of “a space free of law”², since, inattentively, we forget that the fragmentation of legal nature obliges that the “legal regulation must be limited to the essentials of the human condition, and, in no case, to the unessential” (Costa, 2021, pp. 45, 48). Instead, honoring the idea of subsidiarity

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¹ The author tells us that this fact is visible in the provision of the rule stating that “by lack of a similar case, the situation is resolved by the rule that the legislator would create following the spirit of the system” (No. 3 of art. 10 of the Portuguese Civil Code).

² Of course, this free space of law's idea does not correspond to the one that Kaufmann talks about, found in “legally relevant and legally regulated behaviors but cannot be properly valued neither as lawful nor as unlawful” as the case of an exclusion cause of guilt workings (Kaufmann, 2009, p. 339). In our country, this position is not equally followed, for example, by Figueiredo Dias (2020, p. 471).

and fragmentation of legal nature, we should keep in mind that the so-called “non-legal” conducts—as “forms of behavior that are not legally regulated because the law is not at all interested in them” (Kaufmann, 2009, pp. 338-339)—not only should exist, but it must be in large numbers.

These considerations are even much more significant, if moving from a legal system of private law to another one having a sanctioning nature in a broad sense. Therefore, let’s think about criminal law, a legal system highly harmful to citizens’ rights, freedoms, and guarantees. And let’s see how it has expanded unrestrainedly because of new protected legal interest with criminal dignity like those related to the environment, consumption, taxation, economic and financial sectors, informatics, and other technological means, and those within the scope of regulated sectors, in general.

In line with the increasing number of crimes related to new protected legal interest, we have also verified a significant expansion of the mesh of punishment. That’s because the legislator frequently resorts to the so-called crimes of duty, crimes of abstract endangerment, and cumulative crimes (*Kumulationsdelikte*), among others, in these new intervention areas of criminal law. In turn, the rules of objective and subjective imputation get more flexible, and that’s how the criminal law of danger or risk is developing.

Therefore, there is the breaking point between the criminal law, which is a legacy from the post-enlightenment period, and this new criminal law of risk (Torrão, 2020, pp. 862 ff.), an expansion and administrativization of criminal law as Silva Sánchez has classified it (2006, pp. 131-164)³ in due course. In turn, the doors are wide open for the “intensified criminal protection workings”, dispensing with the protected legal interest, and, precisely, meeting the sedimentation of criminal law of risk (Dias, 2019, p. 159). It is worth saying that all that happens, although some voices—that we follow—are heard and defending the existence of criminal law of protected legal interest (Costa, 2013, particularly pp. 169, 173).

In line with this, at the Max-Planck Institute for Foreign and International Criminal Law, in Freiburg, Sieber stated, in 2008, that the “new research program object” is “the current challenges faced by criminal law due to social, economic and political changes”. Thus, the new Max-Planck Institute research program focused on three goals we can briefly define as the “analysis of ‘effective alterations’ of security risks” and ideas, “analysis and critical evaluation of the legal changes” considering those alterations, and the “development of new answers to the relevant criminal-political challenges” (Sieber, 2008, p. 270).

Therefore, it’s not a local question, but a global one. And it is equally pertinent to refer here that we heard with a start the words of the President of Portuguese Supreme Court of Justice—Henriques Gaspar—at the opening session of the first Competition, Regulation and Supervision Court conference, held on 31 March 2016. About the “neo-punishment movement whose goal is efficiency rather than justice”, the author said then that, at the European level, the “criminal nature” of an infraction doesn’t depend on qualification and *nomen* in Portuguese law, but rather on the integration of the so-called “autonomous criminal European notion” (Gaspar, 2018, Point 6). Afterward, he added that the “criminal nature of infractions results from an alternative or cumulative combination of several criteria” (Gaspar, 2018, Point 6); and “a legal qualification of national law certainly is a criterion” (Gaspar, 2018, Point 6) but not exclusive, as there are other criteria. Thus, he says, under the Portuguese administrative sanctionatory law, an offence could have a criminal nature (Gaspar, 2018, Point 6).

³ About the new criminal law to face the economic and financial crisis, cf. Silva Dias (2017), pp. 445-468.

However, we are certainly not here to defend a minimum criminal law based on an anthropocentric or personal monist conception, as Hassemer has staunchly defended it. So, we think we can't give up criminal law, the *Nebenstrafrecht*, that has never stopped slowly growing since the end of World War II until now, whether due to environmental crimes, crimes arising in regulated sectors, or for so many other reasons. However, we neither are taking the side of expansive theories' proponents as the "life relations as such" protection defended by Stratenwerth (Dias, 2019, p. 160).

Much to the contrary: given the historical moment we are living, we cannot avoid accepting, as a principle, another criminal law that, even so, has the protected legal interest as its lighthouse. This protected legal interest can and should be supra-individual and, in some cases, is connected to a human being through one of its specific dimensions, as the consumer, the user of sophisticated technology, or related whether to an economic and financial fund or to the stock exchange.

That being so, it is time to ask: what criminal law do we want? The answer essentially requires the verification of the following points. So, firstly, we will have to face the violation of a protected legal interest with *criminal dignity*, which needs to be protected "because it is recognized by the community" (need of criminal protection). Meanwhile, this violation must be "considered socially harmful", thus, worthy of punishment (Costa, 2017, pp. 194-195). Just that way, the criminal law will have the legitimacy to intervene, respecting subsidiarity and *ultima ratio* intervention, without interfering with the update of new collective protected legal interest' need—meant to contain damages and some dangers we are facing (Vilela, 2013, p. 280 ff.). Quite the contrary, regarded as a "piece of reality, always communicating with axiological density, and having criminal dignity attributed by the legal and criminal order" (Costa, 2017, p. 186), the catalog of protected legal interest is not stagnating in space or in time.

We can, however, tighten the mesh of what is criminally relevant and invoke principles that contribute equally to the maximum restriction of conducts criminalization when creating the legal type of crime. We are referring, among others, to the principles of determinability (a type must be accurately and rigorously made without indeterminate concepts, as much as possible), social adequacy (the conduct is accepted by citizens, since committed in a specific temporal and spatial context, not reaching, for this reason, criminal relevance), and the minimum of criminal dignity (although socially inappropriate, the conduct does not reach the threshold of criminal dignity) (Costa, 2017, pp. 244-247).

Certainly, the ideal would be that criminal law intervention is limited to the so-called classic criminal law or justice, designed to protect individual protected legal interest, in part tributaries of criminal law that emerged from the enlightenment. However, as we have already seen, this is not possible.

Notwithstanding what we have said, it is important to bear in mind another sanctionatory law which is administrative sanctionatory law, in the Portuguese and German cases. A law primevally created to purify, precisely, the criminal law of unlawful acts without any ethical-social relevance, and for this reason, that should not be part of it, lastly, a law aiming to sanction the violation of administrative duties and the arrangement and promotion's norms of community living. However, it has begun to develop as a law very close to secondary criminal law, as insofar each specific sector of human activity (economic, environmental, economic-financial) claimed, on the one hand, to make certain conducts a crime, and on the other, offences of administrative sanctionatory law.

What do we mean by that? Well, just that the regulatory law, from that reference point on, particularly in Portugal from the nineties of the last century, started to provide two types of infractions very distinct from each other: on the one hand, those we mentioned above, on the other, those that are very close to secondary criminal law, insofar as they constitute infractions that protect protected legal interest with criminal dignity, but which do not require penalties. Nevertheless, they are behaviors that must be disapproved not with a penalty, repeat not, but only with a sanction from administrative sanctionatory law, which is a fine.

In other words: we are facing a sanctionatory law which—regarding this second type of administrative offence that protects protected legal interest with criminal dignity—is close to secondary criminal law, as it protects its assets, but its infractions do not require a penalty, only an administrative offence (a fine) (Vilela, 2013, p. 307). These are what Achenbach, in 2008, called “‘major’ administrative offences susceptible of causing relevant harm” which, in our point of view, live indeed very close to secondary criminal law. And for this reason, there are movements changing crimes to offences and vice versa, depending on whether the disciplines of criminology and criminal policy demonstrate the need for a penalty or just a fine (administrative offence) (Achenbach, 2008, p. 9; Vilela, 2013, p. 233).

The truth is that the Portuguese and German administrative sanctionatory law has ample strong guarantees for the defendant. And there is a rule for administrative offences under which the defendant may appeal to jurisdiction whether to appeal against any measure or order from the administrative authorities (Article 55 of Decree-Law No. 433/82), whether to appeal against a final decision ending with a conviction (Article 57 ff. of the mentioned law) (Vilela, 2015, pp. 153-155). But it is also faster. However, this fact should not stop the legislator from using it whenever necessary.

So, to this point, it is now important to appeal to the father of modern German criminal law’s legacy, von Liszt, which is, precisely, the joint science of criminal law, including dogmatics or criminal law in the strict sense, criminal policy and criminology.

As we know, von Liszt brought not only the eminently practical science that is criminal law in the strict sense into the fight against crime’s limelight, but also criminal policy and criminology. In line with that, the author emphasizes that “criminal law is, and should be properly a *systematic* science; for only the organization of knowledge as a system makes possible to subject all particularities to the empire of principles” (von Liszt, 2003, pp. 71 ff.). That is, in criminal law, we will find the fundamental principles, the ultimate ideas, “the provisions of law so as to form a complete system, exposing in the general part of the system the concepts of crime and penalty in general, and in the special one, crimes and penalties that law has been providing against them” (von Liszt, 2003, pp. 71 ff.).

In turn, having in mind the application of a penalty under criminal law, von Liszt argues that to undertake this task it’s firstly necessary to carry out “scientific research into crime on material and external demonstration and its internal causes inferred from the facts” (von Liszt, 2003, p. 146 and following). So, we deduce from this that then it is not enough for the science of Criminal Law to provide penalties as “observation [carried out by criminology] shows every crime results from two groups of conditions: on the one hand, *the individual nature of the delinquent* and, on the other, *the external, social and especially the economic relations that surround him*” (von Liszt, 2003, pp. 149 ff.). Finally, regarding criminal policy, he emphasizes that it only has to do with the delinquent individually considered, and that the “criminal policy requires (...) that there should be a tailor-made

penalty determined depending upon the nature of the delinquent, gender, and who suffers damage (...). In this requirement, there is, on the one hand, a reliable criterion for the critique of law in force and, on the other, the starting point for the program of future legislation development” (von Liszt, 2003, p. 153).

Through a modern interpretation of von Liszt’s vision of this new joint science of criminal law (*Gesamtsstrafrechtswissenschaft*), and conceiving it as Faria Costa nowadays, we realize that, among many others, besides these three sciences, others belong to it: criminal procedural law, disciplinary law, sentences execution’ law, and administrative sanctionatory law. There’s no dispute between these sciences about the lead, as each one of them is autonomous, and the joint science of criminal law presents itself “as having a consolidated and comprehensive approach of matters concerned with crime, delinquent and victim” (Costa, 2017, p. 83 and following).

So, we deduce from this that legislator’s options consider criminology data. It means that criminal policy is influenced by criminology—a discipline that is the starting point for analyzing a crime. None of that will make any sense if there is no science of criminal law in the strict sense, or rather—in another language—the legal dogmatic of criminal law.

Therefore, given mainly criminal policy and criminology, the legislative production process of criminal or non-criminal offences is much easier: we resort to an empirical study carried out by criminology to collect statistical data on a certain conduct that infringes environmental and economic rules, or other; we study the violation of a rule reiteration by a community, its percentage, where and when it decreases and where and when it intensifies as well. And in possession of all these data, criminology delivers the result of its work to another discipline, namely criminal policy.

In the first place, criminal policy is responsible for analyzing these data delivered by criminology, and from then on verifying essentially the following: does the abstract criminal framework provided by law prove to be successful in punishing a given crime, in the sense of contributing to lower the number of occurrences of that same crime? Are prime sanctions of criminal law no longer justified for certain conducts because, for example, they have practically disappeared? Is that other behavior not being effectively fought with a fine, and does it offend a protected legal interest with criminal dignity? Is there still another conduct that’s not deserving of social disapproval?

As we understand, it will be the umbilical relationship between criminology and criminal policy, or, at least, it should be, that dictates the creation of any unlawful act, whether a crime or an administrative offence or even if it has merely an administrative nature.

However, we should not think that the connection between the disciplines in question stops there. If not, let’s see. We saw above some of the methodological canons to which the intervention of the Criminal Law must obey. These are operational rules of criminal law in the strict sense, which we must not obliterate at the moment of criminalization. But, above all, what can play a prime role in the containment of crimes and administrative offences is the choice of the legal type of crime (or administrative offence to be adopted). That is to say: offences of breach of duty and abstract endangerment should be avoided, as well as accumulation offences.

To this point, we must conclude: for example, if the legislator realizes that criminology shows him the ineffectiveness of this administrative sanction to dissuade the agent from committing an infraction that harms protected legal interest with criminal dignity, punished with a fine, then the legislator—that must pay attention to

criminal policy—will have to change the infraction nature from an administrative offence to a crime, as this is justified. On the contrary, if those two disciplines work concludes that the infraction, which violates one of those protected legal interest, can be effectively fought without the need for a penalty, but only with a fine, then the legislator must carry out the reverse process, passing it on from criminal to the administrative offence scope⁴.

We immediately perceive the relevance of von Liszt's joint science of criminal law in an effective fight against criminality. But there is another question. Considering criminology and criminal policy, has the criminal legislator ever wondered if he can successfully repress infractions with overcriminalization and disproportionately over-regulation, as we are witnessing? It doesn't seem to us!

That being so, we tend to disagree with the conclusion reached by Monteiro, according to whom von Liszt's thought, as a rule, has no current application. Notwithstanding, we recognize the author is right about emphasizing interdependence between all the disciplines that von Liszt integrated into the joint science of criminal law (Monteiro, 2017, p. 874). Besides, it is to note that we have also carried out an up-to-date analysis of this joint science of criminal law following Faria Costa, insofar as we did not give priority to any of its components conceiving it as a large continent, as explained above.

Conclusion

Fundamentally, the question we put in the title is how we end this text: at present, because of the environmental issues occurring across the globe, because of massive use of information technology and constant internet use, because of the last economic and financial crisis, because of a pseudo-protection of the personal data, because of highly sophisticated and transnational crime, and now because of the pandemic that persists and is not leaving, penalties, offences, administrative sanctions, and other are constantly springing up, growing, developing, and multiplying, and there is, in addition, the very severe sanction from the economic and subsistence point of view of many companies.

Thus, if so, we ask the following question: will the legislator of sanctionatory laws be attentive to criminal policy, and—why not also ask—to the current *Gesamtsrafrechtswissenschaft*?

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⁴ Still following what is said in text, it should be noted that if the legislator creates offences when he should create crimes—given the rapidity characteristic of administrative offences—he does what some doctrine calls a fraud of tags, which is against von Liszt's legacy, and it is unconstitutionality as well. On the contrary: if creating a crime when the two disciplines data indicate that it should be an administrative offence, then we are again facing unconstitutionality for violation of the principle of proportionality—in the broad sense—under paragraph 2 of article 18 of the CRP which, by the way, is not admitted either.

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