

THE FINE PENALTY NATURE AND ITS APPLICABILITY TO LEGAL PERSONS AND SIMILAR ENTITIES

A NATUREZA DA PENA DE MULTA E A SUA APLICABILIDADE ÀS PESSOAS COLETIVAS E ENTIDADES EQUIPARADAS

Manuel A. Barros Lopes 

Universidade Portucalense-Infante D.
Henrique, Portugal
manuel.aba.lopes@gmail.com

Abstract

The crisis of the penal system and the autonomy of the patrimony reinforced the penalty of fine. The corporation was strengthened as a concrete functional organization of capital and work. Core generator of criminal charge capable of action and guilt, objectionable behaviour, and offensive protected harm principle or social danger. Punishable with reference to the penalty of imprisonment and with uniformity of the days of fine in the type. The penalty of fine returned genuine criminal penalty related to

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Corresponding author:

manuel.aba.lopes@gmail.com



ethical-normative devaluation, aided by binomial reference/uniformity, by the constitutive of distinction of the penalty of fine and disclosure of two aspects: extrinsic and intrinsic. Applicable to legal entities for impossibility of detention *per rerum natura*, legal prohibition without reversal for non-compliance.

Keywords: corporation. nature of the fine penalty. limits. equalization. referibility.

Resumo

A crise do sistema penatário e a autonomia do património fortaleceram a pena de multa. A pessoa coletiva robusteceu como funcional organização concreta de capital e trabalho. Centro gerador-recetor de imputação penal capaz de ação e de culpa, comportamentos censuráveis, ofensivos de bens jurídicos protegidos. Punível por referência à pena de prisão e com uniformidade dos dias de multa cominados no ilícito-típico. A pena de multa volveu pena criminal genuína conexa com desvalor ético-normativo, auxiliada pelo binómio referibilidade/uniformidade, pelos constitutivos de distinção da pena de multa e revelando duas vertentes: extrínseca e

intrínseca. Aplicável às pessoas coletivas por impossibilidade de detenção *per rerum natura*, proibição legal e não reversão em caso de incumprimento.

Palavras-chave: pessoas coletivas. natureza da pena de multa. equiparação. referibilidade.

INTRODUCTION

The theme under study is on the nature of the fine and its applicability to legal persons and similar entities. Of high relevance in the face of the fluency of the collectivities devoted to financialization in a networked world of snapshots, generated in liberalization and globalization that have changed the liberal paradigm of classic legal goods, personalistic and individual, in a multitude of diffuse legal goods of the environment, economy, corruption, cybercrime (simplified by AI) and activated by the spread of organizations in the century XX.

The European movement of legislative recommendations aimed at the accountability of legal persons, encouraged the direct punishment of harmful behaviour of legal assets, when practiced in the name and in the interest of organizations, directly holding collective entities accountable. Although systems that operate *sanc-tions administrative, punishments quasi-penal or criminal penalties*, a trend arises us European and transversal systems to hold organizations accountable at the core of criminal law.

The Portuguese legislature has adopted the penalty of fine as more consistent consequence for punishing criminal behaviour **of the** collective persons and similar entities and given that they are not imprisonable *per rerum natura*. But despite the inclusion in the criminal core, and the reference sanctioning equivalent of the frame of the prison sentence provided for natural persons, has not yet found a complete solution suffraged in the purposes punitive and the specific nature of the collectivities. Which, summons sceptical and critical doctrinal arguments. Moreover, an equivalent *penalty reference* from collective to individual subjects, whose responsibilities are not excluded and can compete, requires comparison the two institutes' commons other criminal measures. Thus, the leaders of the organization to be human, as legal persons, in the name and on account of those who operate, are organizations of distinctive characteristics spares of the natural person, subject to different penalties. This justifies a study on the legal nature of the fine penalty as consequence to the

criminal behaviour of legal persons, in national law compared to other systems¹.

1. The crisis of the penal system and the autonomy of patrimony

The doctrinal and legal criminal law² tradition has consensual *criminal nature of the prison sentence* applicable to physio psychic persons by volitional-offensive attitudes of legal assets and values, protected in descriptive-comminatory types conceived in the core of criminal law. The contemporary legislator devotes the prison sentence to the offensive conduct of the most sublime goods and values of the criminal order. With an old history, the prison sentence has genesis and support as a criminal response to the serious and intolerable crime it assumes a criminal nature and takes the sovereign place in the penal system, advancing on other more severe and primeval penalties. Nevertheless, in century XIX, in the organized society of criminological positivism with the attribution of manifest value to the personal heritage, in the involvement of the industrial revolution: the crisis of the penal system; and the autonomy of the patrimony, evidenced the need and helped the development of the penalty of fine manifesting the need to humanize punishments with substitute penalties and, specially, with the penalty of fine³.

The *fine penalty germinates by approximation-derivation of the prison sentence*: in alternativeness or substitution and, later, also in exclusivity, to prison custody; for being more sociable, liberal and modern; more humane than the traditional prison sentence, whose *criminal nature* it is consensual in doctrine and law. *Referred to the prison sentence* it is applicable for need of imprisonment in a considered prognosis of a favourable future, based on the belief that the conduct of the sentenced will fulfil the purposes of the sentences: pledge in the guarantee of the prison sentence as a form of punitive execution; and this, reversal for revocation of the substitutive penalty granted to the convicted. Both applicable to physio psychic persons by volitional attitudes, offensive of protected legal assets and values; in descriptive-comminatory types conceived in the core of criminal law.

¹For a more profitable reading see LOPES, Manuel A. Barros. *A pena de multa aplicável às pessoas coletivas e entidades equiparadas: natureza jurídica e limites*. Produção e impressão: Urbiface Meios Publicitário e Correio do Minho, 2022, ISBN: 978-989-33-2277-2, pages 15 ss.

²French Criminal Code of 1810; Bavarian Criminal Code of 1813; Austrian Criminal Code of 1852; Portuguese Criminal Code of 1852; Spanish Criminal Code of 1870; German Criminal Code of 1871; Hungarian Criminal Code of 1881; Portuguese Criminal Code of 1886; Dutch Criminal Code of 1886.

³For developments see LOPES, Manuel A. Barros, *op. cit.*, pages 15 ss.

First, the penalty of fine, shares penal space with the penalty of imprisonment, assumes a criminal nature, and solidifies in the juridical-penal order, in a way that *extrinsic* for removal from other branches of law, especially the administrative. Gains intensity *intrinsic* of a juspenal nature, with distinctive agnition of the penal counterparts of the punitive system.

Then, the penalty of fine surpasses the predecessor in punishing natural persons for unnecessary imprisonment. As in the Norwegian⁴ and Swiss⁵ systems that put the penalty of fine first in the punitive structure; although, they do not dispense with the prison sentence for the effectiveness of the purposes of the penalties.

And, benefiting from the experience gained in the application to natural persons: it progresses transformed into a *penalty-rule* applicable to *legal persons*; it represents and replaces the prison sentence, converted into days of fine, because the prison sentence is inadequate as a punitive consequence of legal persons of impossible detention.

The Portuguese legislator prefers the penalty of freed-pecuniary fine⁶, when it remains proficient to comply with the preventive and dissuasive rationalities of punishment, for offensiveness of the illicit-typical protector of juridical-penal to a lesser degree assets of community essentiality. Moved for political-criminal reasons and comparing the criteria of sanctions of other criminal systems: administrative; quasi-penal; criminal, opted for the criminal nature of the penalty of fine applicable to legal persons and similar entities. *Administrative*, as in the systems: German (with current law to make the fine applicable to legal persons criminal)⁷; the Greek; the Bulgarian; the Russian. Sanctions *quasi-penal*, as in the systems: Italian (although punishes legal persons with criminal penalties in special laws); the Polish (intending to withdraw the connecting person); the Latvian; the Brazilian sanctioning judicial law⁸. Feathers *felony*, with irrefutable transversal and global trend as the systems

⁴NCC: Norwegian Criminal Code of 20-05-2005, in force since 01-10-2005, with changes in penalties applicable to companies in force since 01-10-2015 and updates until 27-03-2020 in *lovdata.no*.

⁵SPC: Suisse Penal Code (art.^{es} 40, 41, 36), from 21-12-1937 version from 14-01-2020 in *loisuisse.ch*.

⁶The prison sentence applied no more than one year is replaced by penalty fine [Portuguese Penal Code (from now onwards PC), art.^{es} 45, n.º 1; 70].

⁷The project already officially discussed and revised, of the *Verbandssanktionengesetz* (*Ver-sanG*) was published on 22-04-2020 in Herbert Smith Freehills *hsfnotes.it*. Although, the Federal Government bill was released on 16-06-2020 as: *Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* (Draft law to strengthen integrity in the economy), in *www.bmjv.de*.

⁸The Law 12.846/2013 (Brazilian Clean Company Act) establishes strict liability for companies involved in bribery and other corrupt acts, even if no individuals are criminally charged. Penalties, administrative and civil, include substantial fines, asset forfeiture, suspension of operations, and even the potential dissolution of the company. See MOROSINI, Fabio/FERREIRA, Luciano Vaz. *The regulation of corporate bribery in Brazil*. DOI: 10.1016/S1870-0578(16)30011-7, Elsevier. Mexican Law Review, 2014, in <https://www.elsevier.es/en-revista-mexican-law-review-123>.

establish: French, Spanish, Belgian, Dutch, Austrian, Finnish, Swedish, Norwegian, Swiss, United Kingdom, USA, Australian, Chinese, Japanese, Israeli, Iranian, South African, Indian⁹.

2. The collective person as a functional concrete organization of capital and labour

In turn, the collectivity, historically, germinated *diffuse* with as *universitas*, founded on collectivization in command of power in Roman Law; crossed *confused* and *fictional* the Middle Ages until the rise to absolute power; coming to be *deleted* for the enlightenment of individual freedom, with the French Revolution. However, as a category of criminal agent the legal person invigorates in the century XX as a subject of imputation for behaviours that fulfil an illicit-typical foreseen and punishable by criminal law. As a concrete organization of capital and labour functionalized for the market, endowed with *mens rea*, *actus reus* and *afflictive*.

Historically, the system of *common law* has not opposed resistance to the acceptance of the liability of legal persons as a centre of imputation in criminal law¹⁰ *corporation* it has been manifested since the Anglo-Saxon jurisprudent decisions in the USA from 1886, 1909¹¹ and in England in 1889¹². European recommendations with a suggestion of *instruments administrative*, at the Second Conference of the International Association of Criminal Law held in Bucharest in 1929. Of the importance conferred on *parapenal sanctions by the* Second Protocol to the Convention on the Protection of the Financial Interests of the European Communities, Council Act of 19 June 1997. Of the recent option and advice by application of punishments of *criminal nature*, of the Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017¹³. Multiplication of risk¹⁴ in developed society,

⁹See LOPES, Manuel A. Barros, *op. cit.*, pages 465 to 551 (Part II, Chapter II).

¹⁰See COSTA, José de. *Direito Penal, 11 edição*. Lisboa, Imprensa Nacional-Casa da Moeda, 2017, page 261.

¹¹The case Santa Clara County v. Southern Railroad, decided by US Supreme Court in 1886. The New case York Central v. Hudson River Railroad Co., decided by US Supreme Court in 1909.

¹²The Interpretation Act about case The Pharmaceutical Social v. The London and Provincial Supply Association Ltd. 1889.

¹³Directive (EU) 2017/1371 (art.º 1). In Official Journal of the European Union L 198/29, from 28-07-2017, granting Member States the transposition deadline until 06-07-2019 (art.º 17, n.º 1). Repealed and replaced the Convention on the Protection of the Financial Interests of the European Communities with effect from 06-07-2019 (art.º 16).

¹⁴BECK, Ulrich. Global risk society: in search of lost security (translated by Marian Toldy and Teresa Toldy). Lisbon, Editions 70, 2015, pg. 29. Work where, in development of the *Risikogesellschaft* from 1986, it awakens to the global risks of global terrorism, nuclear, ecology, financialization

international economic and financial scandals. Political-criminal pressure of two World Wars and dogmatic flexibility, first in the 1930s, then in the years 1980¹⁵, later the rise of Artificial Intelligence ¹⁶. Society of today endless development risk and future exponentiation. A set of reasons that enabled the application criminal law for legal persons. By derivation-approach, adaptation by pragmatic necessity. A question of adequacy of traditional structures to new sources of danger and antinormative of the risk society: developed in snapshots and globalized; generating dangerous and antinormative behaviours; whose gravity requires the imputation of criminal responsibility to legal persons. Punishment built on troubles in identifying the *auctoritas* functional and proof of the executing element. Circumstances that forced the expansion of the Penal Law.

Nowadays, it is a cross-cutting conviction that many behaviours harmful to legal assets and values: mainly related to economic and business crime; are generated in the profusion of legal persons; in the fluency of their distant decision-makers; or even in the fungibility of employees. Although this collaborative fungibility cannot mean that the subordinate is *capitis deminutio*¹⁷.

Therefore, it is undeniable that *substantial equivalence* the behaviour of legal persons in the face of individual attitudes. One functional equivalence for which the doctrine competes with the defence of theory designated as *analogy model*¹⁸; hypothesis of *inverse places*¹⁹; functional pragmatic construction between precept and behaviour by similarity with the human person²⁰.

of the economy, dangers manufactured by industrial society, cross-border modernization, pages 15 ss. Alerting that “the danger possesses the destructive force of war”.

¹⁵The penalty nature of fine for legal persons has been adopted: in Denmark since 1926; in the Netherlands since 1951; in France since 1994; in Belgium since 1999; in Switzerland since 2003; in Austria since 2006; in Portugal since 2007; in Spain since 2010; in the Czech Republic since 2011.

¹⁶MOLOI, Tankizo/MARWLA Tshilidzi. Artificial Intelligence and the Changing Nature of Corporations. How Technologies Shape Strategy and Operations, Switzerland, Spring International Publishing, 2021.

¹⁷This does not mean *unimputability*: they do not obligate the legal person; but they are responsible for his active or omission of criminal behaviour. Fungibility and obedience to hierarchical power are not typified as causes of justification, they only impel-retract the business collaborator in the smallest place of productive ingenuity dominated by leaders and members of the corporation installed in high positions; the non-penalization of the subordinate derives from the lack of awareness and will of the fact, part of definitive causes of exclusion of illegality or criminal normative guilt. See SILVA, Germano Marques da. *Responsabilidade penal das sociedades e dos seus administradores e representantes*. Lisboa/São Paulo Editorial Verbo, 2009, pages 350 to 352.

¹⁸See DIAS, Jorge de Figueiredo. *Direito Penal, Parte Geral. Tomo I. Questões fundamentais. A doutrina geral do crime, 2ª edição, 2ª reimpressão*. Coimbra, Coimbra Editora 2012, pages. 300, 303.

¹⁹See COSTA, Jose de Faria. *A responsabilidade juridicopenal da empresa e dos seus órgãos (ou uma reflexão sobre a alteridade, nas pessoas coletivas, à luz do Direito Penal)*. Direito Penal Económico e Europeu: Textos Doutrinários, vol. I, Problemas Gerais. Coimbra Editora, 1988, pages. (501-517), 506, 507, 511, 513, 514.

²⁰See SILVA, Germano Marques da. *Responsabilidade penal das sociedades...*, *op. cit.*, page

2.1. Generator-receiver centre of criminal imputation capable of action and guilt

The legal person turns qualified as a category of bold criminal agent in dynamic division of acquisitive, transformative, commercial, and service delivery functions. With the rights and obligations arising from freedom of enterprise: from free private enterprise, from the ownership and management of the means of production, belonging to private natural or legal persons; directed either to free expression and information, press and communication by radio, television and computer means improved by IA; or to the free creation of consumerist, sports, cultural, scientific, educational, religious or cultic consciousness association. Whether in state, corporate, private, national, or foreign organization²¹. With the right and duty to integrate into those organizations of productive factors of capital and labour their work-energy value.

The collective person, as an organization of factors of capital and labour of associative design and creation of objectives - continuously facilitated through the *internet, amplified with AI*, that absorbs all over the world the traditional means of communication - works as a true normative recipient and generator-receiver centre of criminal imputation²². With sense and capacity for action and guilt: functional attribute and business communication; inserted in the market in any branch of economic, social, or cultural activity; acting as a unit capable of supporting the flow of rights and duties arising from any imputation centre²³. An entity endowed with behavioural capacity: empowered to deny, damage, or endanger legal assets protected by criminal type²⁴; with equivalence to the natural person. Streamlined

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²¹According to the rights and duties oriented *e.g.* in art.^{es} 12, 35, 37, 38, 41, 42, 43, 46, 60, 61, 73, 74, 75, 79, 82; 81, 85, 86, 87; 53, 58 of the Portuguese Republic Constitution, communion by any constitution of a State of law in any continent.

²²See SILVA, Germano Marques da. *Direito Penal Português: teoria do crime*, 2ª edição. Lisboa, Universidade Católica Editora, 2018, pages. 246, 247, where it concludes by a legal concept of criminal guilt with the elements of “possibility of awareness of illegality”; “domain of the will” of the agent; “enforceability of diverse behaviour” on the concrete occasion, supported by various criminal rules (PC, art.^{es} 17, 35, 37) and particularly in the interpretation *a contrario* of art.^o 20, n.º 1, of the Portuguese Criminal Code; see COSTA, Jose de Faria. *Direito Penal...*, *op. cit.*, pages 350, 351, accepting the negative suggestion of art.^o 20, in cognitive and volitional aspects and page 392 when “operates a reconstruction in the plan of an act with or without guilt”. In a similar sense, art.^o 20, 1 *a contrario*, of the Spanish Penal Code of 24-08-2015 (*in coflegal*); art.^o 122-1 *a contrario*, of the French Criminal Code (*in legifrance.gouv.fr*); § 20 *a contrario*, of the StGB (*awareness, will and demandability of diverse behaviour recurrent in criminal codes. In European portal of justice*).

²³Producer of a world of movement and action of chain reaction with others, in the optimization of entrepreneurial action (to justify profit and provide for patrimonial osmosis).

²⁴Measured in empirical factors that rise to normativity according to the need and deserving

for behaviours subsumable to the types of legal illicit that the pragmatic need for criminal policy provides.

2.2. Censurable, offensive behaviour of protected legal assets

Once, only attributable to individuals because they were the only ones considered capable of *mens rea*, *actus reos* and *afflictive* by law and traditional doctrine²⁵. The objectionable behaviour of legal persons, offensive of assets and legal values protected in descriptive-comminatory types conceived in the core of criminal law, have become punishable, since the entry into force in Portugal the Law n.º 59/2007, 04-09 (in force since 15-09-2007). For harm of a series, taxative or special²⁶, of crimes of founded gravity and since legal persons are endowed with ability to act, ability to blame themselves and influenced by criminal penalties. Examples are: Belgian, Spanish, Swiss; United Kingdom and USA. We cannot forget that the collective person is born and rotates built by *personal qualities*, *organizational characteristics*, *capital properties* attributes gathered in the law²⁷.

The Portuguese legislator established the criminal imputation of legal persons in taxative crimes catalogued in a codified precept and a set of penalties in the General Part of the Penal Code, with emphasis on the penalty of fine that conquers criminal nature through the predicate of the *referability* the prison sentence comminated in the types of illicit to natural persons²⁸. Based on a random society of snapshots, no longer based on physio psychic persons, but on legal entities, professional groups, organizations, networks, or universal webs in feudal pitches. With field of coverage confirmed and extended by Law n.º 79/2021 of 24-11 (in force since 24-12-2021); and Law n.º 94/2021 of 21-12 (in force since 21-03-2022). Similarly, fine

protection of the good; of functionalisation the social system; the limitation proportionality of the punitive action of the State. Encoded in personhood; patrimoniality; and diffusibility.

²⁵Founded on the text of art.º 28 of the Portuguese Penal Code of 1886; and on the doctrine of CORREIA, Eduardo. *Direito Criminal, Volume I (com a colaboração de Figueiredo Dias)*. Coimbra, Livraria Almedina, 1971, pages 234, 235; FERREIRA, Manuel Cavaleiro de. *Lições de Direito Penal, parte geral I. A lei penal e a teoria do crime no Código Penal de 1982*. Coimbra, Almedina, 2010, pages. 267, 268.

²⁶PC e.g. art.º 11, n.º 2; DL n.º 28/84 (economic crimes), art.º 3; RGIT (taxation crimes), art.º 7.

²⁷CIRE (corporations insolvency), art.º 5 considers company an *organization of capital and work* intended to carry out economic activity; the Civil Code (CC) art.º 980 adds in order to *share the profits* resulting from that activity, which can be commercial [Commercial Companies Code (CSC), art.º 1, n.º 2]; in turn, CC art.º 157 proposes that associations, foundations and companies *do not have the purpose up with the economic profit of members*; they consist of *persons* (CC, art.º 980), *associates* (CC, art.º 167) which contribute to *goods or services* (CC, art.ºs 167, 980) *social capital* (CC, art.º 167) or *entrances* established in the contract (CC, art.º 983); they are responsible *administrators or representatives* (CC, art.ºs 163 985; CSC, art.º 64).

²⁸PC, art.ºs 11, n.º 2, 90-A to 90-M.

penalties imposed on typical illicit acts: on fine days applicable to natural persons, and *alternatives* or *exclusive*; they apply to legal persons, with the same days in the illicit-typical to physio psychic persons.

3. Referral to the prison sentence and uniformity of the days of the fine

The *referability*²⁹ from the fine to the individual typological prison sentence and the *uniformity*³⁰ in the application of the days of fine committed integrate the punishment of legal persons in the core of criminal law, in equivalence with the criminal punishment of natural persons. And, imbued with the nature of the prison sentence, reach the extrinsic criminal nature by integrating the core of the Penal Law, who, through the tool of the prison sentence, marks his difference from any branch of law. A punishment that assumes and sustains the *criminal law nature*, entered triple criterion. Hence: the antinormative facts that the holders of organs and representatives of legal persons concretize, facilitate or allow to carry out, offend legal assets and values protected by criminal law, constitutive of the essential teleological structure of criminal law³¹; their behaviours and attitudes are threatened and punishable with penalties assimilated in the core of criminal law; physio-psychic persons and legal persons represent two categories of agents and criminal subjects; with rights, freedoms, guarantees and free economic and social initiative³².

But synchronically, they are responsible for the criminal and criminally objectionable acts that they commit or omit³³, whatever the form of the crime³⁴ or the title of participation³⁵.

²⁹PC, art.º 90-B, n.º 1.

³⁰PC, art.º 90-B, n.º 3.

³¹Infused with legality and typicality, determinability, density, and taxativity and specialty, standardization.

³²Freedom, free enterprise, freedom of expression and information, of the press and media, of conscience of religion and worship, of cultural creation, of education, of association.

³³In omission: for the offensiveness of a legal good that could have been avoided; or for the behaviour that should and could have done to avoid the harm of a legal good.

³⁴The attempt with completion of crime, suitability to commit it, probability of the crime being committed.

³⁵Authorship, co-authorship, instigation, complicity.

4. Cumulative liability with dual imputation of connection

To the elements of necessity and dispensation of prison sentence, substantial and procedural connection³⁶, essential to the distinction between criminal and parapenal sentences, adds a pragmatic question of functional balance and legal equivalence³⁷. Inherent to the cumulative liability with dual imputation of the participants in the production of the complex fact between the legal person and their connection authorizers³⁸.

In fact, it would not be understood that the physical person in charge suffered a *criminal penalty*: relevant with *rights, freedoms and guarantees*; of legislative competence of the Republic Assembly³⁹; of the punitive nucleus of the essential goods of the Penal Law; a genuine punishment, with ethical-normative devaluation and the burden of observing punitive rationalities; with effectiveness criminal penalties and effects of criminal penalties; processed in criminal jurisdiction, before a criminal judge; fair guarantee procedure and with double degree of jurisdiction.

And the legal person - in the name and in the interest of which qualified persons function and whose will they express - would tolerate only one *fine* sanctioning; branch of law of an administrative nature; concerning the good management

³⁶PC, art.^e 11, n.º 2, a), b); DL n.º 28/84, art.^e 3; RGIT 7, art.^e; Portuguese Procedure Code (PPC) 24, n.º 1, f).

³⁷Traditionally linked to the prison sentence: *e.g.* prison sentence or fine. Endowed with criminal effectiveness; and procedural guarantees. While non-criminal measures appeal to the common patrimony.

³⁸In fact, jurisprudentially 'the criminal liability of the legal person requires the imputation of the fact to an agent of the legal person, who will be the one who exercises leadership in it or his subordinate under the conditions prescribed in art.^e 11, n.º 2, a) and b) of the Penal Code'. However, 'the criminal liability of the legal person does not require the accountability of its agent, it is enough that it is possible to establish and demonstrate the link of imputation of the fact to the natural person, regardless of subsequent condemnation of this'. Such imputation 'it will happen in cases where it is not possible to determine which, among several, is the agent responsible for the integral facts of the crime; when it is known that the responsibility lies with one of the administrators of the company, but it is not possible to specify which of them'. In cases such as this, if the remaining assumptions of the imputation manifested in the crime committed in his name and in his interest are verified, the legal person can be held liable regardless of the conviction or acquittal of his agents. Judgment of the Evora Court of Appeal of 26-06-2012, Case: 60/09.9TAVVC.E1, available in Judgments TRE, www.dgsi.pt, consulted on 14-07-2025. In doctrine see VALENZANO, Anna Salvina. '*Triggering persons*' in '*ex crimine*' liability of legal entities. Regulating Corporate Criminal Liability (collective), Switzerland, Springer International Publishing, 2014, pages (95-107) 96 to 105, especially 97, 98, one '*two-tier system*' in which the legal person is committed in both cases: for crime perpetrated by a person in a leadership position, harmonized in organic theory; for crime committed by a subordinate for breach of supervisory duties, in charge of the person in a leadership position, conformed in the theory of vicariate.

³⁹Portuguese Republic Constitution (PRC), art.^{es} 29, 32, 1, 165, 1, c).

of the Public Administration⁴⁰; by *generality* of infractions of content of legal good of mere social ordering; with lower density, inclined to economism and appearing neutral axiological relevance; that does not take advantage of the prison sentence⁴¹; proceeds in inquisitorial process, before administrative authority; and only ascends to criminal jurisdiction by means of judicial challenge. Are owned or chosen by the legal person. Be the crimes committed through the commission or omission, with intent or negligence in the *functional exercise of connection agents*. For direct effects of representation or mandate, the benefits of which are directly produced in the legal sphere of the legal person⁴².

Or another sanction *quasi-penal*, with criminal application form, but with matter of *administrative offense*⁴³. Even because in the context of art.º 7 of the Decree-Law n.º 432/82, of 27-10 (*administrative offenses*), the ordination responsibility to be *only organic*. Even though it is a question of criminal mode and form, in the field of art.ºs 20, 32, 41⁴⁴, criminal liability does not cover the representative *only organs*⁴⁵. Position that the Decree-Law n.º 9/2021, of 29-01, which regulates economic offenses does not repeal or change.

⁴⁰PRC, art.º 266 ss.

⁴¹We do not forget that the behaviours covered in the process for misdemeanours and *administrative offenses* may correspond to imprisonment (Decree-Law n.º 17/91, of 10-01, art.º 13). And that, in the proceedings for infringement, the guarantees of criminal proceedings are applicable *ex vi* art.º 32, n.º 10 of the PRC.

⁴²Civil Code (CC), art.º 258, 1161. Mobile industrial specification access by labour or artistic conditions: CC, art.º 1326, n.º 1 *in fine*, 1333, 1, 1336, 1; CPI (industrial property, DL n.º 110/2018, of 10-12) art.º 59; CDADC (author rights, DL n.º 63/85, de14-03) art.º 14.

⁴³See VOGEL, Joachim. *Rethinking Corporate Criminal Liability*. In *Regulating Corporate Criminal Liability* (collective), Switzerland, Springer International Publishing, 2014, pp. 337-341 he sees the current German system as hybrid given that the administrative offence has criminal procedural guarantees. Position that is remembered on page 345 of the same work by LAMBRIGTS, Stijn. Comparatively, as the Portuguese administrative offence system is endowed with criminal procedural guarantees (PRC, art.º 32, n.º 10), and it is defensible that it does not remain in the stronghold of simple administrative law. Some doctrine defends “two large blocks of offenses”: one without complexity, of salutary purpose and of social welfare, with reduced punishment; another of complex nature, violators of legal assets with “criminal dignity” and “serious social harm”. See VILELA, Alexandra. *O direito de mera ordenação social: entre a ideia de ‘recorrência’ e a de ‘erosão’ do direito penal clássico*. Coimbra, Coimbra Editora, 2013, pages. 307, 308.

⁴⁴Referring to infringement procedure, in which the agent will always be punished as a crime (art.º 20); subsidiary law is criminal law (art.º 32); application of the regulatory precepts of the criminal process (art.º 41).

⁴⁵However, there is jurisprudence which contradicts the restrictive nature of the criminal code against corporations. Thus: “in *administrative offence* law the permissive weightings of a greater accountability of legal persons must be considered justified. Art.º 7, n.º 2 of the RGCO [Decree-Law n.º 432/82, of 27-10] must be read in a *meaning of extending the concepts* of ‘organs’ and ‘in the exercise of functions’, to *cover whoever acts on behalf and for the benefit of the legal person, including therefore the members of the governing bodies, employees and whoever has a duty of surveillance and supervision*.” Therefore, with the same weight of the Penal Code. See Judgment of the Court of Evora’s Appeal of 11-07-2013, Case No 82/12.2YQSTR.E1, available in TRE judgments, www.dgsi.pt, consulted on 15-07-2025.

While the criminal procedural connection, established in art.^{es} 24 to 31 of Portuguese Procedure Penal Code (PPC), imposes: the investigation in the same fair criminal process of liability *cumulative* with *dual imputation* of participants in the production of the complex event; between the legal person; and their authorised persons in a position of leadership or entrusted with the duties of surveillance and control. A material-formal or organic-dual connection produced between the organization and its agents of connection, with functions of leadership or surveillance and control. Whether in the field of common criminal law, where art.^e 11, n.^{er} 2 of the Portuguese Penal Code (PC) uses expression *leadership position*, in the representation of the legal person. Whether in special criminal legislation, therefore: art.^e 7 of the RGIT (taxation crimes) watch us *bodies or representatives*; and art.^e 3 of the Decree-Law n.^{er} 28/84 of 20-01 (economic crimes) speaks in *bodies or representatives*.

5. The two sides of the legal nature of the fine penalty: extrinsic and intrinsic

Progressively, the fine penalty, assisted by the predicate of referability, conquered the legal-criminal nature and the guarantees of criminal law and procedure: through its nature *extrinsic*, in the face of other branches of law, especially administrative law; and strengthened in nature *intrinsic* to distinguish the fine penalty from other penalties of the same intrinsic nature, within criminal law. Supported by its constitutive, applicable both to legal persons and to natural persons criminalizable, especially, within the collective entity.

Two guidelines of the penalty of fine committed to supplement both sides of the juridical-penal nature of the penalty of fine. *Extrinsic* nature identifies the nature of criminal law, the descriptive-comminatory core typological in which the penalty of fine is inserted; and distances the penalty of criminal fine from other branches of law, especially the administrative⁴⁶. *Intrinsic* nature distinguishes the fine penalty from its counterparts in the core of the punitive system; highlights the triangular legal relationship of the offender against the offended/victim the community and the State, represented by the formal instances of control of the criminal justice system⁴⁷. And it manifests the penalty of fine as the main penalty that shares the typological combination with the prison sentence. Applicable, by way

⁴⁶How it occurs *e.g.* in the continental systems Portuguese, French, Spanish, Belgian, Dutch, Austrian, Finnish, Swedish, Norwegian, Swiss, or in Anglo-Saxon, British, American, Australian.

⁴⁷PC, art.^{es} 45, n.º 1; 70, 77, n.º 3.

and form, to the criminal subjects as a principal, alternative, or substitute penalty; penalty-rule or prison transformed.

Of this feature, the two vectors of the legal nature of the fine penalty are essential for its integration-accommodation and distinction-differentiation: the extrinsic side as identification in the nucleus of the branch of Penal Law; the intrinsic side as a distinction other criminal penalties.

6. Genuine criminal penalty linked to ethical-normative devaluation

Operating in criminal law as to *mode* and utilizing criminal procedural law as to *form*. As a punitive response to *self-nature* suitable to *collective person* inserted into the core of Penal Law the fine penalty is applied in criminal proceedings by a criminal court: requiring material and procedural assumptions relevant to the field of law and criminal proceedings. A genuine criminal penalty: with all the consequences inherent in criminal penalties; related to the revelation of ethical-normative devaluation; and the burden of observing punitive rationalities. That manifests juridic-penal axiology sustained in reasonableness of the lower juspenal valuation, harm, and social disturbance, endangered, threatened, or produced, for the crimes that enable its application. Punishable with penalty of fine: up to five years imprisonment applied to natural person; or 600 days penalty of fine applied to legal person. Or 900 days in a crime contest and the cumulation of sentences⁴⁸.

The Portuguese typological order is inherent to the traditional structure of prison personhood. A criminal law that combines the criterion of the referability of the fine to the prison sentence, with the jurisdictional criterion of preference of the fine penalty. Attention to strong pragmatic and equal reasons. The meeting of the reference to the custodial sentence and the *fine penal* uniformity, with constitutive differentiators of other penalties, confers the criminal nature to the freed-pecuniary penalty of fine: applicable for unnecessary individual imprisonment; or for impossibility of arrest of the legal person.

Also, in comparative law the criterion of referability manifests the criminal nature of the fine penalty in the following legal systems: French, Spanish, Belgian, Dutch, Austrian, Finnish, Swedish; Norwegian, Swiss; and United Kingdom, USA, Australian. This binomial referability/uniformity gives the penalty of fine a cri-

⁴⁸On the possibility that the duration of 900 days, in competition for crimes and cumulation of penalties, be applicable to legal persons, See LOPES, Manuel A. Barros, *op. cit.*, pages 493 to 500 (under 3).

minal nature integrated into the core of the criminal punitive system inherent in the principle of legality: consistent with the transversality of comparative law as to the criminal nature of the fine penalty; and opposite to the administrative nature adhering to the principle of opportunity, used in certain legal systems (*e.g.* German; Russian).

7. The predicate of the referability and the constitutive of distinction of the penalty of fine

The predicate of referability to the prison sentence integrates the primordial factor of inclusion in the core of the punitive system of a criminal nature. A reference to the arrest that non-criminal measures are exempt. As a rule, the ordinances confer the penalty of fine criminal alternativity switching the prison denial or restriction of *to be* by minimization of *have* pecuniary. The constitutive elements of the fine penalty are structured in alternativeness and durability, *attainability* and substitutability, flexibility and divisibility, convertibility and practicability, diversity, and versatility.

Criminal laws which *recognize predicates* and a *constitutive increase* penalty of fine *they are similar* in the commission of the penalty of a fine of a criminal nature suitable for legal persons.

7.1. The predicate of referability and the transformation of prison into a fine

The predicate of *referability* has the function of supporting the transforming procedure of the prison sentence into a fine. In fact, the fine penalty is imprisonment transformed into days of fine, by a formula chosen by the legislator. One month in prison is ten days in fine (1M=10D). While the prison sentence manifests itself as corporal punishment, it entails the denial or restriction of *to be* the penalty of a freed-pecuniary criminal fine shall be conferred a reduction of *have*. And, through the reference combination with the prison sentence, the fine represents and replaces the prison sentence inapplicable to legal persons who, as an incorporation of capital and labour factors functionalized to the market⁴⁹, reveal impossibility of

⁴⁹Be it companies of cold profit or collectivities of solidarity (CIRE, art.º 5; CC, 980, 157; CSC, art.º 1, n.º 2). As for the classification of companies are Sources: INE PORDATE 18-02-2020 of the total of 99.9 companies in existence in 2018: 96.1% were micro; 3.3% small; 0.5% medium-sized companies. However, DL n.º 9/2021, of 29-01 on economic misdemeanours has a criterion of

detention. While manifesting the penalty of fine as the main penalty that shares the typological commination with the prison sentence, including the prison reference for the alternativity or exclusivity of the penalty of fine. Whatever its penal weight in the ordering, scope, or designation: *multa*, *amende*, *fine*, *geldstrafe*.

Moreover, in its punitive function the fine penalty - as a genuine criminal penalty related to ethical-normative devaluation and observance of punitive rationalities - highlights the advantages of existential continuity, or organizational-functional; of non-labelling, nor dishonour and reduced stigmatization; of non-degeneration of personality, nor deterioration of functional credibility, prestige and trust. Everything in the confrontation with the diversity of feathers: functional incapacitants; or prohibitive of activity⁵⁰.

7.2. The constitutive of distinction of the penalty of juridic-penal fine

The constitutive are part of the intrinsic side of the penalty juridic-penal of fine recognizes the fine penalty from other criminal penalties in the core of the punitive system.

Therefore, the constitutive of the *durability* it will refer to the duration of the prison sentence in months or years: the prison sentence is *transformed* on days of fine applicable to legal persons; or punish on identical days committed to the natural agent. In turn, the *attainability* it considers the income and assets, whether of the connection tax and its family charges or the economic turnover and labour expenses of the legal person, and allows personalization by weighting the economic and financial conditions of the sentenced. The *substitutability* it enables the judicial criterion of replacing the penalty of fine by softer penalty (*e.g.* guarantee of good conduct; judicial surveillance). The *diversity* it shows the existence of various penalties adjustable to the concrete situation of managers and representatives or to the structure of legal persons, allowing to reflect on the rationalities of punishment. The *flexibility* it abbreviates the determination and the receipt for being of easy solvency or execution, spontaneous or procrastinated. The *divisibility* it allows the settlement of the fine in instalments to be requested and authorized by granting a maximum period for solver. The *practicability* evidence of execution, voluntary or coercive, with reduced costs for the State. Operating in *convertibility* it admits conversion into an individual subsidiary prison sentence. Although, as regards legal non-coincident companies.

⁵⁰For a confrontation of diversity of feathers: functional incapacitants; or prohibitive of activity, See LOPES, Manuel A. Barros, *op. cit.*, pages 365 to 463.

persons, the characteristics of the organisation and the criminal system do not allow the penalty of unpaid fines to be reversed. And, like the Portuguese legal system, certain legal-criminal systems do not allow reversal as the systems: Dutch, Finnish, Norwegian⁵¹. The *versatility* it makes possible to apply the same kind of punishment to different persons. Allowing to adjust the penalty of fine: to the physio psychic complexion; or to the organized structure of the legal person. And accepts the *parity* of the days of fine applicable to the two categories of criminal subjects.

Indeed, the free-pecuniary penalty of fine exercises substantially together, significantly and completely comprehensive *constitutive* which distinguish a *penalty fine from* other criminal penalties: in *alternativeness* for combating the criminality of legal persons with the sameness of fine days committed in the illicit-typical to the individual agent; in use as *pen-rule*, for preferring the penalty of fine for unrepeated or instrumentalized behaviours that lead to *last ratio* the dissolutive penalty of the legal person or similar entity; in *durability* considering the time represented in the frame of the individual prison sentence comminated, which turns into days of fine applicable to legal persons; in *attainability* by weighing the economic, financial and labour costs of the sentenced legal person or similar entity; in *divisibility* by expediting the calculation and instantaneous or procrastinated solvency of the pecuniary penalty; in *flexibility* for granting a time limit for the settlement of the fine in instalments; in *practicability*, by carrying out voluntary or coercive enforcement on the collective social property prior to the extinction; in *versatility* for adjusting the penalty fine to the morphology of the individual physio psychic or organizational structure of factors of capital, labour and market position, functional scope of the legal person. Cargo catches *pecuniary* associated with the lightness of *freedom of initiative* only the penalty of dissolution can tollers.

8. Unnecessity of individual imprisonment and impossibility of corporate detention

The positions of natural persons and legal persons as criminal agents reflect a system of equivalent bases: for needless imprisonment; and impossibility of detention. In fact, the freed-pecuniary penalty of a juridical-penal fine is applicable: to the prepositions of connection as a principal, alternative, substitute penalty and in jurisdictional criterion based on unnecessariness from prison. Applied by judicial

⁵¹Examples of penal systems with prohibition of reversing the penalty of fine in subsidiary prison: Portuguese (PC, art.º 90-B, n.º 7); Dutch (CPH, art.º 24-C, n.º 1, II), Finnish (CPFñ, chp. 9, sec. 10), Norwegian (CPN, chp. 9, § 55, n.º 3).

weighting, according to criteria and legal provisions. And suitable for legal persons: as the main penalty-rule, in legal choice, already transformed by reference to the penalty of individual imprisonment, justified in reasoning of impossibility detention per rerum natura and legal prohibition; due to the concrete organization of capital and functionalized labour for the market that integrates legal persons. Attuned to considering the substitution of the penalty-rule: for softer penalties, when, in posthumous prognostic judgment, to fulfil the preventive and dissuasive rationalities of punishment. Operative replacement by penalty dispensation up to 120 days; admonition until 240; judicial surveillance or guarantee of good conduct until 600 days. The seriousness of the crime is weighed against the principles of necessity and proportionality. This obliges the court to know the potentially applicable criminal or pecuniary penalties sub judice.

And guaranteed in penalty of fine – here subsidiary - fixed in the sentence.

As *alternative or exclusive* the penalty of fine is comminated in illicit-typical, as a rule, of softened valuation (mainly patrimonial) to respond to small and medium corporate crime: the leaders of the collective entity; or legal persons - here without the need for transformation. The need for Community protection, consistent with *phatic deficiency* and *penitential merit* of criminal subjects. One *personal attachment penalty* and *main criterion*; of a *juridic-penal nature not deprived of liberty* and *pecuniary in nature*⁵².

The *constitutive models* from the penalty of fine characterize and distinguish this penal consequence of the penalty of deprivation of liberty. A recognition of the penalty of fine, in the face of penalties of custody attributes: inherent in the continuity of the individual free or not deprivation of the freedom of the agent despite the conviction, for the purposes of its compliance; and, in particular, for the maintenance of the proper nature in case of punishment of tender of crimes or for the implementation of clemency measures⁵³.

9. The penalty of a fine as a transformed prison sentence

While the prison sentence is based on the existence of a serious conduct, of a motivating power of social alarm or exceptionally non-convivencial of the serious and intolerable crime. Consequence by a prison sentence applicable to the connection

⁵²Which maintains the same (intrinsic) nature despite the cumulation with other feathers (PC, art.^e 77, n.º 3).

⁵³PC, art.^{es} 127, 128.

agents; or penalty of a transformed fine suitable for the legal person.

More mildly, the crime punishable by a fine consolidates a negative behaviour towards assets of lower social value; lower harm that will be enough with the prudence of the application of fine penalty. Less serious, which justifies non-detained pens and helps to explain in an axiological-legal way the internal nature of the penalty payment of fine against the prison sentence. Pending driving *substitutability*⁵⁴ or even enable the application of criminal procedural instruments⁵⁵.

The typological penalty of more than five years in prison remains that of imprisonment for natural persons and, by substantial equivalence, “enforceable” for legal persons. Which do not comply because of impossibility of detention, as in comparative law *e.g.* in the systems: Dutch, Finnish, Norwegian⁵⁶. And because they are non-imprisonable criminal agents, the prison sentence is transformed into fine days suitable for legal persons. A real transformation, therefore: while the prison sentence is a corporal penalty with denial or restriction of *to be* the penalty of a freed-pecuniary criminal fine shall be granted a reduction of *have*. However, the basis of the sentence continues in the existence of a serious behaviour, of motivating power of social alarm or exceptionally non-convivencial of the serious and intolerable crime. For these reasons, in the system of equivalent bases there is no inconsistency in the legal persons to benefit from the penalty for imputation of crimes with typological penalties exceeding five years in prison, for being criminal subjects of different categories: one of body morphology; another of functional organization of capital and labour factors.

Consequently, legal persons and similar entities apply penalty of fine transformed by serious misconduct, or penalty of fine rule for negative behaviour towards goods of lower social value.

⁵⁴Penalty waiver (prison frames up to 6 months; fine up to 60 days; or fine up to 120 days). Admonition (fine frames up to 240 days). Assurance of good conduct; or judicial surveillance (fine frames up to 360 days, 480 days, or 600 days).

⁵⁵Procedural-criminal instruments: provisional suspension of proceedings; archiving in case of exemption from sentence (Procedure PC, art.^{es} 280, 281), in this regard, if the requirements of the sentence waiver have been met (PC, art.^e 74).

⁵⁶PC, art.^e 90-B, n.ž 7; CPH, art.^e 24-C, n.ž 1, II; CPF_n, chp. 9, sec. 10; CPN, chp. 9, § 55, n.ž 3.

10. Fine penalty as a criminal nature penalty in comparative law

As in Portugal, the referability of the penalty of fine to the penalty of imprisonment is valid in comparative law, in the fight against the crime of legal persons. As a predicate of the penalty of fine, the reference to the prison sentence comminated in the type for natural persons is transversal. The punitive systems accept the constitutive of the penalty of fine applicable to legal persons: in full; or in its identifying essence against other penalties of the penal system, which increase with assertiveness or tendency.

10.1. Referral to the prison sentence in comparative law

The criminal *extrinsic* nature of fine penalty, predicated on *referability* the prison sentence applicable to natural persons is confirmed by various criminal systems through a *formula* to seek consequential equivalence, the *decoding and transforming* the prison sentence imposed on the individual in the illicit-typical in penalty of fine applicable to legal persons as the principal penalty.

The comparative ordinances refer to the penalty of fine to the prison sentence imposed on individual agents through a system of legal conversion of the penalty of individual imprisonment into days of fine. Even systems *Norwegian* and *Swiss* by placing the penalty of a fine first in the punitive structure, they do not dispense with the prison sentence for the effectiveness of the purposes of the penalties. Ordinances punishing legal persons with criminal penalties, including *reference* the penalty of fine to the prison sentence imposed on natural persons. Using techniques of transformation of the prison sentence into the type of crime for natural persons in days of fine suitable for legal persons⁵⁷. One transformation operated through a punitive

⁵⁷Examples of which are: the Belgian legal conversion system (CPBe art.º 41*bis*); the United Kingdom system fines calculator formulated in 28-06-2019, cleared in 2020 by the Sentencing Council (*Magistrate's Court fines calculator, in sentencingcouncil.org.uk*); the unit of criminal account of the individual fine formula, a reference accounting formula of the penalties of the Australian system created, to take effect from 13-03-2019, by the Act n.º 72, 2019 (section 4AA Crimes Act 1914, *in legislation.gov.au*). In Portugal already in 2012, we created formulas on the calculation of feathers that can be consulted in *MLconversaomulta* or, simpler, more *MLconversaomulta*. See LOPES, Manuel A. Barros, *Sobre um caminho para a pena*. Universidade Lusófona do Porto, Faculdade de Direito, ISBN 978-989-20-3229-0, 2012. Produção e impressão: Urbiface Meios Publicitário e Correio do Minho, 2022, pages 4 to 10 of the Anexo I with elaboration of tables and computational formulas of reference for application of feathers.

system of legal conversion of the individual prison sentence corresponding to days of fine (*e.g.* Belgian, Portuguese); multiplication of the days of fine equivalent to individual imprisonment [*e.g.* French, Belgian, (Portuguese RGIT in double, art.^e 12)]; graduation of standardized penalty scales (*e.g.* Dutch, Austrian); fixing of tariffed fines (*e.g.* American, Swiss); creation of a fines calculator (*e.g.* United Kingdom); use of a formula of penal units (*e.g.* Australian); approach in its own chapter (*e.g.* Finnish, Swedish); reduced equivalence (*e.g.* Portuguese, Austrian); parity of fine days commenced for the crime committed by the individual, as a rule, in systems where the law commits similar fine penalties.

10.2. The constitutive of the penalty of fine in comparative law

The comparative systems invoke a *versatility* functional of criminal subjects consistent with principles covering a personal imputation; liability for own fact, legally prohibited, culpability for injurious action of legal assets. Charged to legal persons, in the involvement of the fact by connection committed, facilitated, or permitted by connection representatives. That is, typical and illicit fact, guilty and punishable⁵⁸.

They give *pecuniarity preference* in the face of deprivation of liberty against the offensiveness of legal assets with criminal protection. Thus, the legal systems: Portuguese, French, Spanish, Belgian, Dutch, Austrian, Finnish, Swedish, Norwegian, Swiss; and, overcoming difficulties, the United Kingdom, American, Australian. They value the recovery and balance of the condemned legal person or the socio-existential integration of the sentenced natural person, mainly incorporated into the legal person, and limit durability of the general and abstract penalty between a *minimum* and a *maximum*.

⁵⁸This structural element of crime is linked to the legalization of criminal liability in *decency of the legal good penal* and *penance shortage*. The Portuguese Penal Code lists a diversity of *non-punishable factual situations*. Hence: participation in a feud not punishable by non-censurability (PC, art.^e 151, n.º 2); the realization of *legitimate interests* in defamation [CP, art.^e 180, n.º 2, a)]; the disclosure of facts relating to adequate private life to carry out a *legitimate and relevant public interest* [CP, art.^e 192, n.º 1, d) and n.º 2]; omission of aid not punishable by *unenforceability* (PC, art.^e 200, n.º 3); harmful administration *non-punishable* for the damage is against the founded expectation of the agent (PC, art.^e 235, n.º 2). Penal shortage which occurs in solitary or co-participated withdrawal (PC, art.^{es} 24, 25), corresponding to the voluntary renunciation of his criminal claim and release of the victim or a serious effort to achieve it in the abduction and taking of hostages (CP, art.^e 161, n.º 3, 162, n.º 4); in crimes of criminal association or laundering (PC, art.^e 299, n.º 4, 368-A, n.º 9). The first five applicable to individuals; the others, in general, applicable to legal persons, in view of the principle of taxativeness of art.^e 11, n.º 2 of the PC.

11. Right tending to the individual subject and its suitability to the legal person

The Penal Law focuses its genesis with a tendency to the conduct of the individual subject. However, today it is manifested the adequacy of the Penal Law to the behaviour of the agent collective person. Therefore, the Penal Law, built and developed to punish the conduct of the individual agent, is crucial to adapt and equate in the punishment of the behaviour of the offending legal person of personal, collective, or diffuse legal assets. Manifests ingenuity to involve the secondary criminal law and the criminal law of justice in a single criminal law, conforming pragmatic need to adapt criminal institutes with dogmatic commitment to traditional canons.

The criminal nature of punitive norms of objectionable illicit-typical attitude or behaviour has a reinforced dimension in the principle of legality, of descriptive-communatory norms. And uses the main penalties provided for and directly applicable, with criminal tools in substantial mode and adjective form.

What, considering the principles of criminal effectiveness, procedural guarantee and jurisdictionality, implies dissecting the penalty that would be applied.

On the other hand, the Penal Law has one *integrative and balancing concern* externalized in the consideration of a prognostic judgment of future behaviour: that takes into account the emotional-reactive symptoms of the *way-of-being* of the singular agent; or organic-functional *mode-of-exercise* of the legal person agent; and the concrete characteristics of the recipients of typical offenses, especially in consideration of substitutability for lenitive penalties. Satisfactory censorship of conduct or harmful behaviour of legal assets with criminal protection; and regular community guarantee of validity and effectiveness of the violated, periclitated or threatened rule.

Recuperative and integrative concern of the natural or legal person, related to the purposes of the penalties. Balancing and reconciling the legal person with employees, with the market society, suppliers, and consumers. Only existing in criminal law⁵⁹, which protects the core of the vital interests of the community standardized in legal assets and values, with credit of protection and lack of protection for the functioning of their social experience supported by the binomial: decency of the legal good; lack of punishment. A protection of selected legal assets of fundamental

⁵⁹Affected in empirical factors that amount to normativity in function of the need and protection of the good; the functionalization of the social system; the limitation and proportionality of the punitive action of the State. Whether these are personal, collective, or diffuse legal assets. About legal goods See LOPES, Manuel A. Barros, *op. cit.*, pages 95 to 136.

axiology for social balance. Functionalized by the predicate of *referability* the prison sentence imposed on the individual, in *uniformity* of the days of fine comminated in the type of illicit and supported in the *constitutive* of the penalty of fine of the criminal nucleus where the penalty of fine of *juridic-penal nature* applicable to legal persons and similar entities.

12. Limiting inconsistencies with comparative law and new laws

Attending to certain institutes of the Portuguese order in parallel with existing solutions in comparative law, we see the need to balance certain legal-criminal institutes.

In Lusitanian Penal Code there are no consequences for non-compliance with the penalty of fine applied to legal persons, for equivalence to the sufferings inherent in the penalty of fine applied to natural persons⁶⁰. However, the Spanish system uses the *judicial surveillance* until full payment and the American a *corporate probation*.

Public legal persons⁶¹ continue to be supported in the *exception* criminal liability. Nevertheless, such an exception does not apply *e.g.* in Dutch, French, Belgian, British, American systems. Public legal persons are responsible in special criminal regimes; but they are not responsible in the *regimen* common criminal. Distortions whose abandonment is advocated by most doctrine.

It does not exist *unification* criteria for imputation between the common system and the specific schemes, with the status of main penalties, substitute penalties and ancillary penalties *at the same level*. For example, in RGIT there are no substitution measures; the reduction of the dissolution of the main penalty for accessory penalty which allows its cumulation with the main penalty of fine. Also, in Decree-Law n.º 28/84 there is the absence of substitutionary measures; the promotion of the admonition of substitute the main penalty; the cumulation of the main penalties of admonition with guarantee of good conduct; qualified disobedience for non-compliance with the accessory judicial injunction; the depreciation of

⁶⁰PC, art.º 243, n.º 4: “*sufferings inherent in the execution of sanctions*”.

⁶¹As to criteria for *distinguishing* public legal persons see AMARAL, Freitas do. *Curso de Direito Administrativo, volume I, 4ª edição, reimpressão (colaboração de Luís Fábrika, Jorge Pereira da Silva, Tiago Macieirinha)*. Coimbra, Almedina, 2020, pages 615 to 652 specially 618, 619. And OLIVEIRA, Maria Fernanda/DIAS, José Figueiredo. *Noções fundamentais de Direito Administrativo, 5ª edição*. Coimbra, Almedina, 2019, pages 61 to 63. These two administrative authors defend a criterion of identification of public legal person, based on the respective recognition, able to evidence “what are the decisive signs or marks for its identification”, page 61.

the guarantee of good conduct for accessory penalty. Although a Law on 94/2021, from 21-12 (in force since 21-03-2022) instituting substitution penalties for specific schemes, such “solution” only mitigates these inconsistencies.

Crimes attributable to legal persons are not included in the Special Part of Penal Code (like in *e.g. Norwegian, Swedish, or Finnish systems*). Now, as the crimes attributable to legal persons are a legislative selection of the total of the crimes attributed to natural persons, to a lesser extent given the legal form, they should be marked as the law points out that it is punishable to attempt or negligence in various illicit-typical, to facilitate the search of professionals in the *forum*. For what it is enough to add a number in the articles themselves that commend the taxative illicit-typical: ‘*legal persons and similar entities are responsible*’, as evidenced the art.^o 278-A (until 24-12-2021) with the same simplicity with which the legislator points out that the attempt or negligence in various descriptive-comminatory types is punishable.

The taxative illicit-typical attributable to legal persons and similar entities should include the correspondence in fine days of the typological prison frames *taxatives*⁶². Similar to art.^o 12, n.º 2, of the RGIT, although in this specific regime the penalty of fine applicable to legal persons doubles, while in the common regime it decreases to 1/3, contrary to the *multiplier* system presented in comparative law between the *double to tenth* of the days of fine applicable to the individual, as stipulated *e.g.* the French, Belgian systems and evidence favouring legal persons⁶³. Or at least a standard in the Special Part of Penal Code - the systematic place to room the types of illicit and the penalties corresponding to them – with enumeration of the crimes attributable to legal persons. Board that is made *e.g.* for certain preparatory acts (CP, art.^o 271) or to aggravation by the result (CP, art.^o 285). In comparative law this approach is formalized in the special part of the code, either in its own chapter *e.g.* in the Norwegian⁶⁴, Swedish⁶⁵ systems or at the end of the chapters in a separate section dedicated to *corporate criminal liability e.g.* Finnish system⁶⁶.

⁶²See LOPES, Manuel A. Barros, *op. cit.*, pages 511 to 517 (under 4.2.2.).

⁶³For example, in the crime of human trafficking (PC, art.^o 160, n.º 1), where type establishes: ‘*is punished with prison sentence of 3 to 10 years*’; just add or 360 to 1200 days when legal person. Or in the crime of forest fire (PC, art.^o 274, n.º 1), where the typological frame establishes prison sentence of 1 to 8 years; just add or 120 to 960 days when a legal person.

⁶⁴Chapter 9, § 55 of the Norwegian Penal Code de 20-05-2005, in force since 01-10-2005, with changes in penalties applicable to companies in force since 01-10-2015 and updates up to 27-03-2020, *in lovdata.no*.

⁶⁵Chapter 36 of Swedish Penal Codes (*brottsbalken* SFS 1962:700), adopted in 1962, entered into force on 01-01-1965, in the most recent English translation of December 2019 includes the amendments of Act 2019:829 to take effect from 01-01-2020 (preface) *in government.se*.

⁶⁶Finnish Penal Code 1889 with amendments of the Act 766/2015 and until 29-01-2020 (*in*

The criteria for the choice, measurement, application, and enforcement of penalties applicable specifically to legal persons and similar entities existing *e.g. in* Norwegian system; and procedural measures with specific own treatment consistent with the substance of the legal persons in force *e.g. in* the French, Spanish, Swiss systems⁶⁷, they were only established in Portugal penal system with a Law n.^{er} 94/2021, of 21-12 (in force since 21-03-2022). Even though it has been extended by the criminal legislator, the typological selection of offenses attributed to legal persons remains too constricted and softened compared to the generalization existing in comparative criminal systems *e.g.* French, Norwegian, Dutch, Danish, Austrian. The new Portuguese Laws behold n.^{er} 79/2021, November 24 (in force since 24-12-2021) and n.^{er} 94/2021, December 21 (in force since 21-03-2022), they proposed mitigate these inconsistencies with the extension of taxable crimes attributable to legal persons and institution of substitution penalties for specific schemes and measures appropriate procedural. Nonetheless, they fell short of a complete response capable of solving the problems of the present and the future.

CONCLUSIONS

In century XIX, the crisis of the penal system and the autonomy of the patrimony evidenced the need and helped the development of the fine penalty. On the grounds of humanizing punishments and developing more sociable substitutive penalties, namely the penalty of pecuniary fine.

In turn, the collective person invigorates in the century XX as a category of criminal agent subject to imputation for behaviours that fulfil an illicit-typical foreseen and punishable by criminal law. Manifested as a concrete organization of

oikeusministerio.fi; legislationonline.org, ilo.org; refworld.org, finlex.fi).

⁶⁷In France, the French Procedure Code, art.^{es} 706-43, 706-44, 706-45, 706-46; 550, 551, 555, 557, 559, 561. Free IV, Titre XVIII: De la poursuite, de l'et du jugement des infractions commises par les personnes morales (art.^{es} 706-41 to 706-46). *Legifrance.gouv.fr*. In Spain, the *Ley de Enjuiciamiento Criminal* (Ley 37/2011, from 10-10), art.^e 14bis 119, 120, 409bis 544quater 554.4, 787bis 787.8, 839bis (*in ht tps: //www. bo e. es*, and <https://personasjuridicas.es/ley-de-enjuiciamiento-criminal>). In Switzerland the Swiss Criminal Procedure Code, from 05-10-2007 (updated until 01-02-2020, English version *in fedlex.admin.ch*): art.^{es} 157, right to know the facts of the accusation; 162, definition of witness; 178, persons who can provide information, including the co-defendant and representative of the legal person; 182, request for the hearing of experts; 192, evidence. Art.^e 263, seizure of objects of crime; 264, objects and documents which cannot be learned relating to communication between the accused and his defender; 265 Obligation to provide evidence, except for the defendant, right to silence, documents that may incriminate the company; 244 search locations; 246, audiovisual media containing information that may be seized. Art.^{es} 158, rights of the accused and mandatory information in the first interrogation; 265, right to silence and not self-incrimination; 168, right to refuse to testify.

capital and labour functionalized for the market, endowed with *mens rea*, *actus reos* and *afflictive*. Developed as a generator-receiver centre of criminal imputation, with capacity for action and guilt. With agility for objectionable, offensive behaviours of protected legal assets. However, the impossibility of arrest, *per rerum natura* and legal, claim the predicate of referability as a transformative support of the individual prison sentence comminated in the type on days of fine applicable to legal persons.

Hence, one month of individual imprisonment corresponds to ten days of fine applicable to legal persons and similar entities. But, where the penalty applicable to natural persons is determined exclusively or alternatively in a fine, the same fine days shall apply to legal persons or similar entities. Therefore, a *referability* from the fine to the individual typological prison sentence and the *uniformity* in the application of the days of fine committed in the illicit-typical integrate the punishment of legal persons or similar entities in the core of criminal law, in equivalence with the criminal punishment of natural persons.

Progressively, the fine penalty has conquered the juridic-penal nature and the guarantees of criminal law and procedure: through its *extrinsic* nature, in the face of other branches of law, especially administrative law; and strengthened in *intrinsic* nature to distinguish the penalty of a fine from other penalties of the same intrinsic nature, within criminal law. Supported by its constitutive, applicable both to legal persons and to natural persons criminalizable, especially, within the collective entity. In this sense, the *extrinsic* nature identifies the nature of criminal law, the descriptive-communatory core typological in which the fine penalty is inserted; and distances the penalty of criminal fine from other branches of law, especially the administrative. While the *intrinsic* nature distinguishes the fine penalty from its counterparts in the core of the punitive system; highlights the triangular legal relationship of the offender against the offended/victim the community and the State, represented by the formal instances of control of the criminal justice system.

As a punitive response to *self-nature* suitable to *collective person* inserted into the core of Penal Law the penalty of fine is applied in criminal proceedings by a criminal court: requiring material and procedural assumptions relevant to the field of law and criminal proceedings. A genuine criminal penalty: with all the consequences inherent in criminal penalties; related to the revelation of ethical-normative devaluation; and the burden of observing punitive rationalities. Applicable as main pen, *alternative or exclusive*; penalty-rule or imprisonment transformed into days of fine in corroborated need for community protection, consistent with *phatic deficiency* and *penitential merit* of criminal subjects. One *personal attachment penalty* and *main criterion*; of a *juridic-penal nature not deprived of liberty and pecuniary*

in nature.

A protection of legal assets of fundamental axiology for social balance. Functionalized by the predicate of *referability* to the prison sentence imposed on the individual, in *uniformity* of the days of fine comminated in the type of illicit and supported in the *constitutive* of the penalty of fine of the criminal nucleus where the fine penalty of *juridic-penal nature* applicable to legal persons and similar entities.

In addition, as in the Portuguese order, in comparative law is manifested the adequacy of the Penal Law to legal persons and similar entities assisted by the predicate of *referability* the prison sentence, at the discretion of *uniformity* of the days of commination and by the assertiveness or increase of *constitutive* the fine penalty. Therefore, despite the limiting incongruities in relation to comparative law and the new laws, the Portuguese criminal law continues to be at the forefront of criminal prosecution systems.

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