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“Corruption” and social and economic criminal law: Criminology, criminal policy, political science and law & economics – A new idea about criminal liability of legal entities

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Abstract If we think there is a significant number of legal offshore in the globalized world, then there is not even a global consensus about what “corruption” is. What is “illegal corruption” in a country may be legal in another country. Moreover, the great global corruption is above the law or above democratic States. And not all democratic States are “Rule of Law”. Therefore, the solution is global in time and space law, democratic, free and true law. While the human being does not reach a consensus of what “corruption” really is, the discussion will not go further than a caricature. Other problem about “corruption” is that it is very difficult to establish the imputation of crimes, including “corruption” (Portugal) on some “companies”, corporations. We have a juridical problem in the composition of the art. 11. of the Portuguese Penal Code. © 2013 Instituto Politécnico do Cávado e do Ave (IPCA). Published by Elsevier España, S.L. All rights reserved.

“Danach kann eine Tat nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor sie begangen wurde.”

(Jescheck, H.-H./Weigend)¹

“Everyone – from the individual up to the State itself – is accountable to laws that are known to all, enforced equally and adjudicated independently”.

(Irene Portela)²

1. Introduction and methodological considerations

The present text followed the method of critical legal and scientific analysis of the main European Continental Universities of Law. Sociology and Criminology are also important here.

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¹ Jescheck and Weigend (1996, p. 49).

² Portela (2012, p. 119).

A problem called “corruption”³ is now something that is rather mediated in all media, whether Portuguese or foreign. In democratic countries, where freedom of expression is natural (or should be ...) and more extensive, the problem of “corruption” is much debated, including the virtual network computing, calling for the attention of various more or less educated audiences. If we add to these issues the fact that we are facing a deep economic crisis, then the situation could become even more worrying from the economic point of view in general, and in the social and political vision that is either, in itself, culture, or even in a much deeper scrutiny of mental analysis. The capitalist economic crises are cyclical and even inevitable.⁵ This brief note will look into the issue of “corruption” inserted in the “economic crisis”. Therefore, social and economic criminal law is also analyzed. Thus, the legal and scientific perspective herewith presented regards criminal law, criminal procedural law, criminology and criminal justice policy. We are talking about the criminal law in a broad sense. This does not preclude the fact that we will make some notes on what is ultimately perceived as corruption within the positive law and which is present in the Portuguese criminal law in force.⁶ We have also a big problem in Portuguese law. Art. 11 of the Portuguese Penal Code is like the “law of the tailor”, as art. 11/2 and 3 puts out of the criminal responsibility of many organizations as the organizations that are referred in the exceptions of criminal imputation. In accordance with n. 2 and n. 3, art. 11 Penal Code (CP), companies, corporations, which cannot practice the crimes of corruption of the Portuguese Criminal Code (CP) are: “(a) legal persons governed by public law, in which public corporations are included; (b) utility entities, regardless of their ownership; (c) other legal persons carrying on public powers”, such as public corporations or public companies and public organizations, among others. One wonders: where is the corruption if Law itself is not fair?

2. Corruption and methodological considerations: also a problem of language terminology

It has become very common to use the terms “fighting corruption”, “war on corruption”, “battle of corruption”, “let’s kill corruption”, etc. It is useless to mention here other expressions. Such expressions are practically everywhere, yet neither in the Portuguese Constitution nor in the Penal Code. These expressions are used daily, not only by the media, but also among jurists, private associations and even

in “statutory institutions” and even criminal police, among others. Let us be clear that, in many of these statements of intentions, no one doubts the good intentions of such use of terminology. Nevertheless, the old aphorism says that “of good intentions... hell is full...”. However, are we facing a battle?! “Fighting” in the name of what and whom? State that is often a State of corruption?! Sometimes, it is the legislator who uses the term “battle” against corruption. V.g.: “Lei n.º 19/2008, de 21 de Abril”, which “Aprova medidas de combate à corrupção e procede à primeira alteração à Lei n.º 5/2002, de 11 de Janeiro, à décima sétima alteração à lei geral tributária e à terceira alteração à Lei n.º 4/83, de 2 de Abril”. The legislator (or lawmaker) should be the last to use this expression. It is a violation of the 40th article of the Portuguese Penal Code. Clearly there is a freedom of expression, of a profound and constitutional nature, and there are no ontological truths that can impose absolute truths upon us. However, the scientific language must be as neutral as possible. Is law science? We know that we have to distinguish the common language from the scientific and technical language. The scientist of the law or the legislator him/herself must have objectives from the technical point of view. The politician, through the legislature, cannot be tempted to make political propaganda through the composition of the law. Corruption can be Legislation itself. It was, indeed, a similar language of “battle or war” that, from one point in time, invaded the so-called bio-and-anthropological theories that fall upon the “Human Being delinquent”. Let us talk about, v.g., the “eugenic criminal policy” from Hooton and Sheldon, which has long been the target of deep scientific consensus that must be exorcised. That is logical. “Or should science not be constantly concerned with human rights?” Of course it should. The problem, perhaps one of the main problems, is that, ironically (or maybe not!), the “eugenic criminal policy”, through many of its depressing postulates, continues to preside over the premises, v.g., the “model doctor”, and the “ideology of treatment”. The war and fight against crime, which honor the substantive concepts of bio-anthropological theories: “the offender would be eradicated as a virus or an enemy”, as anyone who kills rats or snakes, not only, of course, for public health issues. It turns out that in many cases – and history proves it in a cyclical fashion – the “State” becomes, itself, the criminal of corruption. As such, many of the “States” should, themselves, begin by putting their own house in order. More important than the State are space and time. There are frequent public complaints – many of them with defense, but many others without any objection or opposition or with a very partial one – that there is sometimes a rotten promiscuity among some political power, some nebulous economic and financial interests, and even the execution of the “tailor law”, not to mention the obscure financing of political parties. This undermines the (still) shallow foundations of democracy. It is worth quoting a few sentences, e.g., Paulo Morais, university teacher, former “alder-man” of urbanization between 2002/05 from the Municipality of Porto (second largest Portuguese city) and a member of the “Transparency and Integrity, Civic Association” (TIAC):⁷

³ N.B.: Henceforth, the word “corruption” even if arising without quotation marks, must be understood always within quotation marks. This due to the fact that one thing is the “corruption” in terms of legal and criminal matters, and another quite different thing is the “corruption” in general terms. “Corruption” in terms of popular language has a quite broad meaning. Indeed, it is so broad that we may assert that sometimes we call “corruption” what, in reality, has nothing to do with “corruption” in a juridical and criminal sense.

⁴ Préposiet (2007, p. 15) and following pages (f.p.).

⁵ Shiller (2005, pp. 31) and f.p. About corporate scandals, pp. 213–214.

⁶ Cunha (2011, pp. 1–123), *passim*.

⁷ Lourenço (2012, p. 8) and <http://www.transparency.org> (31.07.13).

“Each deputy vacillates between loyalty to the people who elect him and loyalty to corporations that pay him”, “When the Parliamentary Committee on Public Works meets, with six of its members connected to the medium, it looks more like a business association in the sector” (!).⁸ Well, if that is true – we do not have enough proof⁹ – because we only quote, and always with respect of the innocence, then we have a potential for corruption that may have been realized for many years, even in the nest of democracy: Parliament through legislation! This entails channeling billions of euros in taxes honestly. For the purpose – it must be said with all the letters – of institutionalized corruption. It is the political structure (*democratic regime*) that is in danger. Is that logical as why were there so many public works projects that cost billions of Euros in public funds without any previous studies, and has been completely useless in practical terms? Was it because of that, v.g., that there were and still is, so much controversy around the so-called “SCUT S” (a SCUT was a toll highway under virtual costs being borne by Portuguese citizens. The concept was abolished in 2011, with the motorways A22, A23, A24 and A25 to be the last to leave this “payment system”)? It should also be a good time to change the legislation so as to prevent promiscuity, in particular, when public opinion, moreover, is increasingly demanding a full and transparent democracy. New generations, and soon new voters, read very easily on their computers and on social networking what is going on. It is needless to say that everything is perfect at the level of corruption in Portugal. Otherwise, for historical ingratitude, one runs the risk of returning to the military dictatorship in a short time. And what the true movements of anti-corruption want are not to endanger democracy.

Returning to Paulo Morais, his statements, if true, are too serious. One of the two things: either is Morais not telling the truth and a lot of persons and companies covered in his allegations have not used the courts for criminal defamation, which is strange, or rather, Morais, fearless, is telling the truth and we have corruption that is installed at the present time, well within the Portuguese democratic power: the Parliament. Do we have defamation not only against individuals but also against legal persons, corporations, and organizations? In the latter case, the politicians who do not agree with this situation, should move away immediately and report the same in public terms; accordingly, the Attorney General’s Office and prosecutors have to determine quickly what is happening in fact. However, even to reach the conclusion that “all laws have been complied with”, for example, to renegotiate the contracts of “SCUTS” between the State and its enterprises in the context of the “miraculous public-private partnerships”, then everything goes on as if nothing had happened. We are not just in a situation of corruption (in the broad sense), at the “highest level”, either from the political power in function, or from the citizens and/or companies involved, but also in a violation of art. 227 – “pre-contractual liability” (for example) or “guilt on the formation of the contract” – and, above all, of art. 334 (abuse of Law) of

the Portuguese Civil Code. Not only is there a criminal, as well as a pre-contractual, liability, but also a very visible “abuse of rights”. If, for example, in the context of a public-private partnership, a private company (corporation), in a context of profound economic and social crisis, and whatever it is, continues to receive enormous sums without a fair and minimum match in the services it provides, then, when receiving the monetary amounts, although in accordance to specific legislation, it is exercising a right, it is incurring, clearly, in abuse of the law. Why not sue this corporation?

3. A problem that, also from a legal standpoint, is worldwide

The Portuguese State is subjected to various international obligations with regard to dealing with corruption. These obligations are found, in essence, in the 2003 “United Nations Convention against Corruption”; the 1997 “OECD Convention Against Corruption”, the 1999 “Council of Europe Criminal Law Convention against Corruption”, and/or the 1997 “Convention of the European Union on Fight Against Corruption”, or the 1997 “Convention of the European Union on Fight Against Corruption Involving Officials of European Communities or Officials of Member States of the European Union”. And how is this influence made mandatory at the international level and on a country like Portugal? Let us start with the United Nations.

The United Nations Convention against Corruption has an influence in Portugal through the following mandatory items: active and passive corruption of national public officials; active corruption of foreign and international public officials; active and passive corruption of judges and officials of international courts; laundering¹⁰ “capital” (p.s.: “laundering” is not just about the “money”); accounting fraud, embezzlement, obstruction of justice. The United Nations Convention against Corruption has an influence in Portugal through the following optional items: passive corruption of foreign and international public officials; influence peddling; abuse of office; embezzlement; breach of trust in the private sector. The United Nations Convention against Corruption has an influence in Portugal through the following optional items: active and passive corruption in the private sector. We can conclude, therefore, that the United Nations Convention against Corruption has mandatory, elective and optional items. Eventually, this brings to surface that there is a very different view from different countries about the problems that are posed by corruption, either economically, socially or politically, both at the cultural level and at the mental level. Another conclusion that we can already draw from this is that “corruption”, even in the technical legal sense, is understood in the United Nations Convention against Corruption in a very broad sense.

The 1997 OECD Convention against Corruption has an influence in Portugal by the following required item:

⁸ <http://www.tvi24.iol.pt/impostos/scut-impostos-corrupcao-estado-paulo-morais-portugueses/1282424-5240.html#> (31.07.12).

⁹ Andrade (1992 e 2006, pp. 15) and following pages.

¹⁰ Bandeira (2010, pp. 555) and following pages. Portela (2009, pp. 255–290).

“Money” laundering (p.s.: “laundering” is not just about the “money”, “capital”). Conclusion: “only” an item, but which is mandatory.

The 1999 Criminal Law Convention against Corruption of the Council of Europe has an influence in Portugal through the following mandatory items: “money” laundering. The 1999 Criminal Law Convention against Corruption of the Council of Europe has an influence in Portugal through the following items with “admission reservation”: passive corruption of foreign and international public officials, active and passive corruption in the private sector. The 1999 Criminal Law Convention against Corruption of the Council of Europe has an influence in Portugal through the following items, with “possible reserves”: accounting fraud; influence peddling. Conclusion: the “admissibility” and “possibility” of establishing “reserves” are the main features.

With our inverted commas, both the 1997 “Convention of the European Union On Fight Against Corruption” and the 1997 “Convention of the European Union On Fight Against Corruption Involving Officials of the European Communities or Officials of Member members of the European Union” have an influence in Portugal by the following required item: active and passive corruption of national public officials or the European Union. Conclusion: “only” one item, but that is mandatory.

Clearly, all these items have to be taken together to form a better Portugal to face the phenomenon of corruption. In this case, therefore, “corruption”, even in technical and legal terms, is considered in a very broad sense, although with mandatory, optional, optional and “reserve admissible” or “possible” features.

3.1. Some specifications about the international legal instruments referred at the convention’s level

First of all, it is important to note that we can draw some conclusions from the Council of Europe Criminal Law Convention on Corruption. The involved States should criminalize the “request” or the “acceptance” by a “public official”, directly or indirectly, of some undue advantage for him/her or for a third party, or, also, the acceptance of an offer (sometimes donation) or the promise of such advantage, to act or not act in the performance of his/her duties. Here [...] acting in the performance of duties [...] seems to have a clear meaning. That is, it should also be a criminal offense if an employee receives a benefit in exchange for acting in accordance with his/her duties. In the case the employee acts in a prohibited or arbitrary way, the penalty should be more severe. An official may not grant a license, e.g., administrative, which, in that case, should be rejected unambiguously. In the case of the Criminal Law Convention on Corruption of the Council of Europe, there is, however, a need to verify a “breach of duty”. The discretion is irrelevant here. The key is whether the employee has received an offer – or gift, or promise – of a bribe in order to achieve something in “exchange”. In this case, the briber agent may not even know that the employee had, or did not have, discretion. This becomes irrelevant. The rule is that the civil servant is paid by the

public budget, unless the private payments intended to contribute to further enhancing public interest, without any illegal favoritism in return. The selflessness and/or meritorious action in the public interest are not corruption. The “breach of a duty” brings along, however, new problems of proof. Moreover, this element of the need for “breach of a duty” cannot serve for the States to not implement the concept of corruption that is provided in the Convention without hampering its goal. Therefore, it seems precluded the design of a [...] violation of official duties [...] that prevents the “protection” of a [...] public confidence in the correctness of public administration [...]. In one word: honesty.

The United Nations Convention against Corruption referred to above provides us also an expanded definition of [...] act in the exercise of functions [...]. The so-called legislative guide for implementing the UN convention against corruption, admits that the phrase [...] in the course of their official duties [...] should be interpreted in a very broad vision and, therefore, [...] with orders to act or avoid acting on matters relevant to official duties [...].

The OECD Convention against Corruption mentioned earlier provides criminalization of promise, gift or supply so that the official acts or fails to act with respect to the exercise of his/her official duties. Whether or not within the competence of the authorized official, this consists of any use of a public official. Discretion and/or judgment must be exercised in an impartial manner by the employee. It is important that functional duties and/or positions held are exercised in an impartial manner.

According to what we saw earlier, the Portuguese State has, therefore, also to comply with the Convention on “Combating” Corruption of Foreign Public Officials in International Business Transactions.

Let us remember the following: *rectius*, article 2, “Passive corruption”: “1. For the purposes of this Convention, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute passive corruption” § article 3, “Active corruption”: “1. For the purposes of this Convention, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties shall constitute active corruption”.

Any agreements we are analyzing here seem to require a connection between supply (sometimes gift) or solicitation of bribery and an action or omission by a public official.

Thus, it is not without doubts that we can say that none of the conventions that we are considering implies, or does not imply, the violation of the functional duties of the public official as a constitutive element of the crime. That is, in some cases, it seems that there are doubts that the commission of a legal act by a public official may be the target of active and passive corruption. In other cases, according to the conventions, as previously noted, we have more questions. It seems to us, with due respect for our

colleague, that Paulo Pinto de Albuquerque¹¹ goes a little too far, according to a specific doctrine, legislation, case law and even criminal legal-dogmatic, when he asserts that: “More: when this element is required by domestic law, it cannot be interpreted so as to defraud the scope of criminality in the light of international obligations of the Portuguese State”. Well, then where is the respect for the principle of criminal legality? (Cf. art. 1 Portuguese Penal Code (CP), or art. 29 of CRP (*Constituição da República Portuguesa*, i.e., Portuguese Constitution). Where are, even, the rules of interpretation of the Portuguese legislation? (Cf. art. 9 Portuguese Civil Code (CC)).¹² All these occur within an independent country with its own legal order, although we are a pluralistic democracy, a social rule of law that we want with more free and true space and time. A true doctrine cannot claim, as absolute truth, premises such as: “[...] it cannot be interpreted so as to defraud the scope of criminality in the light of international obligations of the Portuguese State” (art. 8 CRP and art. 9 CC.). The “Portuguese State” has linked to international conventions, not to the “international interpretation” with absolute value. We believe that everyone will agree on this. We are not talking about opposite interpretations. We are talking about legitimate and different interpretations. We are talking about tiny legal details. We have to refuse “any absolute interpretations”.

Our interpretation of doctrine in no way detracts from the fact that we can say that the international obligations of the Portuguese State appear to result. Yet, the criminal offense of corruption refers to acts or omissions of the official in matters relating to his/her official duties, whether being or not within the competence of the authorized official. Furthermore, he/she must not use the same impartiality in his/her judgment, for having been influenced by promises of benefits or by benefits (and/or gifts) originated in private and jeopardizing, thus, the trust of citizens and organizations in the correction and honesty of public administration. It is not possible to force, by way of doctrine, or by any other means, that there is a “unique interpretation”. That interpretation endangers the practical application of the principle of criminal legality. That would violate the freedom of discretion by the trial judges. And even more: it is, as already stated, the violation of rules of interpretation that are prevailing in the Portuguese legal system itself. The “*Assentos*” (Portuguese court decisions that were like the “force of law”) were considered unconstitutional long ago. Of course we cannot accept now “irrefutable interpretations”, because, first and foremost, from the analysis of these international conventions which Portugal joined do not result interpretive absolute truths. All findings lead to new questions.

On the other hand, all the conventions, in question here, indicate that there should be no distinction between active corruption and passive corruption, namely in terms of severity of sanctions.

This brief analysis we are doing here is already based on the latest legislative changes.

4. Brief note of criminology and criminal policy in relation to the role of the police concerning the theory of discretion in the context of the corruption, also an economic and social problem

Regarding the phenomenon of corruption, is not negligible at all to do here some references to the doctrinal theory of discretion, especially regarding the specific role of the police. We choose the police from other sectors of Justice. Naturally police works very close to corruption cases. It is known that corruption is closely linked to the police that represent the State in various sectors. This influences the choice and discretion. It is known that the reality is diverse from country to country and from one legal system to another. In 1978, G. Sykes stated that “[...] any analysis of the structure and functioning of the police must take into account that corruption is a chronic problem [...]”.¹³ “Chronic problem”, G. Sykes posits. This should be well noted. We have here two serious problems that are related: organized crime and police with the interpenetration of the political apparatus. This is affirmed not only by G. Sykes, but also by Figueiredo Dias and Costa Andrade.¹⁴ Clearly this “mixture” creates problems with regard to issues of anti-corruption. Recent news coming from the mass media in Portugal – safeguarding in any case the presumption of innocence of those involved –, seek to establish a link between Portuguese intelligence agencies and/or police, political parties and private companies. What is the main problem that results from here? The lack of credibility of the institutions involved. Undoubtedly, there are many fair persons. They are secret agents, police, politicians, entrepreneurs and businesses, and masons (*maçons*)¹⁵ or someone else. Unfortunately, their image will be affected in general terms. Hence, it is necessary to quickly, effectively, carry out not only the special and general positive prevention, but also legal and criminal retribution and repairs. The democratic political system begins to be in danger. The Rule of Law system begins to be in danger. It is always good to remember that Portugal was a deeply violent country for example during the twentieth century.

It should not be affirmed, however, that the problem of connection between the phenomenon of corruption and the police was a Portuguese invention. As Figueiredo Dias and Costa Andrade claimed,¹⁶ “[...] Corruption also binds closely with the very nature of police work. As Goldstein points out, the police are in daily contact “with the worst side of humanity [...], permanently exposed to a show of illegality””. And this applies also to the secret services, internal and external, of each country, etc. The police are often faced with the crime committed by “respectable people”. In particular, the secret services are aware of some secrets that are unknown secrets to the public opinion. The police, for example, as a result of profound research by G. Sykes, seem to run into crimes committed by the most

¹¹ Albuquerque (2010, p. 969) and following pages.

¹² Lima and Varela (1987, pp. 58) and following pages.

¹³ *Apud* Dias and Andrade (1984 e 1997, pp. 467–469).

¹⁴ Dias and Andrade (1984 e 1997, pp. 467–469).

¹⁵ <http://www.visao.pt> (31.07.12, p. 28) and following pages.

¹⁶ *Idem ibidem*.

unsuspected individuals, as judges themselves (we quote). Anyone attentive to these problems understands that there are neither people nor perfect professions. No one is above the legitimate law, founded on the deeper human principles. Not to mention the so-called “dark figure” because, unfortunately, we have many crimes in human history to resolve. Real life is much harder than what happens in the movies. Not always can we find the “guilty” or the “author”. When faced with these crimes of “white collar, blue, pink or orange dim, or dark red, yellow or green, striped or the dots”, it remains to believe in the “divine Justice”. Anyway, “rainbow crime, *regime* crime, political structure [...]” but also “occupational”, “professional”, of “robe and gown”, of “legislature”, “architect or engineer”, “doctor or artist”, “economist or manager”, “social or financial”, “union or athlete”, performed by deputies, teachers, students, fellow police officers, in short, almost ubiquitous in a society that breathes, here and there, corruption (for statistical reasons, but not only). The honest police, we said, become cynical, seeking, in some cases, to participate in a mere game that, after all, aims only at distributing profits among all those who have abandoned the ideals of transparency, integrity and public interest.

And it is mainly in the areas in which the legislature seeks to coercively impose a certain “moral”, particularly in victimless¹⁷ crimes, that corruption finds its preferred field. It is precisely here in the crimes “without victims” that criminology scholars think it becomes easier to rationalize the conduct, in this case, of the police and/or of the “state supervisor”, invoking and calling for, v.g., the “idea of realism”, or for facts, actions or omissions which, after all, “would not harm anyone”. There is unfortunately a “self-and hetero-consent inside” v.g. the corporation, “conscious” and, often, in many countries around the world.

5. The problem of “corruption”, especially within the social and economic criminal law: the case of the importance of the company or corporation¹⁸

It cannot be denied that there may cases of “corruption” within the context of classic criminal law and in many areas, such as: the economy and society in general, management, environment, consumption, taxes¹⁹; securities markets and/or other financial instruments, medicine, biology, public health, work, competition, industrial property, sports, culture, among others. If we wish, we may say that “corruption” could entail economic, social, political, cultural and even mental consequences.

As we have seen before, and as cannot be denied not only in the economic-capitalist context, entrepreneurs and companies or corporations have acquired a central role in all this dialectic.

However, is it easy to impute firms the responsibility for crimes of (crimes of companies, crimes of corporations), in particular responsibility for crimes of corruption? They are, of course, “collective beings” or “collective persons” or “collective entities”, also called “legal persons” or, for example, as it is more appropriate, “organizations” (i.e., corporations).

We can already assert that, from a technical-legal point and legal-criminal viewpoint, it is not easy to hold companies, corporations, accountable for crimes (in Portugal), including a liability for corruption offenses. It is not easy at all.

6. Some results about the difficulty in attributing or imputing crimes, including crimes of corruption, in “companies”, corporations as legal entities

Strange as it may be, and this is valid for at least the entry into force of the new wording of art. 11 of the Portuguese Criminal Code, i.e. since the end of 2007 and the present moment we are writing this work, it is easier – from the standpoint of legal imputation of criminal responsibility – for a company to practice an offense of corruption p. and p. in the Criminal Code (e.g. 374 of the CP or Penal Code) than, for example, a crime of speculation punished in the art. 35 (and 3) of the “Legal and Economic Offenses Against Public Health”. And when we refer to such difference of this crime – as regards the establishment of its connection to initiate the criminal process²⁰ – we could mention many other examples that appear on both pieces of legislation when confronting the art. 11 of the Portuguese Criminal Code and art. 3 of “R.I.A.E.C.S.P.”.

As *sui generis* as it could also be, and this is valid for at least from the start of the “new version” of art. 11 of the Criminal Code, i.e. since the end of 2007 and the present moment we are writing this text, it is easier – from a perspective of legally allocating criminal responsibility – for a company to operate an offense of corruption punished in the Criminal Code (e.g. art. 374 of the CP, Criminal Code) than, for example, a crime of tax fraud p. and p. in art. 103 (and 7) of the General Tax Infractions (R.G.I.T., i.e., *Regime Geral das Infracções Tributárias*).

Whoever points the differential examples described above, of the crime of tax fraud or crime of speculation – as to the application of the respective link allocation – could point many others that appear on both pieces of legislation when we compare art. 11 of the Criminal Code (CP) and art. 35 of R.I.A.E.C.S.P. or art. 7 do R.G.I.T. (General Tax Infractions, i.e., “*Regime Geral das Infracções Tributárias*”).

We can find more differences of legal imputation of criminal liability to companies and collective bodies and/or legal persons and/or organizations, even in the field of offenses and/or offense against society. This has no sense and violates some constitutional principles as the essential principle of universality (art. 12/2 of the Portuguese Constitution) or

¹⁷ Andrade (1980, pp. 227).

¹⁸ Bandeira (2004, pp. 187 e f)... Bandeira (2011, pp. 83) and following pages.

¹⁹ Monte (2007, pp. 31, 37, 43) and following pages.

²⁰ Dias (1974 e reimpressão, 2004, pp. 254) and following pages. And Silva (2008 e 2009, I, pp. 13) and following pages; II, pp. 11 and following pages; III, pp. 11 and following pages.

the principle of equality (art. 13 CRP), among other basic foundations of the social, democratic, free and true rule of law.

Safeguarding the need to avoid constant changes to the legislation, it is urgent to fix this in terms of legislation and in those cases where the divergence of the legislative procedure is carried from a constitutional perspective and, therefore, legal and scientific.

In accordance with n. 2 and n. 3, art. 11 Penal Code (CP), companies, corporations, who cannot commit the crimes of corruption of the Portuguese Criminal Code (CP) are: “(a) legal persons governed by public law, in which to include public corporations; (b) entities utilities, regardless of their ownership; (c) other legal persons carrying on public powers”, that is, public corporations or public companies and public organizations, among others.

Thus, not all “undertakings” (corporations), by logical reasoning, are capable of practicing corruption offenses provided for and punished under articles 372, 373 and article 374 of the Portuguese Penal (Criminal) Code (CP).²¹

The “Utility entities, regardless of ownership”, contrarily to many other companies, cannot practice the crimes of corruption that are set out in articles 372, 373 and article 374 of the Penal Code. And why “cannot” they? It is because the law itself does not allow so! This is what the law requires, in art. 9/2 of the Portuguese Civil Code. In this case, it is the composition of the law that is wrong and violates the CRP. The composition of the art. 11 of the Penal Code (CP) – in that sense – is not correct and clashes with the nature of the exception to the principle of responsibility modeled on international texts. Although the design part of the legislature can be different, it is not transparent. It is very opaque. On the contrary, it is not clear, with due respect to the deep work that must have to be done in order to carry out a serious reform of the Portuguese Penal Code (CP). However, it is even worse when the reform is a historic setback, although unintentionally, for others, in the future, will have to correct the mistakes. The letter of the law in art. 11 of the Penal Code, describes “Other legal persons exercising public powers”. It does not describe it “acted without or with public powers” and the text is not transparent with regard to public “undertakings” (corporations) and utility entities. In this paper, we approach the relevant legislation that defines these legal settings. When in doubt regarding the letter of the law, and according to the Constitution, we must choose the interpretation that is more favorable to the defendant, whether it is individual or organizational (collective). Here is the center of the Legal-Criminal Sciences of the democratic, free and true Social State. A different illegitimate way should not be taken! On the other hand, it is really against the Constitution, as stated elsewhere in this work that the so-called public organizations (and/or in this case, “public bodies”), even if they are “acting under powers of public authority”, are excluded, at the outset, from the entire collective criminal, corporation, responsibility. We wonder if this privilege still does make sense, when the State, public enterprises or the “public-private partnerships” behave, often, as true major players, sometimes

monopolistic, of the game of the capitalist economic and financial system, and many of these cases, “only” speculative capitalism and even, e.g., in violation of public financial standards, market, consumer and/or environmental, tax, among others. See, e.g., the case of a “public corporation” (statutory corporation) that violates, with intent, in co-authorship and/or co-participation, (public) budgetary standards: *quid juris?* Some will claim that “there may be no law for these very specific cases, or, if there is, it does not have pragmatic results, it is symbolic”. Thus, we say: the legislation has to be changed as soon as possible, or it can be the end of the democracy and the Rule of law in Portugal. How is it possible, e.g., that the State signs a high-way concession, or a “swap securities contract”, which is highly favorable to the private company? We have already noted this point earlier in this text. In other words, it was cheaper to the State if it had not made this concession, and had taken care of the road itself. In addition to criminal liability, is there no liability here, as pre-contractual civil liability and/or abuse of the right (abuse of the Law), in the case that amounts continue to be received by companies, even in situations of deep economic crisis?! How is it possible that persons responsible for the negotiation of those contracts, and even in some cases by their signature, are now working with these private companies and there is no penalty? Is it all legal?! Has the end of the Ethics, the end of shame, been decreed? Well, respecting the presumption of innocence, we could give many other examples.

We can also state, therefore, that not all “undertakings” (corporations) may practice the corruption offenses provided for and punishable by Law n. 20/2008 of April 21 (corruption in international trade and in the private sector).

Contradictory as it may seem, and this is valid for at least the entry into force of the new wording of art. 11 of the Criminal Code (CP), the entry into force of Law n. 20/2008 of April 21 and the moment that we are writing this text, it is easier – from the standpoint of legally allocating criminal responsibility – that a company practices a crime of corruption p. and p. Law n. 20/2008 of 21, than, for example, a crime of speculation in the art. 35 (and 3) of the Legal and Economic Offenses Against Public Health (R.I.A.E.C.S.P.). And when we referred to such difference of this crime – and the establishment of the corresponding allocation/imputation bond – we could mention other examples that appear on both pieces of legislation when we compare art. with 11 of the Criminal Code and art. 3 of R.I.A.E.C.S.P. Not to mention, e.g., the current Portuguese “General Rules of Administrative Offenses or against-ordinances” (R.G.C.O., i.e., “*Regime Geral das Contra-Ordenações*”) and its art. 7, which establishes a narrow model (perhaps one of the closest models!) of allocation (imputation) of responsibility for “administrative offense” to “collective bodies” and/or “legal persons” and/or “organizations”, corporations, when it refers only to “organs” (v.g. board of directors).

As bizarre as it may also be, as already stated elsewhere in this text, and this is valid for at least between the entry into force of the new composition of art. 11 of the Criminal Code, the entry into force of Law n. 20/2008 of 21 April and this moment that we are writing this work, is easier – from the standpoint of allocating (imputing) legal responsibility criminal – for a company, a corporation, to operate a crime

²¹ Costa (2001, pp. 654) and following pages.

of corruption punished by Law n. 20/2008, dated April 21, than, e.g., a crime of tax fraud p. and p. in art. 103 (and 7) of the General Administration of Tax Offenses (R.G.I.T., i.e., “*Regime Geral das Infrações Tributárias*”)!)

Although the reasoning remains the same, it is still jarring in from the scientific and legal-criminal standpoint. Is Law a science? Or is it not? Because if not, v.g. sociology will eventually supplant and even crush Law, “for the good to the evil of the [social] rule of law”, which is expected to be democratic, free and true. Constitutional principles are very important, including the principle of legality and the principle of criminal guilt, among others. It is also a question of space and time. The guarantees and the presumption of innocence or the right to defense and to the contradictory are important too.

“Legal persons” (corporations) governed by public law and/or organizations of public law (statutory organizations and corporations), which include public business, “utility entities”, regardless of their ownership, and other legal persons (and/or organizations) who exercise powers of government (“State power”) cannot practice corruption crimes provided for and punished, either in arts 372 to 374 of the Portuguese Penal Code or in Law. n. 20/2008, dated April 21, which deal with “criminal responsibility for crimes of corruption in international trade and private activity” (where it might be applied, not being the specific crime). Indeed, this is what is really happening.

From our legal and scientific modest standpoint, not only there is no meaning in the exceptions pointed in terms of criminal liability of “legal persons” and/or organizations (v.g. corporations), but also this is a probable violation, not to mention a “provocation” of the principle of universality, as provided in art. 12/2 of the Portuguese Constitution (C.R.P.): “2. Legal persons shall enjoy rights and are subject to duties compatible with their nature”, and also a violation, extensively, of the principle of equality provided for in art. 13 of the Constitution (C.R.P.). Or even, as it is evident, and even proclaimed by the very “religious apostles of the capitalist economic-financial system” of the “sacred, free and fair competition between companies in the markets”, not to mention the ethical example that must, or should, be given to all others by the “public corporations” (statutory corporations).

7. Conclusion

Quoting Figueiredo Dias, “The principle of the rule of law means that [...] the protection of rights, freedoms and guarantees is to be carried out not only through criminal law, but also under penal law [...]”.²²

With or without intention, we may well conclude that much of the “corruption”, in the broad sense, is the legislation itself – the legislature appears, here and there, as an “agent of corruption” – and the use of the expression “fight or combat against corruption” is very doubtful. Perhaps “the best expression” is “guerrilla war against corruption”. The problem is that, in many cases, we have “corruption” just within the State.

The objective of this study lies in its main conclusion: the wording – or the composition – of art. 11 of the Portuguese Penal Code must be changed as soon as possible. Are we in face of “the law of the tailor”?

8. A new idea

The new idea that is intended to be brought here, therefore, is that “corruption” is not just a problem of the State toward the citizens, but also of the citizens toward the State(s). This is not just a problem from Portugal or a problem from Europe. It is a worldwide problem, definitely. Therefore, we must approach it as “global”. Moreover, corruption can be practiced both by individuals and by “legal persons”, organizations, corporations. We do not mean just “persons” from private law, but also “persons” from public law, i.e., “public legal persons”, public organizations, “public corporations”.

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²² Dias (2007, p. 177).

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