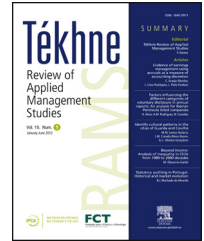


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## ARTICLE

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

G.N. Cerqueira Sopas de Melo Bandeira

*Departamento de Direito, Escola Superior de Gestão I.P.C.A., Campus do I.P.C.A., Barcelos, Portugal*

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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)<sup>1</sup>

“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)<sup>2</sup>

## 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.

E-mail addresses: [gsopasdemelobandeira@ipca.pt](mailto:gsopasdemelobandeira@ipca.pt), [gsopasdemelobandeira@ipca.pt](mailto:gsopasdemelobandeira@ipca.pt)

<sup>1</sup> Jescheck and Weigend (1996, p. 49).

<sup>2</sup> Portela (2012, p. 119).

A problem called “corruption”<sup>3</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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):<sup>7</sup>

<sup>3</sup> 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.

<sup>4</sup> Préposiet (2007, p. 15) and following pages (f.p.).

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

<sup>6</sup> Cunha (2011, pp. 1–123), *passim*.

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

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