This file corresponds to the introduction, general part and special part of the Portuguese penal code.

Introduction

1. This criminal code is fundamentally based on projects drawn up in 1963 («general part») and in 1966 («special part»), authored by Eduardo Correia. That text («general part»), corresponding to a unitary, coherent, markedly humanist and in many aspects profoundly innovative vision, was welcomed by the most prominent scholars of the science of national and foreign criminal law. Of these, the names of Hans-Heinrich Jescheck, president of the international association of criminal law, Marc Ancel, president of the international society for social defense, and Pierre Canat stand out, by way of example. It was a shame that the approval of this project had not been quicker, as many of its provisions would have had a highly precursory character - in relation to German law and other foreign projects -, thus placing us, as Canat wrote, «à la pointe même du progress». It should be said at the outset that, contrary to what it might seem, thanks to a less reflected analysis, the diploma, whether in the form or in the content of its prescriptions, does not depart from what is truly alive in the Portuguese criminal legal tradition, rather precisely consecrates it. And this very thing seems to have been understood and accepted by the various review committees that had the opportunity to comment on the project, at various times and in different political frameworks, but always composed... However, despite all the effort made, the initial project went through several vicissitudes, never having found the political space necessary for its legal consecration. The purpose and texture of the code's own punitive system is no stranger to this fact, which is based, he adds, on coordinates that would barely fit within the framework of a markedly repressive understanding. The need to adapt ordinary legislation to the new legislative spirit resulting from April 25th meant that the last provisional government encouraged the idea of

turning the project into a living normative reality that the country so desperately needed. This impulse did not fade, quite the contrary, during the First Constitutional Government. In this spirit, a review committee was set up, whose work served as the basis for draft law no. 117/I (Diary of the Assembly of the Republic, supplement to no. the entire architectural plan of the Portuguese criminal system. Once again, a proposed law (relating to the “general part”) was presented to the Assembly of the Republic, absolutely coinciding with the one sent by the 1st Constitutional Government. As regards the “special part”, this was the case. also reviewed by the Ministry of Justice, resulting from its work in an article that was also sent to the Assembly of the Republic, in the convenient form of... However, that was not the right moment for the Portuguese political scene to find the minimum consensus ever necessary for large legislative undertakings. However, to express it laterally, many of the main pillars of a broader legislative movement were then launched. In this wake, two pieces of legislation with a strong practical and dogmatic impact on the overall structure of the Portuguese penal system were published: that of the reform of the prison organization (decree-law no. 265/79, of August 1) and... But, although much has already been done, it is indisputable that the essential remains to be enshrined, that is, the penal code - parts general and special. The current government has been deeply committed to this, which, after having appointed a new review commission, now presents a diploma that, without deviating from the parameters of previous projects, undergoes some important modifications that time, reflection and new doctrinal guidelines required. . The diploma on social recovery, an essential condition of... You will not fail to remember, is also prepared.Finally, the code, which is now no longer in force, also represented, in its time, a significant advance in relation to the criminal science of the time, which contributed to it maintaining, fundamentally, its initial structure, despite the successive changes imposed by a criminological reality in constant change. (*) Constant introduction of Decree-Law No. 400/82, of September 23.

General Part

2. One of the basic principles of the diploma lies in the understanding that all punishment must have as its axiological-normative support a concrete guilt. The principle nulla poena sine culpa, contested lately in certain quarters of criminal law thought, although more, or almost exclusively, against the strand that considers guilt as the basis for punishment, won the unanimous vote of all the political forces represented in the German parliament, when the main guiding principles of the reform of that penal system were assessed. It should be added that even authors who place greater emphasis on general prevention unequivocally accept guilt as the limit of punishment. And more. We can say, without wanting to go into details, that it corresponds, regardless of the perspective from which the investigator places himself, to a broad and deep Portuguese and European cultural tradition. However, attributing to punishment a content of ethical reprobation does not mean that the purposes of general and special prevention are abandoned, much less that it suggests that the rehabilitation of the offender is disregarded. As for general prevention, we know that there is no true antinomy between this purpose and guilt, since, through the axiological mediation that criminal law requires of all members of the legal community, the inhibiting barrier of punishment is thus erected. However, its dissuasive force does not arise so much from its heteronomous reality, but rather from the autonomy of the agent himself, who knows that the definition of that punishment is the result of the participation, at a given historical moment, of the entire community, even if filtered by the constitutionally competent bodies. In this light, it is not difficult to see that the emphasis on special prevention can only gain meaning and effectiveness if there is real, dialoguing and effective participation by the offender. And this can only be achieved by appealing to his or her total autonomy, freedom

and responsibility. It is, in fact, by combining the intervening role of the auxiliary bodies responsible for the execution of custodial sentences and the responsible and autonomous commitment of the offender that the most appropriate means to prevent reoffending can be found. The offender is not abandoned to pure expiation in isolation - the negative effects of which have been fully demonstrated - nor is the prison administration allowed to fall into fruitless omissions and employ pedagogies whose values

the offender often does not feel motivated by nor, what is more serious, does he or she recognise any form of participation in them. It is known that, in essence, the balance between these two vectors is not always easy to achieve, to which is added the rigidity of institutional penalties. In order to overcome this traditional view, this diploma establishes, in an articulated and coherent manner, a set of non-institutional measures that greatly facilitate and enhance that desired meeting of wills. There is a conscientious assumption of what the new sociology of behavior calls the dedramatization of the ritual and the bodies executing the custodial sentence are obliged to be jointly responsible for the success or failure of re-education and resocialization. It is believed that this is one of the most effective ways to lead to the reintegration of the offender into society. It should be added that the whole new understanding of facing the punitive panoply is already strongly implemented in other countries with satisfactory results. At least at a certain stage of development of economic structures, such measuresthey prove to be highly operative in a type of society whose common denominator resembles the pattern of our daily living.

3. on the other hand, it is known that the principle of guilt, as presupposed in the diploma, implies that security measures depriving liberty will only exist for those who are not responsible. The solution to the problem of so-called “dangerous charges” is fundamentally achieved by the introduction of a relatively indeterminate penalty. In this way, the comprehensive unity of the diploma is satisfied and the legitimate desires - all the more legitimate when living in a democratic state - of the legal community are responded to, to see the value of security protected, which, as can also be easily inferred, It should only be honored in cases specifically enshrined in law. and it cannot fail to be so because the men to whom this diploma is addressed are understood as “open” and dialoguing structures capable of assuming their own freedom. in other words, they will always be a prius, never a posterius.

4. characteristic of the entire philosophy of this diploma is the way in which the problem of error is enshrined. in fact, this point can be seen as the cornerstone of the entire issue of guilt, since it is there - whether one considers the error regarding the circumstances of the fact (article 16) or the error regarding illicitness (article 17).) - that criminal law finds the true meaning to be considered as criminal law of guilt. It therefore becomes clear, in light of this diploma, that the agent can only deserve a judgment of ethical censure if he has acted with awareness of the illegality of the act. however, if he has acted without awareness of the illegality and if the error is reprehensible to him, the agent “shall be punished with the penalty applicable to the respective intentional crime, which may be specially mitigated” (article 17, no. 2). In this way, not only certain prevention purposes are protected, but also the value that all rights pursue: the idea of

justice.

5. It is not unknown that, often, the border between the attributable and the non-imputable is extremely difficult to draw. hence the urgency of adopting a criterion that would rigorously list the various hypotheses by measuring which the perpetrator of the offense could be considered attributable or non-attributable. On this horizon, the diploma calls for a biopsychological criterion integrated by components of a clear axiological hue, that is, «the proven inability of the agent to be influenced by penalties» (article 20). It is therefore necessary, for the agent to be considered imputable, to be able to determine himself through the penalties. a fact that demonstrates not only the careful integration of the element of ethical valuation, but also a strong emergence of the Portuguese correctionalist tradition, thus demonstrating, at this point, as in others, the inconsistency of those who believe that the code is not based on Portuguese cultural roots. Furthermore, by admitting a vast domain for non-imputability due to the definition of criteria that move away from the most rigid thought of guilt, it will allow those who are most reluctant to accept this principle to construct a model based on an idea that slides towards mitigated social responsibility.

6. Another particularly important issue in this area is the acceptance that those attributable to those over 16 years of age and those under 21 years of age deserve special legislation, to which reference was made above. This idea corresponds, on the one hand, to the awareness of what is arbitrary - but not intrinsically unfair - in determining a certain age as a formal limit to distinguish the attributable from the non-imputable. It is precisely to mitigate the effects of this dogmatic and practically indispensable cut that we welcome a right of imputable young people that aims at the same walls, in the principles and protective and re-educational measures, the ends of the right of minors. but, if this would be, in itself, a reason to takewent to legislative compliance with that right for imputable young people, other motivations and reasons further support our conviction. Not only are those that arise from the less stigmatizing effects that this right entails, but also - in connection with those consequences and within this branch of law - the greater capacity for resocialization of the young person which also opens up to non-traumatized areas, as such perfectly lucid and understanding of fair

and appropriate requests from the legal system;

7. the code outlines a punitive system that starts from the fundamental thought that sentences must always be carried out with a pedagogical and resocializing sense. Simply put, the achievement of that objective seems compromised by the existence of the prison itself. hence the entire set of non-institutional measures that have already been mentioned in another context. measures that, although they do not result in the loss of physical freedom, always involve a more or less profound interference in the conduct of the lives of offenders. on the other hand, although these non-detention criminal reactions function as replacement measures, they cannot be seen as forms of legislative clemency, but as authentic measures of well-defined treatment, with a variety of regimes capable of providing an adequate response to specific problems of certain areas of delinquency. However, it is clear that the fight against institutional penalties would run the risk of failure if the code were limited to stating substitute measures, without simultaneously providing the general criteria guiding the choice of penalties. This is what article 71 aims to do: requiring the court to give a reasoned preference to a non-custodial sentence “whenever it proves to be sufficient to promote the social recovery of the offender and meets the requirements of reprobation and crime prevention”. that is, the existence of the prison sentence is accepted as the main penalty for the most serious cases, but the diploma clearly states that the use of custodial sentences will only be legitimate when, given the circumstances of the case, the appropriate non-detention criminal reactions.

8. However, the content of article 71 does not exhaust the powers granted to the judge to, through the choice and graduation of the sentence, achieve the just punishment of the offender and achieve the general objective of preventing crime through the treatment of the convicted. Therefore, a special mitigation of the penalty is provided for in cases where circumstances prior to or subsequent to the crime, or contemporaneous with it, significantly reduce the illegality of the act or the guilt of the offender (article 73) or when it leads to replacing prison with “prison for days off” or with a fine (article 74). but the code enshrines two important innovations in this matter. in fact, "the court may not impose any penalty if the offender's guilt is minimal, the damage has been repaired and if the demands of the offender's recovery and general prevention are not opposed" (article 75, no. 1). Furthermore, it is allowed that, in cases where those assumptions have not yet been fully met, the judge may not hand down the sentence, postponing it to a later time, in the hope that the delinquent's behavior, the imminent reparation of the damage or confirmation of the lack of special prevention requirements justify the dismissal of the sentence (article 75, paragraph 2). with such measures - which the committee of ministers of the Council of Europe recommends in a resolution of March 1976 and which are already enshrined, for example, in England, France (by a recent law of June 11, 1975) and also in Austria (penal code, § 42.º) - the code expects to provide the administration of criminal justice with a suitable means of replacing short prison sentences or even the pronouncement of other sentences that neither the protection of society nor the recovery of the offender seem to seriously require .

9. already mentioned abovethe reasons why, at the present time, the code cannot stop using prison. but it does so with the clear awareness that it is an evil that must be reduced to the minimum necessary and that its structure and regime must be harmonized as much as possible with the recovery of the criminals to whom it will be applied. With regard to institutional measures, the differentiation of prisons into various types was abolished (as is still the case among us with major prisons and correctional prisons). the meaning of the existence of different types of prison is, traditionally, to translate a differentiation of forms of retribution, corresponding to the diversity of the nature and gravity of the facts that give rise to it. Hence, the most serious types should correspond to certain specific effects (such as, for example, dismissal from public posts or the inability to perform certain functions). The solution outlined in this area by the code starts, from the outset, from the idea - which the most representative practitioners of penitentiary science have been insisting on for some time - that the execution of custodial sentences can only be differentiated depending on their longer or shorter duration. but he is also no stranger to another fundamental thought: that of removing any defamatory character from the prison sentence, in line, moreover, with the provisions of article 65 - another novelty of the code in relation to our current law -, where it is proclaims that “no penalty involves, as a necessary effect, the loss of civil, professional or political rights”. In accordance with these ideas, the legislation on criminal records must be changed, and the respective project has already been prepared. Another aspect to take into account in a correct reading of the diploma is that which concerns the measures enshrined with the aim of limiting the criminogenic effects of prison as much as possible. In addition to a very open regime of replacing imprisonment with a fine (article 43), it should be noted that imprisonment of no more than 3 months may be served on free days (weekends and public holidays), to avoid, or at least mitigate the harmful effects of a short detention with continued service (article 44). the same purpose of, on the one hand, preventing the offender from contaminating the prison environment and, on the other hand, preventing the deprivation of liberty from completely interrupting his social and professional relationships also justifies the possibility, provided for in article 45, of a semi-detention regime. Originally considered as a simple transition period between prison and freedom, semi-detention (or semi-freedom, as it is sometimes also called) was initially used in the field of executing long prison sentences, constituting a last phase of the sentence that allowed the prisoner a progressive readaptation to normal life. The positive results of this experience led, in modern times, the legislator to try a different use of the measure. This happened, for example, in France, where the law of July 11, 1970 (which modified article 723 of the criminal procedure code) authorized the court to immediately decide whether to subject the defendant to the regime of semi-freedom in cases of offense punishable by short prison sentences. and the code follows the same path

when establishing a semi-detention regime that allows the offender to continue his training or normal professional activity or studies. It is within the framework of this policy of combating the criminogenic nature of detention sentences that the regime provided for in articles 61 et seq. for conditional release must also be understood. Having definitely surpassed its understanding as a measure of clemency or reward for good conduct, conditional release serves, in the policy of the code, a well-defined objective: that of creating a transition period between prison and freedom, during which the offender can, in a balanced way, recover the sense of social orientation fatally weakened by the effect of confinement. with such measurea - which can normally be decreed as soon as half of the sentence has been served (article 61, no. 1) - the code hopes to strengthen the hopes of an adequate social reintegration of the interned, especially those who have suffered a longer separation from the community. This includes, on the one hand, the setting of minimum durations for the period of probation (article 61, no. 3) and, on the other, the obligation to pronounce it, after five-sixths of the sentence has elapsed, in cases of imprisonment for more than 6 years (article 61, paragraph 2). on the other hand, the imposition of certain obligations in granting freedom (article 62, with reference to paragraphs 2 and 3 of article 54) and the possibility of support from social workers (article 62, with reference to article 55) will certainly mitigate the influence of several “external components of danger”, which will better guarantee the success of a definitive release.\

10. However, it is in non-detention measures that the best hopes are placed. thus, and first of all, in the fine, which, alongside imprisonment, the code establishes as another of the main penalties. substitute measure par excellence for prison, its importance can only be fully assessed in light of what is provided for in the "special part" of the code, where it is widely used, which, in fact, complies with the most insistent recommendations of the modern criminal science and penology. the code used the system of «fine days», which allows it to be better adapted to both the guilt and the economic conditions of the agent, and, as already mentioned above, it also established the principle of converting the prison sentence into a fine. imprisonment for less than 6 months, unless serving the prison sentence is deemed necessary to prevent future offenses (article 43, no. 1). Special reference deserves the proposed regime for the case of non-payment of the fine. Given the prohibition on converting them into prison (which is the traditional system, still practiced in most countries), it was necessary to define a varied regime that, although intended to make the sentence actually effective, did not fail to take into account a wide range of hypotheses (ranging from a simple refusal, without serious reason, to pay to cases in which the reason for non-compliance is not attributable to the agent) that may lead to non-payment of the fine. hence the extensive regulation of articles 46 and 47 which provides for deferred payment or in installments, the recourse to the execution of the convicted person's assets, the replacement, in whole or in part, of the fine for the provision of work in state works and workshops or other persons governed by public law and, finally - but only if none of these other methods of enforcement can be used -, the imposition of imprisonment pronounced as an alternative in the sentence, for the corresponding time reduced by two thirds, although the imprisonment may be mitigated or Exemption from the penalty may even be decreed whenever the agent proves that the reason for non-payment cannot be attributed to him. on the other hand, we opted for the autonomous punishment of the agent who has intentionally placed himself in a position where he cannot pay the fine or cannot replace it with the performance of work (article 47, paragraph 5).

11. other non-detention measures are the suspension of the execution of the sentence (articles 48 and following) and the regime of evidence (articles 53 and following). As particularly suitable substitutes for custodial sentences, it is important to make their use flexible, freeing them, as far as possible, from formal limits, so as to cover an appreciable range of offenses punishable by imprisonment. Thus, the possibility of suspending the execution of the sentence or subjecting the offender to probation is provided for whenever the prison sentence does not exceed 3 years. It is clear, however, that the adoption of any of these measures is not and should not be a mere automatic replacement for imprisonment. as criminal reactions of pedagogical and re-education contentactive (particularly with regard to the regime of proof), should only be ordered when the court concludes, in view of the agent's personality, the conditions of his life and other circumstances indicated in article 48, paragraph 2 (applicable also to the regime of proof under article 53), these measures are appropriate to keep the offender away from crime. It is up to the court to make this inquiry and make the responsible choice it will make between suspending the execution of the sentence and the probation regime. If one is often tempted to confuse them, it is worth highlighting that they are two distinct institutes, with their own characteristics and regimes. in effect, the conditional sentence, or institute of suspended sentence, corresponding to the institute of continental probation, means a suspension of the execution of the sentence which, although effectively pronounced by the court, is not fulfilled, as it is understood that the simple censure of the fact and the threat of punishment will be enough to keep the offender away from crime and satisfy the needs of reprobation and prevention of crime (article 48, no. 2). the possibility of imposing certain obligations on the defendant (article 49), aimed at repairing the evil of the crime or positively facilitating his social readaptation, reinforces the pedagogical nature of this measure that our law has long known, although in terms not completely coinciding with those now proposed in the code (e.g., in terms of assumptions). differently, the probation regime - the English and North American-inspired probation - is one of the great novelties of the code. the proposed system, and which corresponds to its purest form, consists of suspending the sentence itself, with the agent being subjected to a period of "trial" in a free environment (which can last from 1 to 3 years, without prejudice to the possibility extension), which will serve to assess the extent to which the offender is suitable for complete reintegration into social life. the court

may also impose on the offender certain obligations or duties designed to ensure his rehabilitation (article 54, paragraphs 2 and 3). but what truly characterizes this measure - and gives it that markedly educational and corrective meaning that has always distinguished it from the simple suspension of the sentence - is, on the one hand, the existence of a social readaptation plan and, on the other, the submission of the offender special surveillance and control of specialized social assistance. Hence, as an essentially individual form of treatment, the greatest care must be taken in the selection of offenders, and the personal conditions of each one must be carefully investigated. and this is because, it is repeated, with the use of this measure the mere useful effect of replacing prison is not only expected, since it is believed in its high resocializing value, proven by a large experience, frankly positive, in several countries, such as England, Sweden or the United States of America. To record here the most prominent notes of this institute's regime, it is also important to remember that the law will seek, as already mentioned above, to immerse this non-institutional measure in the very structures of non-formal social control, calling on society to collaborate in understanding the phenomenon of crime and the recovery of offenders. and it is very sincerely hoped that such an experience will also serve to better inform the general public about the advantages offered by measures that replace prison, in the sense of an increasingly broad and clear acceptance of forms of criminal treatment of offenders, without deprivation of their liberty.

12. To close this chapter on the modalities of criminal reaction, it is important to say something about two measures that are also new in our law and that are also part of the framework for combating detention sentences. we refer to admonishment (article 59) and the provision of work in favor of the community (article 60). as for pfirst - that foreign legislation offers us, among others, the example of Yugoslavia, where this measure has been known since 1959 -, it is a solemn censure, made in a court hearing, applicable to individuals guilty of facts of little gravity and in relation to whom it is understood (either because they are first-time offenders or because they have a more vivid feeling of their own dignity, for example) that there is, from a preventive point of view, no need to use other criminal measures that imply the imposition of a substantial sanction. as for the second, it is also a measure applicable to the agent found guilty of committing a crime that carries a prison sentence, with or without a fine, not exceeding three months and consists of the provision of free services, during periods not included during normal working hours, to the state, to other legal entities governed by public law or even to private entities that the court considers to be of interest to the community. The experiences of other countries point to certain advantages. Thus, in addition to representing an effective possibility of replacing prison, the provision of work in favor of the community seems to have even met with favorable reactions (see, for example, the case of England, where the measure has also been experimented with since 1972). by the general public itself. The fact that, in this type of criminal execution, the offender's work is directly introduced into the production circuit of goods or services of community interest, alongside the normal activity of free citizens, must certainly have contributed to the good acceptance of this measure, which the code provides for it to be controlled by social service bodies (article 60, paragraph 5).

13. when, however, for the reasons given above, it is not possible to employ the full range of non-institutional measures and a prison sentence has to be imposed, it becomes clear that every effort must be made to combat the demoralizing effect that is points to you. This is where the vast field of execution of prison sentences opens up. The domain of execution has always deserved, among us, the most intense attention, not only from practitioners but also from theoreticians. As part of the broad reform movement felt in several countries, the reform on the execution of custodial measures, in force since January 1, 1980, has already been drawn up. The aim was to follow a path that would progressively bring execution to the domain of the legal, having overcome the phase in which it was left to the discretion of an all-powerful administration, with emphasis on the legal position of the inmate. The realization of the ideals of humanity, as well as of social reintegration highlighted, today, indisputably, involves the assumption of the prisoner as a subject of rights or subject of execution, which the principle of respect for his human dignity immediately points out. the very idea of

re-education is not compatible with the existence of harsh and degrading prison regimes or the application of corporal punishment, rather presupposing the safeguarding of the dignity of the human person, while in this way the prisoner's sense of responsibility is fostered, an essential basis for a resocializing thinking. Therefore, a decisive movement of respect for the person of the prisoner is highlighted, which, recognizing his autonomy and dimension as a human being, gives his participation in the execution a very important role in the work of social reintegration, in which not only society but also the inmate are the first interested parties. A final aspect that is important to highlight also concerns the difficulties caused by the lack of structures to carry out a minimally effective treatment. Its implementation requires, from the outset, competent and appropriate resources and personnel. the problem related to the personnel in charge of execution is becoming more and more acute and is revealed, not only by the attention given to it in the aforementioned diplomalegislation, as well as the concern to provide personnel responsible for social assistance with adequate training. This order of concerns corresponds, moreover, to the preparation of a draft diploma that creates services to assist the social reintegration of criminals.

14. the dogmatic dimension of illegality, according to some authors, only gains true resonance and acuity in the special part of the criminal codes, as that is where it is confronted with the real legal tensions imposed by the nature of the criminal-legal good that

is sought to be protected. but not only in that aspect. in fact, it is in the rigorous definition of the elements of the type that the principle of typicality is realized in true rigor. It is this work, so often arduous and difficult, that is the best guarantee of citizens' freedom, which cannot fail to be supported, as the diploma does, clearly and unequivocally, by the principle of legality - extending to the security measures themselves. therefore, illicitness, in a certain view of things, must be shaped by typical determination and avoid the use of general clauses and open types. In due time it will be seen that this happens in the “special part”. but the privileged and classic place of illicitness is the general part of codes. In this sense, the code enshrines illegality as an essential element of typical action, joining the causes that exclude it. In this regard, it is necessary to highlight the openness of the system in that it does not exhaustively state the different causes of exclusion of illegality, but rather makes an indicative statement. once again there is, and it will never be too much to remember, a notional space that appeals to the true and creative activity of the judge. the judge does not, therefore, have to adhere solely to legal prescriptions; he can seek, through the best hermeneutics, the fairest solution for the specific case.

15. in the sense of a greater extension of criminal responsibility, punishment is permitted for acting on behalf of another when the agent acted “voluntarily as the holder of the bodies of a legal person, companies or mere de facto association, or in legal or voluntary representation of another, even when the respective type of crime requires” (article 12, no. 1) certain elements that the law describes below. In terms of criminal policy, this results in a consistent infiltration of criminal law into extremely sensitive areas, where crime normally falls into the “black figures” area. It is clear that this action is not enough. it must be accompanied by the appropriate increase and application of the law on administrative offenses. In any case, a large part of the crime - perhaps the most qualitatively dangerous -, which is harbored and uses legal entities, falls under the jurisdiction of criminal law. In this context, it is worth highlighting the rule of criminal liability of natural persons (article 11) - a corollary of the conception of the principle of guilt stated - and the possibility of the law making exceptions, in justified cases, with regard to the criminal liability of legal persons.

16. linked to a pedagogical idea, guided by the ferment of participation of all citizens in common life, it is enshrined, in limited terms, to equate omission with action. in this way, "the commission of a result by omission is only punishable when the omitted person has a legal duty that personally obliges him to avoid that result" (article 10, paragraph 2). It is easy to see that the unlimited consecration of that equivalence would lead to terrible injustices, and the precept that is born loaded with an intention of justice would transform, dangerously, into its opposite. the existence of a legal duty, created to prevent the result, is, today, the most extreme point that can be legally conceived in order to extend the equation of omission to action in the field of criminal law. In any case, the proposed solution corresponds to the teachings of ddoctrine and comparative law and is based on the broader and deeper idea of

social solidarity, to which Seabra's own civil code was no stranger.

17. another extremely important point is related to the victim's problem. This, fundamentally after the 2nd world war, began to be the subject of criminological studies that drew attention to the sometimes careless way in which it was viewed, not only by public opinion, but also by the doctrine of criminal law. . the victim becomes an element, with equal dignity, of the punitive triad: state-offender-victim. corresponding to this doctrinal movement, the diploma allows - beyond that, regardless of the civil liability arising from the crime (article 128) - the compensation of injured parties (article 129). on the other hand, it is known that even in countries with economies that are undoubtedly stronger than ours, the creation of social insurance that compensates the injured party, when the offender is unable to do so, has not yet been fully established. In a context of financial austerity, the creation of that insurance is referred to special legislation. However, so that the actual compensation of the victim may have some practicality, the court is granted the right to award to the injured party, at his request, the seized objects or the proceeds from their sale, the price or value corresponding to benefits arising from the crime paid to the state or transferred in its favor pursuant to articles 107 to 110, and the amounts of fines that the agent has paid (article 129, paragraph 3). It goes, therefore, to the point of allocating the fines themselves to satisfy the injured party's right to have the payment of compensation fulfilled. We believe that, in this way, the real interests of the injured parties are safeguarded, especially those who were victims of so-called violent crime.

Furthermore, it is not only in the “general part” that the code reveals itself to be particularly attentive to the values

and interests that are relevant to the victim’s position. There is every need to prevent the criminal system, as it is exclusively oriented towards the demands of the fight against crime, from ending up, for certain victims, becoming a repetition and intensification of aggression and trauma resulting from the crime itself. This danger assumes, as is known, particular acuteness in the field of sexual crimes, where the criminal process can, after all, work more against the victim than against the offender himself. Therefore, although resolutely adhering to the decriminalization movement, the code has not neglected the careful consideration of the victim's interests. As it is also in the name of the same interests that the code multiplies the number of crimes whose procedure depends on a complaint from the offended party and which will be referred to in due course.

Special Part

18. it can be said, without risk of error, that the “special part” is the one that has the greatest impact on public opinion. It is through it that the politically organized community elevates certain values

to the category of criminal legal assets. Not all collective interests are criminally protected, nor are all socially harmful conducts criminally sanctioned. This is why we fundamentally talk about the necessarily fragmentary nature of criminal law. Judgments about the punitive dignity and the need to punish a certain action or omission are far from being neutral from an ethical-political point of view. It is not without foundation that it is recognized that in the discourse of punitive power all the major problems of legitimizing power itself create a crisis. It is, above all, in the “special part” that, in a more impressive way, the lines of force of historically triumphant political-ideological conceptions are reflected. hence the “special part” of the penal code of a plural, open and democratic society differs significantly from the “special part” of the penal code of a closed society under the weight of moral dogmatisms and cultural and political monolithisms.waistband. This is what historical experience and the lesson of comparative law demonstrate with particular evidence. Both due to the systematization followed and the content of the concretely typified illegality, the code deliberately assumes itself as the criminal legal system of an open society and a democratically legitimized state. He consciously chose to maximize the areas of tolerance in relation to conduct or forms of life that, based on particular moral and cultural views, do not directly jeopardize legal-criminal rights or trigger intolerable social harm. In other words, the code limits the scope of the criminally punished to a minimum that tends to coincide with the space of consensus inherent in any democratic society.

19. 19th century and traditional systematization stemmed from the idea of

the primacy of the state. In this sense, most codifications began by defining crimes against the state. but it is evident that systematics itself cannot be seen as axiologically neutral; it reveals, among other things, the place that is granted to man in the normative world, a principle that has obtained clear constitutional consecration. From what little has already been said, but from much that has been implied regarding the axiologically priority character of man, it should not be surprising that the “special part” opens precisely to “crimes against people” (title i). In this way, a radical - highly salutary - break is established with the traditional system that only dignifies Portuguese culture and doctrine. but this understanding, in the development of its logical thread, leads to sending “crimes against the state” (title v) to a final place. It will be easy to understand that this systematization must be seen from its positive side. that is, it represents the affirmation of the dignity of the person, but it does not mean the undermining of the interests and values

that the state assumes and synthesizes in a given historical moment.

20. "crimes against peace and humanity" (title ii) are an innovation in our legal system with enormous doctrinal resonance and which assumes a cutting-edge qualification in the need to classify certain conduct that violates values

that the international community recognizes as essential to its development;

21. title iii “crimes against values

and interests of life in society” is one of the longest in this diploma. however, all its legal types of crime are likely to be integrated into the same common denominator, although they still present dogmatic autonomy, at least with regard to the legal good they aim to protect. Thus, this title involves, among others, crimes against the family, sexual crimes and crimes against religious feelings and the respect due to the dead. however, one of the most prominent points of this title consists of the consecration of the so-called “crimes of common danger” to which we will have the opportunity to refer later. This chapter is followed by crimes against public order and tranquility, which also significantly closes this title.

22. in the value order that guides the systematic structure of the “special part”, title iv deals with “crimes against property”. An order that contradicts the vision emerging from radical liberalism is also advocated here. Today, this is contrasted with a conception that, with one variation or another, starts from forms of property that are not confined to the narrowest understanding of ius utendi et abutendi. Furthermore, going forward, the title tops the expression "against heritage" and not "against property", which is in itself revealing of the mutation - unquestionably aimed at greater expansion - that has taken place in the tone of this field so sensitive part of legal life.

23. from another perspective we can say that the code, in this “special part”, does not fail to acceptkeep up with the most modern trends in criminal thinking. but he only followed them after mature and considered reflection and even when he saw in them a

correspondence with the values

that criminal law cannot fail to defend. In any case, two major trends in this field may be surprising. on the one hand, a strong sense of decriminalization, and, on the other hand, a vocation for the so-called neocriminalization, which is almost exclusively restricted to crimes of common danger. is that in a society that is increasingly technical and sophisticated in its material instruments, with its consequent dangers and risks, the person and the community itself are frequently attacked. a fact to which the criminal legislator could not remain indifferent, as can be seen from the lessons of comparative law itself.

24. On the other hand, it must be stated that the code did not include anti-economic crimes, of a more changeable nature, better suited to special law, in accordance, in fact, with the Portuguese legal tradition and the idea that criminal law has a pragmatic nature. Crimes against the environment must be placed in the same line. For identical reasons, the infractions provided for in the highway code were not included, the specificity of which requires its own treatment. It is clear that the fight against these types of illicit activities can be carried out not only by secondary criminal law but also by the law of mere social order. We are once again faced with having to understand that the fight against crime is a matter of an all-encompassing structure, which cannot do without other branches of sanctioning law.

25. in parallel with that characteristic, one should not forget - and this is what the code kept in mind - that criminal law must always act as ultima ratio. and when, in obviously less serious cases, the parties to the conflict come together, it is natural and healthy not for criminal law to intervene. the implementation of this idea was achieved through the need, in the cases specified in the law, for the criminal procedure to depend on a complaint. that is, whenever a sound criminal policy advised it (to safeguard other assets of an institutional nature, e.g., the family), certain infractions were removed from being classified as public crimes. which, without being the same thing, can be understood as part of a movement of discrimination that has already emerged.

26. Of note, as particularly highlighted in the “special part”, is also the general lowering of the penal framework. and this just doesn't happen in the types that aim to combat so-called violent crime. It is understandable that delinquents suffer more intense disapproval when it is known that the definition of incriminating conduct and the respective criminal injunction results from democratic bodies of a state constitutionally organized along pluralist lines.

27. another point that is important to highlight - this has already been mentioned - is the rigor with which each legal type of crime was defined. for each of the incriminating prescriptions, meticulous care was taken to always outline the elements of the type in the clearest and most immediately understandable way, because only in this way, it is repeated, and it cannot be said enough, that the principle is honored throughout of typicality, one of the bastions of the citizen's constitutional guarantees.

28. in crimes against people, it is important to highlight, as a legislative innovation, participation in a fight (article 151). legal type of great practical importance that resolves, through its autonomous configuration, serious problems that arise in the issue of co-payment, being, in addition, a strong deterrent to the practice, often frivolous and thoughtless, of disputes and efforts that are born small, but whose effects can be highly harmful.

29. another issue that aroused particular interest was the protection of private life (chapter vi). It is well known that massification inAccess to electronic means and instruments has encouraged outside and illegitimate intrusion into people's private lives. This must be overcome, in order to protect the last strongholds of privacy to which everyone is entitled, by defining specific legal types of crime that protect that legal asset. but if these reasons were not enough, the fundamental law would also be indisputable support by prescribing in paragraph 1 of its article 33: «everyone has the right [...] to reserve the privacy of private and family life. » to which is added, in paragraph 2, the content of the following programmatic norm: «the law will establish effective guarantees against the abusive use, or use contrary to human dignity, of information relating to individuals and families.»

30. the violation of the duty of social solidarity (omission of assistance - article 219) appears as another issue, now under the title "crimes against values

and interests of life in society", where the nature of balanced dosimetry of what social solidarity should be, at least for criminal law. On the other hand, as had already been suggested when we spoke about omission, that precept will cover cases or situations in which the lack of legal duty would lead to aberrant and unfair acquittals.

31. as we have already said, crimes of common danger (title iii, chapter iii) constitute the consecration of a line of thought in criminal policy that finds it necessary to introduce criminal law to safeguard certain legal interests that our technological society puts in jeopardy. danger. from the classic figure of fire and fire danger (articles 253 and 254), through explosion (article 255), release of toxic gases (article 258), flood and avalanche (article 263).), and the spread of epizootics (article 271), culminating in crimes that provide for the violation of communications security rules, we are surprised by legal types that are undoubtedly linked to conduct that violates certain rules required by the services, goods and instruments that material civilization provides. The crucial point of these crimes - not

to mention, obviously, the dogmatic problems they raise - lies in the fact that conduct whose action value is small often results in a loss of value as a result of effects that are often catastrophic. It should be clarified that what is primarily at stake in this chapter is not damage, but danger. Criminal law, in relation to certain conduct that involves great risks, is sufficient to produce the danger (concrete or abstract) for the legal type to be fulfilled. the damage that could be caused is of no immediate dogmatic interest. danger is immediately punished, because such conduct is so reprehensible that it immediately deserves ethical-social censure. Furthermore, due to the nature of the highly harmful effects that these illicit conducts can trigger, the criminal legislator cannot wait for the damage to occur for the legal type of crime to be fulfilled. he has to move protection back to earlier moments, that is, to the moment when the danger manifests itself.

32. Still within this title 3, it is necessary to consider the issue of “terrorist organizations” and the crime associated with them. there was - if we compare the current statement with the immediately previous one - a systematic change of placement. these crimes are removed from title v, “crimes against the state”, and are included in title iii, solely because it is considered that such activities do not offend, at least directly, the values

of the state. It is indisputable that this type of crime must be combatted by criminal law in a severe manner, but beyond the adoption of all guarantees - such as those enshrined in the diploma - we must be aware that this is one of the particular cases in which criminal law , by itself, has very little preventive effect. by your sideThere must be an awareness of the community in the sense that it is, in the first instance, the sieve that inhibits that crime.

33. in crimes against property, namely theft and theft, the technique of varying the criminal framework according to the amount of the real value of the object of the action was abandoned as incorrect, ineffective and likely to cause relative injustices. In line with, even here, decriminalization, rectius of decriminalization, the anthill theft was typified, a figure that encompasses an area of

petty crime with a high practical incidence in modern times.

34. infidelity was defined (article 319) - a new legal type of crime against property - which, roughly speaking, focuses on situations in which there is no intention of material appropriation, but only the intention of causing a serious property damage. Furthermore, criminology and criminal policy teaches that these behaviors are not as rare as at first thought. Furthermore, in the world of legal trafficking, the golden rule is trust and its violation may, in cases well determined by law, require the intervening force of criminal law, which despite everything, must be understood, say, as ultima ratio.

35. Still within the scope of this title, it is worth highlighting the consecration of a special chapter relating to the so-called “public or cooperative sector crimes aggravated by the quality of the agent”. The aim is, therefore, to criminally protect a vast national economy but not to hinder the movements of those responsible who represent them. It is known that economic life is often based on quick decisions that involve risks, but which must be taken under penalty of omission being more harmful than the possible failure of the decision previously made. Hence, the decision-making act that, due to the combined play of random circumstances, causes losses is not punishable, but only those that are co-intentional and lead to the production of disastrous results. To conceive differently would be harmful - as experienced - and would prevent these people with better and recognized merits from being afraid to take on leadership positions in sectors of national economic life.

36. To conclude, it should be said that in crimes against the state the salient point lies in the most correct and careful subjective definition of the elements that constitute each of the different legal types of crime that this title encompasses. However, fundamentally, with regard to crimes against the internal security of the state, the legal good that is protected is the constitutional democratic order. In this way, the legal good is not diluted in the very notion of the state, but rather has a value that it, for its pursuit, aims to safeguard.